No. 98-1437

In the Supreme Court of the United States

NATIVE VILLAGE OF EYAK, ET AL., PETITIONERS

v.

WILLIAM M. DALEY, SECRETARY OF COMMERCE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
ROBERT L. KLARQUIST
DAVID C. SHILTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioners' claims of exclusive fishing rights, based on claims of aboriginal title, in areas of the ocean beyond the three-mile limit of Alaska's jurisdiction, are inconsistent with the federal government's paramount interests in those areas.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 98-1437

NATIVE VILLAGE OF EYAK, ET AL., PETITIONERS

v.

WILLIAM M. DALEY, SECRETARY OF COMMERCE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 154 F.3d 1090. The opinion of the district court (Pet. App. 19-62) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1998. A petition for rehearing was denied on December 7, 1998 (Pet. App. 63-64). The petition for a writ of certiorari was filed on March 8, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, Native Villages on the south coast of Alaska, challenged Department of Commerce regula-

tions establishing individual fishing quotas for the commercial fishing of halibut and black cod (sablefish) in waters beyond the three-mile limit of state jurisdiction in the Gulf of Alaska. Petitioners claimed aboriginal title to those waters and alleged, among other things, that the regulations violated their exclusive fishing rights. Without deciding whether petitioners might have *non*-exclusive fishing rights in those areas that would support a challenge to the regulations, the courts below held that petitioners' claim of *exclusive* rights conflicts with the paramount authority of the federal government over the resources of the Outer Continental Shelf (OCS).[1]

1. a. The modern contours of the "federal paramountcy" doctrine were first drawn in *United States* v. *California*, 332 U.S. 19, supplemented by 332 U.S. 804 (1947), in which this Court rejected California's claim to ownership of the submerged lands within three miles of California's coastline. The Court held that the protection and control of the adjacent seas is an inherent function of national external sovereignty and that, under our constitutional system, paramount rights over those seas and their beds are vested in the federal government. *Id.* at 34-35. In subsequent litigation

---

[1] The courts below referred to the area at issue in this case as the OCS, and, when discussing their holdings (and petitioners' arguments), we will do the same. When speaking of fishery resources, however, it is appropriate to refer to the area beyond state jurisdiction as the "exclusive economic zone" (EEZ) rather than the OCS. Compare Outer Continental Shelf Lands Act, 43 U.S.C. 1332(1) and (2), with Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1811(a). While both the EEZ and the OCS begin at the seaward boundaries of the States, the EEZ extends outward 200 miles from the coast, whether or not the continental shelf extends that far.

between the United States and the States of Louisiana and Texas, the Court extended the *California* doctrine to apply not just to the three-mile belt but also to the OCS. *United States* v. *Louisiana*, 339 U.S. 699, 704 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950). The Court held:

> [O]nce low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. * * * If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities.

Id. at 719. The Court reaffirmed that principle, and the continuing vitality of the federal paramountcy doctrine, in *United States* v. *Maine*, 420 U.S. 515 (1975).

b. To date, the Ninth Circuit has been the site of all litigation concerning the effect of the paramountcy doctrine on claims of aboriginal rights in the OCS. Because the certiorari petition makes frequent reference to that litigation, we discuss the relevant cases here in some detail.

In the early 1980s, Natives on the north slope of Alaska asserted aboriginal claims of exclusive use and occupancy with respect to large areas of the OCS in the Beaufort and Chukchi Seas, in part to prevent the Department of the Interior from authorizing oil and gas development. Those claims were rejected under the federal paramountcy doctrine. "[I]t makes no difference," the district court held, "whether the competing domestic claimant is a state or a tribe of American natives. All are subordinate to the federal government, and neither can, under the Constitution, claim rights

which are at odds with those which are of necessity entrusted to the one external sovereign recognized by the Constitution." *Inupiat Community of the Arctic Slope* v. *United States*, 548 F. Supp. 182, 187 (D. Alaska 1982) (*Inupiat*), aff'd on other grounds, 746 F.2d 570 (9th Cir. 1984), cert. denied, 474 U.S. 820 (1985).

