No.

In The Supreme Court of the United States

MUCKLESHOOT INDIAN TRIBE,

Petitioner,

v.

TULALIP TRIBES, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit, in conflict with precedent of this Court and the D.C. Circuit, impermissibly narrowed a decades-old judicial decree so as to deprive Indian tribes of their ability to exercise treaty fishing rights.

PARTIES TO THE PROCEEDINGS

Petitioner Muckleshoot Indian Tribe was the plaintiff in the district court and the appellant in the court of appeals.

Respondents Tulalip Tribes, Suquamish Tribe, Puyallup Tribe, Squaxin Island Tribe, Nisqually Tribe, Swinomish Indian Tribal Community, Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe, and Skokomish Indian Tribe were respondents or real parties in interest in the district court and appellees in the court of appeals. The State of Washington is also listed as a respondent in the district court and an appellee in the court of appeals, although it did not participate in the proceedings below.

The Hoh Indian Tribe, Lummi Indian Nation, Quileute Indian Tribe, Quinault Indian Nation, Stillaguamish Tribe of Indians, and Sauk-Suiattle Indian Tribe were real parties in interest in the district court and/or the court of appeals.

The United States did not participate in the proceedings below.

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INTRODUCTION

In the 1850s, Indian tribes in the Pacific Northwest—including Petitioner Muckleshoot Indian Tribe—secured from the United States a promise vital to the preservation of their cultural, economic, and religious identities: "The right of taking fish, at all usual and accustomed grounds and stations[.]" Despite this Court's broad interpretation of that right on multiple occasions, continued encroachment prompted the federal government and the tribes to seek further relief in 1970 in *United States v. Washington*. Judge Boldt of the U.S. District Court for the Western District of Washington, in turn, issued a landmark decree ("Boldt Decree") identifying and protecting the usual and accustomed ("U&A") fishing grounds of those tribes.

Judge Boldt was forthright that his Decree "by no means" set forth "all *** of the[] [tribes'] principal usual and accustomed fishing places." Instead, recognizing that "it would be impossible to compile a complete inventory of any tribe's usual and accustomed fishing grounds" at that time, Judge Boldt devised (in the words of Judge Ikuta's dissent below) an "elegant solution to a complex problem": the Decree invites tribes to "invoke the continuing jurisdiction of th[e] court" to identify new U&A locations "not specifically determined," based on a more complete record. For decades, tribes presented new evidence and obtained new determinations of additional U&A locations under that Decree provision, referred to as the "New Determinations Paragraph."

In this case—the latest dispute arising out of the Boldt Decree to come before this Court—Muckleshoot

invoked the New Determinations Paragraph to prove that its saltwater U&A fishing grounds include portions of Puget Sound beyond Elliott Bay. But the Ninth Circuit upheld the district court's refusal to consider Muckleshoot's request as a threshold jurisdictional matter. That holding, contrary to Judge Boldt's directive, bars Muckleshoot from presenting a fully developed record to vindicate its treaty rights in *United States v. Washington*.

As Judge Ikuta noted, "[i]t is manifestly unfair for a court to rule that the Muckleshoot tribe has no U&A fishing locations outside Elliott Bay without considering all of the tribe's evidence." Muckleshoot continued to fish beyond Elliott Bay for decades after issuance of the Boldt Decree in 1974 and had no reason then to appeal its "Puget Sound" U&A determination. Yet now, 45 years later, the Ninth Circuit has declared the New Determinations Paragraph—and thus the rest of Puget Sound—off limits no matter Muckleshoot's evidence. The upshot: Muckleshoot has never had a fair opportunity to prove the full extent of its U&A fishing grounds, in derogation of Judge Boldt's clear intent and subsequent practice under the Decree.

That result cannot stand. The Ninth Circuit has effectively rewritten the New Determinations Paragraph, in contravention of this Court's precedents prohibiting such de facto modifications and requiring tribal treaty rights to be interpreted liberally. The Ninth Circuit deferred to the views of Judge Martinez, who has overseen Boldt Decree proceedings in more recent years, while paying no heed to Judge Boldt's contemporaneous statements about the purpose of the continuing jurisdiction provisions—an approach to

interpreting decrees that perpetuates a direct conflict with a sister circuit (the D.C. Circuit).

All of this threatens to diminish the treaty fishing rights of tribes throughout the Pacific Northwest. This Court should grant certiorari once more to ensure that the promises made to those tribes—which the Boldt Decree is meant to protect, not imperil—remain meaningful.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 944 F.3d 1179. The opinion of the district court (App., *infra*, 26a-42a) is unreported, but is available at 2018 WL 1933718.

JURISDICTION

The court of appeals entered its judgment on December 18, 2019. Muckleshoot timely filed a petition for rehearing en banc, which was denied on March 18, 2020. This Court extended the time to file any petition for certiorari due on or after March 19, 2020, to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT TREATY PROVISIONS

Article III of the Treaty of Medicine Creek states: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory[.]" 10 Stat. 1132.

Article V of the Treaty of Point Elliott states: "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians

in common with all citizens of the Territory[.]" 12 Stat. 927.

STATEMENT OF THE CASE

A. Background

1. In the 1850s, the United States negotiated a series of treaties with Indian tribes in the Pacific Northwest. In exchange for ceding much of their territory, the tribes received monetary payments and other guarantees, including a central promise that their fishing rights would be protected. *See Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661-662 (1979), *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979).