On appeal, *Inupiat* was decided together with *Village of Gambell* v. *Clark*, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*). In *Gambell I*, Natives in western Alaska had asserted not just aboriginal hunting and fishing rights, but also rights under the subsistence-protection provisions of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, which applies to public lands "in Alaska," 16 U.S.C. 3102(3). Without reaching the issue of federal paramountcy, the Ninth Circuit held that, if the Natives had aboriginal hunting and fishing rights with respect to the OCS, those rights would have been extinguished by Section 4(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1603(b).[2] 746 F.2d at 574-578. At the same time, however, the Ninth Circuit held that the district court had improperly dismissed the Natives' claims under ANILCA. See *id.* at 579-583. After a remand, the Ninth Circuit further held that ANILCA entitled the Natives to a preliminary injunction against oil and gas exploration. *Village of Gambell* v. *Hodel*, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*).

This Court granted certiorari to review the propriety of that injunction, and it reversed. *Amoco Prod. Co.* v.

---

[2] That Section provides that "[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished." 43 U.S.C. 1603(b).

Village of Gambell, 480 U.S. 531 (1987). The Court held, among other things, that the phrase "in Alaska," which defines the scope of the asserted ANILCA rights, excludes the OCS. See 480 U.S. at 546-555. As the Court noted, that same phrase also appears in Section 4(b) of ANCSA, upon which the Ninth Circuit had separately relied in holding that any aboriginal claims had been extinguished. See 480 U.S. at 536. The Court declined to "decide here the scope of ANCSA § 4(b)" because that issue was not before it; instead, the Court granted a cross-petition that presented that issue, vacated the relevant portion of the Ninth Circuit's decision, and remanded to that court for further proceedings. *Id.* at 555.

On remand, the court of appeals held that Section 4(b) of ANCSA, which refers to claims of aboriginal title "in Alaska," does not apply to the OCS and therefore does not extinguish otherwise valid aboriginal claims concerning the OCS. *Village of Gambell* v. *Hodel*, 869 F.2d 1273, 1278-1280 (9th Cir. 1989) (*Gambell III*). The court further observed, however, that such claims are limited by federal paramountcy principles. See *id.* at 1276 & n.3. The court explained:

> In *Inupiat*, the Natives tried to distinguish the paramountcy cases by limiting them to their facts—a dispute between national and state governments. However, the district court realized that this was a distinction without a difference, and that a claim of sovereignty over adjacent waters, by any party other than the United States, is equally repugnant to the principles set forth in the paramountcy cases.

869 F.2d at 1276. The court ultimately held that the paramountcy doctrine did not control the case, however, because the plaintiffs had asserted rights to

subsistence hunting and fishing free from significant interference, and the exercise of such non-exclusive rights would not conflict with federal paramountcy. *Id.* at 1276-1277, 1280. The court did not, however, address any claim of exclusive aboriginal rights; to the contrary, it remanded with instructions to determine "whether the drilling and other activities by the oil companies will interfere significantly with the Villages' exercise" of their asserted subsistence rights. *Id.* at 1280[3]; cf. *Village of Gambell* v. *Babbitt*, 999 F.2d 403 (1993) (*Gambell IV*) (declaring controversy moot).

2. Petitioners filed this suit to challenge, among other things, "individual fishing quota" (IFQ) regulations, promulgated by the Department of Commerce in 1993, governing commercial fishing for halibut and black cod in federal waters off the Alaska coast. See 58 Fed. Reg. 59,375 (1993); 50 C.F.R. 679.40.[4] The complaint sought a declaration that petitioners "hold

---

[3] In subsequent cases, the United States has not acquiesced in the holding of *Gambell III* that certain aboriginal subsistence rights may exist in the OCS or EEZ. That issue did not need to be decided here, however, because, as the court of appeals made clear, this case involves claims of exclusive aboriginal rights, to which *Gambell III* is inapplicable. Pet. App. 13-15.

[4] The regulations at issue were promulgated pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 336, 16 U.S.C. 1802(7) (1994 & Supp. III 1997), 1811(a), and the Halibut Act, 16 U.S.C. 773 *et seq.* The latter statute in turn implements the Convention for the Preservation of Halibut Fishery of Northern Pacific Ocean and Bering Sea, Mar. 2, 1953, U.S.-Can. 5 U.S.T. 5, T.I.A.S. No. 2900. The Magnuson-Stevens Act claims for the United States "sovereign rights and exclusive fishery management authority over all fish, and all continental shelf fishery resources within the exclusive economic zone." 16 U.S.C. 1811(a). That zone extends from three to 200 miles outward from the coastline. See note 1, *supra*.

aboriginal title and exclusive aboriginal rights to use, occupy, possess, hunt, fish, and exploit the waters, and mineral resources within their traditional use areas of the OCS in Prince William Sound, the Gulf of Alaska, and Cook Inlet." Pet. App. 14 (quoting complaint). Petitioners sought to assert "regulatory power over third parties, including officials of our executive branch of government, subject only to the laws of Congress." *Id.* at 14-15.