The right to fish was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). Fish was "a major part of the Indian diet, was used for commercial purposes, and *** was traded in substantial volume." *Fishing Vessel*, 443 U.S. at 665 (footnote omitted). Tribes performed "[r]eligious rites *** intended to insure the continual return of the salmon and the trout." *Id.* And the "variations in the runs of the different" fish determined tribes' movements. *Id.*

"[R]ecogniz[ing] the vital importance of the fisheries to the Indians," each of the treaties—including those to which Muckleshoot is signatory—"secure[s]" to the tribes in "[i]dentical, or almost identical, language," a "right of taking fish, at all usual and accustomed grounds and stations." *Fishing Vessel*, 443 U.S. at 666, 674 & n.21 (quoting Treaty of

Medicine Creek, art. III, 10 Stat. 1132); *see also* Treaty of Point Elliot, art. V, 12 Stat. 927.

2. For "decades after the treaties were signed, Indians continued to harvest most of the fish taken from the waters of Washington." *Fishing Vessel*, 443 U.S. at 668. But with "major economic developments in canning and processing," the "resource *** bec[a]me scarce," and eventually Indians came to be "excluded from their ancient fisheries." *Id.* at 676, 668-669.

In 1970, the United States, on its own behalf and as trustee for Muckleshoot and other tribes, filed an action "seeking an interpretation of the treaties and an injunction *** protect[ing] the Indians' share of the anadromous fish runs." *Fishing Vessel*, 443 U.S. at 669-670. Four years later, Judge Boldt issued the Boldt Decree—a landmark decision encompassing 253 findings of fact and 48 conclusions of law, as well as a permanent injunction. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

Interpreting the treaty rights "in the sense in which they would naturally be understood by the Indians" and "as justice and reason demand," Judge Boldt endeavored to identify the U&A fishing locations "where members of [each] tribe customarily fished from time to time at and before treaty times *** whether or not other tribes then also fished in the same waters." 384 F. Supp. at 330-332, 359-382. For Muckleshoot, Judge Boldt made the following finding:

> 76. Prior to and during treaty times, the Indian ancestors of the present day Muckleshoot Indians had usual and accustomed fishing places primarily at locations on the upper Puyallup, the Carbon,

> Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek and Newaukum Creek) and Lake Washington, *and secondarily in the saltwater of Puget Sound*.

Id. at 367 (emphasis added).

Judge Boldt appreciated that "it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations." 384 F. Supp. at 353. Accordingly, he qualified his ruling by stating that "[f]or each of the plaintiff tribes, the findings set forth information regarding *** *some, but by no means all*, of their principal usual and accustomed fishing places." *Id.* at 333 (emphasis added). And he set forth the "means for resolving future matters" and "retain[ed] jurisdiction" over the case "to take evidence, to make rulings and to issue such orders as may be just and proper upon the facts and law and in implementation of this decree." *Id.* at 408, 413-414.

Two of the Boldt Decree's continuing jurisdiction procedures are relevant here.[1] Paragraph 25(a)(1)—the "Clarification Paragraph"—facilitates a determination whether "the actions, intended or effected by any party *** [,] are in conformity with" the Decree. 384 F. Supp. at 419. Through this

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[1] The provisions of Paragraph 25 of the Permanent Injunction contained in the original Boldt Decree were renumbered in 1993 without substantive change. App., *infra*, 8a n.1. Original Paragraph 25(a) is now Paragraph 25(a)(1), and original Paragraph 25(f) is now Paragraph 25(a)(6). *Id.* This petition refers to the current numbers.

mechanism, parties may ask the district court to "clarify the meanings of terms used" in the Decree. *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1360 (9th Cir. 1998) ("*Muckleshoot I*"). But, under this Paragraph, the court may not "alter, amend or enlarge upon the description" of a tribe's U&A grounds as set forth in the Decree. *Id.* The court's sole task is to "give effect to the intention of the issuing court"—*i.e.*, Judge Boldt—by reviewing "the entire record before the issuing court and the findings of fact *** in determining what was decided." *Id.* at 1359.

The New Determinations Paragraph found at Paragraph 25(a)(6), by contrast, facilitates a determination of "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by" the Decree. 384 F. Supp. at 419. Unlike a proceeding under the Clarification Paragraph, a proceeding under the New Determinations Paragraph requires parties to offer, and the district court to consider, evidence beyond that previously in the record to establish additional places a tribe historically fished. *Muckleshoot I*, 141 F.3d at 1359-1360.

3. Muckleshoot members fished in central Puget Sound from 1974 to 1999. During that period, Muckleshoot entered into several court-approved agreements premised on the understanding that the Boldt Decree established Muckleshoot's right to fish there. *See, e.g.*, *United States v. Washington*, 626 F. Supp. 1405, 1476 (W.D. Wash. 1985) (reproducing Approval of Settlement Agreement Among Muckleshoot, Suquamish, and Tulalip Tribes re Puget Sound Fishing Area Claims, July 8, 1993); *United States v. Washington*, 19 F. Supp. 3d 1184, 1229 (W.D.

Wash. 1995) (reproducing Intertribal Salmon Allocation Plan for South Puget Sound (Area 10 and South), March 15, 1996).

In 1997, however, several tribes (including certain Respondents here) commenced Subproceeding 97-1 within *United States v. Washington* to challenge Muckleshoot's Decree U&A fishing right in "Puget Sound." App., *infra*, 9a. Invoking only the Clarification Paragraph, the tribes "s[ought] a determination that [under the Decree] the Muckleshoot Indian Tribe has no *adjudicated* usual and accustomed fishing grounds and stations in marine waters outside Elliott Bay." CA ER107, ECF No. 11-2 (emphasis added) (Request for Determination). Muckleshoot countered that the Boldt Decree's use of the broad language "secondarily in the saltwater of Puget Sound" confirmed that its U&A fishing grounds encompassed areas in Puget Sound beyond Elliott Bay (a small fraction of the Sound). App., *infra*, 29a-30a.

Judge Rothstein, who had taken over the case from Judge Boldt, sided with the challengers. She determined that the terms "Puget Sound" and "secondarily" were ambiguous. *United States v. Washington*, 19 F. Supp. 3d 1252, 1274 (W.D. Wash. 1997). Resolving those ambiguities in accordance with the constraints of Clarification Paragraph proceedings set forth in *Muckleshoot I*, Judge Rothstein considered only the "evidence before Judge Boldt when he made his finding" and evidence "indicative of the contemporary understanding" of the phrase "secondarily in the saltwater of Puget Sound." *Id.* at 1275. Based on that limited universe of evidence, Judge Rothstein interpreted the Boldt Decree's

reference to "the saltwater of Puget Sound" to mean Elliott Bay. *Id.* at 1306-1312. In particular, she concluded that there was "no evidence in the record *before Judge Boldt* *** that Judge Boldt intended to describe a saltwater U&A any larger than the open waters and shores of Elliott Bay." *Id.* at 1311 (emphasis added).

The Ninth Circuit affirmed. *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000). Because the "case turn[ed] on the interpretation of the phrase 'secondarily in the waters of Puget Sound' as used by Judge Boldt," the court focused its analysis on the "[e]vidence [r]eferenced" in the Boldt Decree. *Id.* at 432, 434. The court agreed that there was no evidence presented to Judge Boldt "indicating that [Muckleshoot's historical] fishing occurred with regularity anywhere beyond Elliott Bay." *Id.* at 434.

B. Procedural History

1. In 2017, Muckleshoot brought this case (Subproceeding 17-2) under the New Determinations Paragraph. Citing evidence of its historical fishing practices that had never been considered by any court, Muckleshoot requested a finding that its U&A grounds in Puget Sound extended beyond Elliott Bay—the area specifically determined in the Decree (as construed by Judge Rothstein). App., *infra*, 9a. Judge Martinez, who had taken the case over from Judge Rothstein, granted Respondents' motions to dismiss for lack of jurisdiction.

Judge Martinez held that "Judge Boldt specifically determined Muckleshoot U&A in [the Boldt Decree], and therefore there is no continuing

jurisdiction under" the New Determinations Paragraph. App., *infra*, 39a. Relying on Judge Rothstein's decision in Subproceeding 97-1, Judge Martinez reasoned that Muckleshoot's U&A claim concerning Puget Sound could be adjudicated only under the Clarification Paragraph. *Id.* at 40a-41a.[2]

2. A divided Ninth Circuit panel affirmed.

a. Writing for the majority, Judge Rakoff of the U.S. District Court for the Southern District of New York (sitting by designation) began by confirming the Ninth Circuit rule that de novo review should be tempered by "giv[ing] deference to the district court's interpretation" of a decree. App., *infra*, 11a. The majority then agreed with Judge Martinez as to "the most reasonable reading of Judge Rothstein's findings" in Subproceeding 97-1 (a Clarification Paragraph proceeding): issuance of "'a supplemental finding under [the New Determinations Paragraph] defining the scope of Muckleshoot's U & A in *Puget Sound*' would be an impermissible attempt to contradict Judge Boldt's determination" in the Boldt Decree. *Id.* at 13a-14a.

b. Judge Ikuta dissented, warning that the majority's "manifestly unfair" ruling "thwarts Judge Boldt's elegant solution to a complex problem." App., *infra*, 14a, 21a. As Judge Ikuta recounted, Judge Boldt attempted to address "as many as possible of the divisive problems of treaty right fishing," but "knew that he could not define every U&A fishing location for

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[2] Judge Martinez further held that collateral estoppel barred Muckleshoot's request. App., *infra*, 41a. But the Ninth Circuit did not rely on that ground. *Id.* at 11a & n.4.

every tribe." *Id.* at 14a-15a. He therefore "made findings that defined, or 'specifically determined,' 'some, but by no means all,' of the tribes' U&A fishing locations," and then "issued an injunction to set forth 'the basic obligations of the parties, together with means for resolving future matters.'" *Id.* at 15a (citation omitted). In this case, Muckleshoot "br[ought] a claim under the New Determinations Paragraph," which Judge Boldt "included *** to allow a tribe to invoke the court's jurisdiction to consider further evidence showing the tribe historically fished at additional locations not included in the initial Specific Determinations." *Id.* at 16a-17a.

Judge Ikuta explained that, in affirming the dismissal of Muckleshoot's claim, "the majority fail[ed] to recognize the limited scope of decisions made in a proceeding under the Clarification Paragraph" and, as a result, "mischaracterize[d] Judge Rothstein's decision [in Subproceeding 97-1] as holding that Judge Boldt made a Specific Determination *excluding* all areas in Puget Sound except for Elliott Bay from the Muckleshoot's U&A fishing locations." App., *infra*, 23a. "Under the Clarification Paragraph, Judge Rothstein could consider only Judge Boldt's intent in making Specific Determinations. And Judge Rothstein's ruling, quoted by the majority, speaks only of Judge Boldt's intent to include, not exclude, particular locations." *Id.* Consequently, "Judge Boldt's intent to include only Elliott Bay as a U&A location, based on the evidence then before him, does not raise the inference that Judge Boldt intended to exclude other areas of Puget Sound from consideration under the New Determinations Paragraph." *Id.* at 24a.

The majority's decision, Judge Ikuta observed, deprives Muckleshoot of "any additional U&A fishing locations in Puget Sound without [any court] reviewing all the admissible evidence." App., *infra*, 21a. In Subproceeding 97-1, a Clarification Paragraph proceeding, "the tribe could not make arguments or present new evidence to Judge Rothstein about their historic entitlement to locations within Puget Sound; they were limited to evidence regarding Judge Boldt's intent" under the Clarification Paragraph. *Id.* at 25a. Yet even after "Judge Rothstein ha[d] determined that Judge Boldt intended to make a Specific Determination that the tribe had a U&A fishing location in Elliott Bay," Muckleshoot *still* could not "present any new evidence regarding their historical use of other locations in Puget Sound." *Id.* That result "was both unfair to the Muckleshoot tribe and contrary to" the Boldt Decree. *Id.* at 21a.

c. The Ninth Circuit denied Muckleshoot's petition for rehearing en banc. Judge Ikuta voted to grant it. App., *infra*, 43a-44a.

REASONS FOR GRANTING THE WRIT

The New Determinations Paragraph—a central pillar of the Boldt Decree's "elegant solution" for resolving disputes over treaty fishing rights—exists precisely to ensure that tribes in the Pacific Northwest have a full and fair opportunity to seek determinations of their U&A fishing grounds based on a complete record. In holding (over Judge Ikuta's dissent) that Judge Boldt's circumscribed and incomplete determinations may block those tribes from proceeding under the New Determinations Paragraph, the Ninth Circuit impermissibly narrowed the Decree

to the detriment—not the benefit—of tribes seeking to prove additional U&A fishing areas as Judge Boldt intended. Had the Ninth Circuit adhered to Judge Boldt's contemporaneous explanations for crafting the Decree's continuing jurisdiction provisions, it could not have understood the New Determinations Paragraph to be limited in that manner. Instead, the Ninth Circuit deferred to a subsequent district court's interpretation of the Decree, thereby perpetuating a direct conflict with the D.C. Circuit over decree interpretation that bolsters the need for this Court's review.

That the Ninth Circuit's decision jeopardizes treaty fishing rights cannot be disputed: even some of the tribes that oppose Muckleshoot's U&A claims on the merits have argued that Muckleshoot should have the ability to proceed under the New Determinations Paragraph. That is because the Ninth Circuit's decision, which disrupts the longstanding operation of the Boldt Decree, will harm tribes throughout the Pacific Northwest that have relied on the New Determinations Paragraph time and again to preserve their treaty rights over the last half century.

This Court has granted certiorari on several occasions—including just a few Terms ago—to protect the treaty fishing rights that the federal government promised to tribes and that the Boldt Decree enforces. Certiorari is warranted in this case as well.

I. THE NINTH CIRCUIT'S DECISION CONTRAVENES THIS COURT'S PRECEDENT BY NARROWING THE ORIGINAL JUDICIAL DECREE.

The Ninth Circuit's "interpretation" of the Boldt Decree adds a novel limitation to the New Determinations Paragraph. This Court's precedents prohibit such de facto modifications, especially where Indian treaty rights are concerned.

A. Courts Cannot Modify A Judicial Decree Under The Guise Of Interpretation.

In certain circumstances, "sound judicial discretion may call for the modification of the terms of an injunctive decree." *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437 (1976). But the authority to modify a decree does not include the power to do so through "interpretation." *See Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993) ("In a modification proceeding, *** there is by definition no pre-existing right to interpret.").

Whether considering a consent decree or a judicial decree, changes may be made only "upon an appropriate showing." *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968); *see United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) (acknowledging that even where "[p]ower to modify [a decree] exist[s]," courts must ask "whether enough has been shown to justify its exercise"); 11A FEDERAL PRACTICE AND PROCEDURE § 2961 (3d ed. 2020) ("Decrees entered after litigation and those entered by consent are treated in the same fashion on a motion to modify or vacate."). Typically, the inquiry involves

"the same sort of balancing of equities that occurs in an initial proceeding." *Nebraska*, 507 U.S. at 592. When a party "establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004); *cf. Pasadena*, 427 U.S. at 439 (explaining that injunction remains in effect "until modified or reversed by a court having the authority to do so").

United States v. Atlantic Refining Co., 360 U.S. 19 (1959), is instructive. In that case, this Court considered a consent decree between the United States and several oil companies in which the parties agreed stockholders could "receive a dividend equal to 'its share of 7 percentum (7%) of the valuation' of the common carrier pipeline's property." *Id.* at 20-21. The parties settled into a practice of calculating the "allowable dividends by taking 7% of the valuation of pipeline property and then giving each owner a proportion of this sum equal to the percentage of stock it owned." *Id.* at 21. After nearly 20 years, however, the United States claimed that such dividends were unlawful, on the theory "that only a part of 7% of the valuation could actually be made available as dividends to stockholders." *Id.*

Considering "the language and the history of th[e] decree," this Court rejected the United States' "strained construction," which could not be squared "with the consistent reading given to the decree" since its inception. *Atlantic Refin.*, 360 U.S. at 22-23. It made no difference that the United States' interpretation better "effectuate[d] the basic purpose" of the underlying laws. *Id.* at 23. Regardless of

whether "modification might be appropriate" for that reason, "modification disguised as construction was not." *United States v. ITT Cont'l Baking, Co.*, 420 U.S. 223, 236 n.9 (1975); *accord Hughes v. United States*, 342 U.S. 353, 357 (1952) (reversing directive that "effected a substantial modification of the original decree" on ground that "there is no fair support for reading that requirement into the language of [the decree]").

B. The Ninth Circuit's Decision Narrows The Boldt Decree In A "Manifestly Unfair" Manner.

The decision below did not offer a permissible "interpretation" of the Boldt Decree; it effected an unmistakable alteration. Giving short shrift to both the text and purpose of the Decree, the Ninth Circuit grafts a new limitation on Indian tribes' ability to prove their U&A fishing grounds that leaves Muckleshoot and others without the ability to secure a complete determination of their treaty fishing rights in the manner envisioned by the Decree.

1. In issuing the Boldt Decree, Judge Boldt was explicit: "Although there are extensive records and oral history from which many specific fishing locations can be pinpointed, it would be *impossible* to compile a complete inventory of any tribe's usual and accustomed grounds and stations." 384 F. Supp. at 353 (emphasis added); *see id.* at 402 ("[N]o complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be compiled today[.]"). Thus, "[f]or each of the plaintiff tribes, the findings set forth information regarding *** some, *but by no means*

all, of their principal usual and accustomed fishing places." *Id.* at 333 (emphasis added).

As to those yet-to-be-determined U&A fishing grounds, Judge Boldt was careful to preserve, through the New Determinations Paragraph, tribes' ability to "invoke the [district court's] continuing jurisdiction" to assert additional claims based on evidence not before him. 384 F. Supp. at 419. Including that provision in the Decree implements his rulings that "the court does hereby reserve continuing jurisdiction of this case *without limitation*" and "for the life of this decree," in order "to take evidence, to make rulings and to issue such orders as may be just and proper upon the facts and law and in implementation of this decree," and to "grant such further relief as the court may find appropriate." *Id.* at 333, 347, 405, 408 (emphasis added).

Other contemporaneous explanations confirm a broad retention of jurisdiction under the New Determinations Paragraph. In a hearing held not long after entering the Decree, Judge Boldt reiterated that "it was clearly understood" by those who participated in the underlying trial "that further places that couldn't be identified as usual and accustomed places by any particular tribe or tribes should be included as and when evidence sufficient to sustain that showing was presented." CA9 ER377, ECF No. 11-3. It therefore remained "open to any tribe to seek to have the areas identified previously in the main decision extended or further restricted, because there was not the time nor the necessity during the trial to try to identify all of the hundreds of specific places in this area." *Id.*

Tribes regularly sought and obtained such findings, irrespective of whether Judge Boldt had made specific determinations of their U&A fishing grounds in the Decree. *See, e.g.*, *Washington*, 626 F. Supp. at 1441-1442 (expanding U&A fishing places of Nisqually, Puyallup, and Squaxin Island Tribes in Puget Sound); *id.* at 1443 (detailing Lower Elwha Tribe's U&A fishing locations "in addition to those determined in the Order of April 18, 1975, and the Order of March 10, 1976") (citation omitted); *id.* at 1467 (enlarging Makah Tribe's U&A fishing grounds beyond those specifically determined in Boldt Decree); *United States v. Washington*, 129 F. Supp. 3d 1069, 1073 (W.D. Wash. 2015) (outlining findings from trial to determine boundaries of Quileute Tribe's and Quinault Nation's U&As "beyond the original case area considered by Judge Boldt"), *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017).

The decision below flouts "the language and the history of this decree," thereby effecting an impermissible modification. *Atlantic Refin.*, 360 U.S. at 22. Nothing in the Boldt Decree itself provides "fair support," *Hughes*, 342 U.S. at 357, for the Ninth Circuit's holding that Judge Boldt's specific determinations of some U&A locations, including those findings refined under the Clarification Paragraph, control whether a tribe may seek under the New Determinations Paragraph additional locations beyond those previously determined.

Likewise, nothing in Judge Rothstein's decision in Subproceeding 97-1, which the decision below deemed conclusive, justifies denying a tribe the right to proceed under the New Determinations Paragraph.

As explained in Judge Ikuta's dissent, Subproceeding 97-1—initiated under the Clarification Paragraph—simply applied the rule from *Muckleshoot I* (another Clarification Paragraph proceeding) that consideration of new evidence would need to be done under the New Determinations Paragraph. *See* App., *infra*, 22a-23a. "[A]fter Judge Rothstein's decision," the only thing that changed was that the Boldt Decree "specifically determined only that Elliott Bay is a U&A fishing location for the Muckleshoot," such that "there was no longer a Specific Determination addressing Puget Sound as a whole." *Id.* at 21a. So refined, "Judge Boldt's intent to include only Elliott Bay as a U&A location, based on the evidence then before him, d[id] not raise the inference that Judge Boldt intended to exclude other areas of Puget Sound from consideration under the New Determinations Paragraph." *Id.* at 24a. Accordingly, the "Muckleshoot were entitled to request a new Specific Determination under the New Determinations Paragraph relating to areas in Puget Sound outside of Elliott Bay." *Id.* at 21a.

2. The "manifest[] unfair[ness]" wrought by the Ninth Circuit's decision, App., *infra*, 21a (Ikuta, J., dissenting), makes its rewriting of the Boldt Decree all the more intolerable. When the United States, joined by Muckleshoot, brought suit in 1970, it "call[ed] upon [Judge Boldt] to exercise the traditional equity powers entrusted to the Federal District Courts in declaring in clear and certain terms the special reserved nature of the treaty tribes' fishing rights and in fashioning just and appropriate relief which is comprehensive enough to protect the tribes' rights." 384 F. Supp. at 400. The New Determinations Paragraph—at the core

of Judge Boldt's "elegant solution," App., *infra*, 14a (Ikuta, J., dissenting)—did just that. Even in the context of an outright decree modification, a court could not reshape the contours of that solution without a "balancing of equities," *Nebraska*, 507 U.S. at 592, in a manner that takes into account "[d]etrimental reliance" on the Decree, *Arizona v. California*, 460 U.S. 605, 626 (1983).

Here, the equities weigh decisively in Muckleshoot's favor. At the time of Judge Boldt's 1974 decision, all parties understood that Muckleshoot's U&A grounds in Puget Sound extended beyond Elliott Bay. Consonant with that shared belief, Muckleshoot members fished throughout central Puget Sound for the next 25 years. Muckleshoot therefore had no reason to invoke the Clarification or New Determinations Paragraphs during that time. Ignoring that undisputed history, the decision below holds that Muckleshoot is powerless to present new evidence of additional U&A grounds beyond Elliott Bay, even though, based on this prior shared understanding, Muckleshoot had no reason to appeal the original Decree or invoke the New Determinations Paragraph. Judge Boldt could never have intended to ensnare Muckleshoot or any other tribe in such a perverse game of "gotcha." *See* App., *infra*, 25a (Ikuta, J., dissenting).

The unfairness does not stop there. During Subproceeding 97-1, Muckleshoot initially sought to introduce evidence proving its treaty-time fishing practices throughout Puget Sound in areas other than Elliott Bay. But because that case arose under the Clarification Paragraph, Muckleshoot "w[as] limited to evidence regarding Judge Boldt's intent" and "could

not make arguments or present new evidence to Judge Rothstein about [its] historic entitlement to locations within Puget Sound." App., *infra*, 25a (Ikuta, J., dissenting). And now, contrary to the representations of the opposing parties in that prior Clarification Paragraph proceeding (most of whom are Respondents here), the Ninth Circuit precludes Muckleshoot from presenting that new evidence in the forum it was promised (this New Determinations Paragraph proceeding). *Id.*; *see, e.g.*, CA9 ER51, ER56, ECF No. 11-2 (arguing that "[i]f Muckleshoot believes it has sufficient evidence to establish additional U&A, it can file a Request for Determination and present the evidence—and all other parties can cross-examine the Muckleshoot witnesses and present their own evidence"; "if Muckleshoot wants a new finding and an expanded U&A, it must do as tribes did in [previous] cases, and file an appropriate Request for Determination").

In doing so, the Ninth Circuit deprives Muckleshoot—and all the other treaty fishing tribes—of the benefits of Judge Boldt's intent as set forth in his initial decision: a non-exhaustive designation of U&A fishing grounds, subject to expansion based on new evidence.

C. The Ninth Circuit's Decision Flouts Interpretive Rules Governing Treaty Rights.

The Ninth Circuit's reformulation of the Boldt Decree is problematic for another reason: it shrinks Indian treaty rights as interpreted and implemented in the Decree.

It is well settled that "treaty rights are to be construed in favor, not against, tribal rights." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2470 (2020); *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-203 (1999) (reiterating that implicit abrogation of treaty rights is disfavored and requires "clear evidence"); 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (2019) ("The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor."). As a corollary, "the words of a treaty must be construed in the sense in which they would naturally be understood by the Indians." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (internal quotation marks omitted). These rules have "been explicitly relied on by th[is] Court in broadly interpreting" the very treaties at issue here, no less, consistent with the understanding that a treaty is "not a grant of rights to the Indians, but a grant of rights from them." *Fishing Vessel*, 443 U.S. at 676, 680; *see also* 1 COHEN'S HANDBOOK § 2.02[1] ("Chief Justice Marshall grounded the Indian law canons in the values of structural sovereignty, not judicial solicitude for powerless minorities.").

For example, in *Seufert Brothers Co. v. United States*, this Court confronted whether a treaty in which the Yakama Indians ceded lands "on the north side of the Columbia river in the territory of Washington," but reserved "the right of taking fish at all usual and accustomed places in common with citizens of the territory," encompassed "the right to fish *in the country of another tribe* on the south or Oregon side of the river." 249 U.S. 194, 195-196 (1919)

(emphasis added). Affirming a decree and injunction in favor of the Yakama, this Court explained that "[t]o restrain the [tribe] to fishing on the north side and shore of the river would greatly restrict the comprehensive language of the treaty" and "substitute for the natural meaning of the expression used *** the artificial meaning which might be given to it by the law and by lawyers." *Id.* at 199.

These principles featured prominently in the Boldt Decree. Quoting from this Court's precedents, Judge Boldt underscored that "[t]he language used in treaties with the Indians should never be construed to their prejudice," but rather "as justice and reason demand." 384 F. Supp. at 330-331; *see id.* at 401 ("Treaties with Indian tribes must be construed liberally in accordance with the meaning they were understood to have by the tribal representatives at the treaty council and in a spirit which generously recognizes the full obligation of this nation to protect the [tribes'] interests."). He then instructed that "[e]ach of the basic fact and law issues in this case must be considered and decided in accordance with the treaty language reserving fishing rights to the plaintiff tribes, interpreted in the spirit and manner directed *** [by] the United States Supreme Court." *Id.* at 331.

The decision below breaks with the letter of the Boldt Decree and the principles expressed in this Court's directives. The ability of each treaty fishing tribe to invoke the New Determinations Paragraph advances the liberal construction of treaty rights by ensuring that U&A fishing grounds are not confined to Judge Boldt's avowedly incomplete specific determinations. By the same token, constricting the

scope of the New Determinations Paragraph in a de facto manner, as the Ninth Circuit sanctioned here, necessarily curtails those rights. If tribes can no longer seek a determination of their U&A fishing grounds based on a review of evidence of treaty-time fishing not presented at the original 1973 trial—evidence that can be considered only under the New Determinations Paragraph—the ability to vindicate those rights under the Decree is lost. That is the opposite of the scheme the Boldt Decree erected and contrary to the expansive interpretation of treaty rights that the Indian law canons of construction demand.

II. THE D.C. CIRCUIT HAS EXPRESSLY REJECTED THE NINTH CIRCUIT'S APPROACH TO INTERPRETING DECREES.

The Ninth Circuit's treatment of the Boldt Decree reflects a threshold misstep that infected its analysis from the outset: it deferred to Judge Martinez's interpretation of the Decree decades after it was written by Judge Boldt. That approach to interpreting decrees conflicts directly with D.C. Circuit precedent.

1. In the decision below, the Ninth Circuit made clear that its focus was on the district court's (*i.e.*, Judge Martinez's) "interpretation of a prior judicial decree." App., *infra*, 11a. According to the Ninth Circuit, "[i]n such case, [t]he district court's interpretation of a judicial decree is" ostensibly "reviewed *de novo*." *Id.* (second alteration in original) (internal quotation marks omitted). But importantly, plenary review is watered down by the caveat that a reviewing court "typically gives deference to the

district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." *Id.*; *see Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 893 (9th Cir. 1982) ("Although we are permitted de novo review, we think that in this instance the district judge's view deserves deference."). In other words, "special deference" to the district court's "conclusions about the meaning of the decree" is warranted "[i]n light of the district court's extensive experience with the case and the decree." *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986).

Those principles framed the Ninth Circuit's review here. In response to Muckleshoot's assertion that "[i]nterpretation of a judicial decree is reviewed de novo," CA9 Op. Br. 47, ECF No. 16, Respondents insisted that "[t]he standard of review is deference to the district court," Tulalip CA9 Resp. Br. 3, ECF No. 39. In their view, because Judge Martinez has presided over *United States v. Washington* for more than 14 years, and thus has exercised "extensive oversight of the decree," the Ninth Circuit was obligated to "uphold" Judge Martinez's interpretation of the Decree so long as it was "reasonable." *Id.* at 34 (internal quotation marks omitted); *see* Opposing Tribes CA9 Resp. to Pet. for Reh'g 9-10, ECF No. 117.

The Ninth Circuit agreed. Focusing on "what occurred in the prior rulings," the Ninth Circuit asked whether, "[w]hen Judge Rothstein was called upon [in Subproceeding 97-1] to determine what Judge Boldt meant when he ruled [in the Decree] that the Muckleshoot had usual and accustomed fishing places 'secondarily in the saltwater of Puget Sound,'" "Judge Rothstein somehow left a door open for the

Muckleshoot to argue that they have fishing rights in Puget Sound beyond Elliott Bay" under the New Determinations Paragraph. App., *infra*, 13a. On that score, the Ninth Circuit took Judge Martinez's "most reasonable reading of Judge Rothstein's findings" to be "the end of the matter." *Id.*

Doing so let the Ninth Circuit sidestep the most on-point and powerful evidence of the Decree's meaning: Judge Boldt's contemporaneous explanations for crafting the continuing jurisdiction provisions. To repeat, Judge Boldt was explicit "that further places that couldn't be identified as usual and accustomed places by any particular tribe or tribes should be included as and when evidence sufficient to sustain that showing was presented," and that "any tribe" could "seek to have the areas identified previously in the main decision extended or further restricted, because there was not the time nor the necessity during the trial to try to identify all of the hundreds of specific places in this area." CA9 ER377, ECF No. 11-3. As explained next, such contemporaneous evidence is a necessary and conventional aid in construing a decree.

2. The Ninth Circuit's decision is fundamentally at odds with the D.C. Circuit's decision in *United States v. Western Electric Co.*, 900 F.2d 283 (D.C. Cir. 1990) (per curiam), which eschews deference to a district court's later interpretation of its decree.

In *Western Electric*, a district court adjudicating the breakup of AT&T under federal antitrust laws drafted decree provisions (i) retaining jurisdiction generally to modify its judgment and (ii) requiring removal of certain line-of-business restrictions, which

would be revisited triennially, upon a petition by the affected Regional Bell Operating Companies (BOCs) demonstrating sufficient market competitiveness. 900 F.2d at 291 & n.6. A few years later, the Department of Justice and the BOCs moved the district court to remove the line-of-business restrictions under the latter provision. *Id.* at 292. The district court agreed in part and several parties appealed. *Id.* at 291-293.

In setting forth the principles that would govern its review, the D.C. Circuit declined to pay lip service to the de novo standard for "review[ing] the district court's conclusions about the scope of the applicability of" the decree provisions at issue. 900 F.2d at 293-294. Pointing specifically to the Ninth Circuit, the D.C. Circuit held:

> [W]e reject the suggestion—apparently embraced by other circuits, *see, e.g.*, *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986)—that this particular district judge's interpretations should be afforded some "special" deference because he drafted the pivotal provision of the decree *** and because he has had enormous experience overseeing the case and the decree since its inception.

900 F.2d at 294.

"In addition to [expressing] *** discomfort with the concept that the degree of deference *** afford[ed] should depend even in part on the identity of a district judge hearing the case below," the D.C. Circuit "note[d] that appellate courts do not normally defer to anyone else's *non-contemporaneous* interpretations of the Constitution, statutes, cases, or contracts—

whether or not the interpreter was also the drafter of the language at issue." 900 F.2d at 294 (emphasis added). Instead, the correct mode of interpretation involved "discern[ing]" the "meaning of the Decree's terms *** within its four corners, *** guided by conventional aids to construction, including the circumstances surrounding the formation of the consent order [and] any technical meaning words used may have had to the parties." *Id.* at 293 (second alteration in original) (internal quotation marks omitted). To that end, the D.C. Circuit recognized the need to "take careful account of the explanatory opinion issued by the district judge *at the time the decree was entered*." *Id.* at 294 n.10 (emphasis added).

Applying that contemporaneous/non-contemporaneous distinction, the D.C. Circuit construed the relevant decree provision in a manner that "comport[ed] with the intent of the parties as expressed to the district court in 1982" when the decree was entered, and rejected the suggestion that the district court's subsequent statements in the decision under review "amended the decree['s]" standard for removing the line-of-business restrictions. 900 F.2d at 295. In particular, the D.C. Circuit disagreed with the district court's sentiment that reliance interests in the line-of-business restrictions made "the BOCs' burden *** 'particularly heavy.'" *Id.* at 296 n.13. "Any enterprise that read the decree and the district court's 1982 opinion could not reasonably have relied on the perpetual enforcement of th[os]e *** restrictions," given "the inclusion of [the continuing jurisdiction provision] and the explicit pledge to review the continuing need for the restrictions every three years." *Id.*

Also relevant here, the D.C. Circuit separately reversed the district court for analyzing the lifting of the line-of-business restriction on "information services" under the wrong continuing jurisdiction decree provision. 900 F.2d at 305. Reiterating that courts "must look first to the text of the decree, and then, if the question remains subject to doubt, to contemporaneous statements of [its] objectives," the D.C. Circuit found the decree "[a]t best *** silent on the question" of which provision should apply. *Id.* at 306 (internal quotation marks omitted). But "[t]he circumstances surrounding the formation of the decree"—reflected in the district court's contemporaneous statements—"le[ft] little question." *Id.* at 306-307.

3. Had the Ninth Circuit followed the D.C. Circuit's non-deferential approach to interpreting decrees, there would have been little question that the New Determinations Paragraph is available to Muckleshoot. For reasons already discussed (pp. 14-21, *supra*), no statement by either Judge Martinez or Judge Rothstein could have amended the Boldt Decree. To the extent any ambiguity exists or any doubt remains, Judge Boldt's contemporaneous explanation—not Judge Martinez's or Judge Rothstein's subsequent views or experience—provides a firm answer.

III. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE.

The Ninth Circuit's narrowing of the New Determinations Paragraph has considerable consequences for Indian tribes across the Pacific

Northwest that make this Court's intervention imperative.

This Court long ago recognized that "[t]he right to resort to *** fishing places" is "not much less necessary to the existence of the Indians than the atmosphere they breathe[]." *Winans*, 198 U.S. at 381. As fishery resources have become increasingly "scarce" over time, "the meaning of the Indians' treaty right to take fish has accordingly become critical." *Fishing Vessel*, 443 U.S. at 669. So has the role of courts in protecting that treaty fishing right. *See, e.g.*, *id.* at 678, 684-685 (rejecting argument that "right of taking fish" should be limited to "merely the 'opportunity' to try to catch" fish, and holding that "[n]ontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area").

This case presents the same considerations. To borrow Judge Boldt's words, "one common cultural characteristic among all of the[] Indians [throughout Western Washington] was the almost universal and generally paramount dependence upon the products of an aquatic economy, especially anadromous fish, to sustain the Indian way of life." 384 F. Supp. at 350. "These fish were vital to the Indian diet, played an important role in their religious life, and constituted a major element of their trade and economy." *Id.* For these reasons, it is easy to see why "the United States, on its own behalf and as trustee for several Western Washington Indian Tribes"—including Muckleshoot—brought suit to secure the judicial protections afforded by the Boldt Decree. *Id.* at 327. Simply put, "[t]he right to fish for all species available in the waters from

which, for so many ages, their ancestors derived most of their subsistence [wa]s the single most highly cherished interest and concern of the present members of plaintiff tribes." *Id.* at 340.

The decision below does serious violence to the Boldt Decree by effectively eliminating the procedural mechanism tribes throughout the Pacific Northwest have relied on "to preserve their treaty rights and to provide sustenance for their members for the last 40 years." Nisqually CA9 Answering Br. 9, ECF No. 45. That alarming result has not gone unnoticed. In the wake of the district court's decision, a number of tribes filed or joined briefs in the Ninth Circuit. Some, like the Sauk-Suiattle Indian Tribe, have no direct interest in whether Muckleshoot's U&A fishing grounds in the saltwater of Puget Sound extend beyond Elliott Bay, but warned that an inability to invoke the New Determinations Paragraph "would be devastating." Sauk-Suiattle CA9 *Amicus* Br. 2, ECF No. 17-2. Even among tribes that "disagree[d] with Muckleshoot's claim" on the merits, the Nisqually Indian Tribe "support[ed] the [Muckleshoot's] right to be heard" under the New Determinations Paragraph and urged the Ninth Circuit to reverse for fear that "[a]llowing th[e] [district court's] misunderstanding to persist could strip some tribes of their not-yet-declared usual and accustomed fishing grounds." Nisqually CA9 Answering Br. 4 n.1, 9-10, ECF No. 45.

There is no reason for this Court to put off consideration of these grave harms. No other court of appeals will have occasion to interpret the Boldt Decree generally or the New Determinations Paragraph specifically. The Ninth Circuit's word therefore will be final absent a grant of certiorari.

The potential for the Ninth Circuit's decision to do further harm beyond this case is anything but academic. Judge Boldt's statement—that "[t]he right to fish, as reserved in the treaties of plaintiff tribes, certainly is the treaty provision most frequently in controversy," and has been the subject of voluminous litigation "involving all of the tribes and numerous of their individual members"—is no less true today. 384 F. Supp. at 340. Respondents themselves made that point below:

> In the 45 years since [the Boldt Decree], the district court has been kept very busy exercising its continuing jurisdiction in the subproceedings of *U.S. v. Washington*. To date there have been 90 separately litigated subproceedings, which have spawned hundreds of district court decisions and 41 opinions of [the Ninth Circuit], with two cases in addition to this one currently pending. Many of those subproceedings have involved issues concerning tribal U&As.

Tulalip CA9 Resp. Br. 10, ECF No. 39 (citation omitted).

Given the stakes, it is hardly surprising that this Court has also resolved several fishing-rights disputes that concern the Boldt Decree and the underlying treaties. Indeed, the Solicitor General recently recounted—in a proceeding that arises out of this same case—that "this Court has on a number of occasions been called upon to interpret and apply the Tribes' 'right of taking fish.'" S.G. Br. 27-31, 47-48, *Washington v. United States*, 138 S. Ct. 1832, 1833

(2018) (mem.) (discussing *Fishing Vessel*, 443 U.S. 658; *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977); *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 46 (1973); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Winans*, 198 U.S. 371); *see also Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Brothers*, 249 U.S. 194. This Court should grant certiorari once again to ensure that tribes' treaty fishing rights are not diminished—this time through the "manifestly unfair" construction (and constriction) of the New Determinations Paragraph.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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