The district court granted partial summary judgment for the government. The court did not resolve petitioners' claims of interference with Native fishing, and it left "for another day the question of what non-exclusive fisheries rights, if any, plaintiffs might have in the OCS which are not dependent upon aboriginal title." Pet. App. 23. Instead, the court decided "only the aboriginal title issues." *Ibid.* As to those issues, the court found that the doctrine of federal paramountcy forecloses petitioners' claims of aboriginal title in areas of the OCS. *Id.* at 36-57.[5] The court alternatively held

---

[5] In both *Gambell IV*, 999 F.2d at 407 n.8, and *Gambell III*, 869 F.2d at 1276 n.1, the Ninth Circuit noted that the existence of aboriginal rights on the OCS had not yet been proven as a factual matter. Those cases addressed only whether such rights could exist as a matter of law. Similarly, in the proceedings below, the district court did not address whether petitioners could in fact substantiate their claims of aboriginal rights by demonstrating historic use and occupancy of the relevant areas. The government had submitted an analysis of the anthropological and historical literature on use of the EEZ from Kayak Island to Lower Cook Inlet. SER 7-45. As noted in that report, Native Alaskans in this area of Alaska had historically traveled over EEZ waters for purposes of journeying from one point to another, but not for fishing or hunting. SER 25-26, 34. The report concluded that "[t]here is no conclusive evidence of aboriginal use of the OCS in the historic

that, "[q]uite apart from the aboriginal title issue, plaintiffs cannot claim an exclusive right to fish for halibut and [black cod]. Exclusive rights to fish in navigable waters in the hands of Alaska Natives would require recognition by treaty or congressional statute." *Id.* at 58-59.

The court of appeals affirmed. Pet. App. 1-18. It held that the doctrine of federal paramountcy applies with equal force to all entities claiming rights to the ocean, including both States and Natives, and added that "we are hard pressed to see a practical difference between the relief sought by the Native Villages and that sought by the states in the paramountcy cases." *Id.* at 14. Having decided the case on that ground, the court of appeals did not reach the district court's alternative holding that, in the absence of a treaty or statute to the contrary, Natives generally lack exclusive hunting or fishing rights in navigable waters. *Id.* at 17 n.6.

ARGUMENT

1. Reasoning that Congress has broader authority to extinguish claims of Natives than analogous claims of States, petitioners argue (Pet. 25-30) that the doctrine of federal paramountcy should apply only to state claims, not Native claims. That argument is without merit, as the Ninth Circuit has repeatedly explained. See Pet. App. 15-17; *Gambell IV*, 999 F.2d. at 407; *Gambell III*, 869 F.2d at 1276; see also *Inupiat*, 548 F. Supp. at 185.[6]

---

or ethnographic literature of the study area for anything other than travel." SER 33.

[6] Petitioners' contention that "the decision below cannot be reconciled with *Gambell III*[]" (Pet. 7 n.5) is incorrect for the reasons identified by the court of appeals. See Pet. App. 13-15. In any event, this Court as a general rule does not grant certiorari to

Application of the paramountcy doctrine does not turn on case-by-case inquiries into the degree to which non-federal claims would interfere with federal power. The doctrine instead embodies a generally applicable principle that property interests and sovereignty in the ocean must "coalesce and unite in the national sovereign." *Texas*, 339 U.S. at 719; see also *Inupiat*, 548 F. Supp. at 186 n.3. That principle applies no matter what entity asserts property and sovereignty interests in those federal areas.[7] Of course, in its exercise of sovereign authority, Congress is free to cede certain rights. It did so, for example, in the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, which transferred to the States the rights to the seabed underlying the marginal sea within limits (generally three miles) defined by the Act.[8] But any decision to cede federal rights over the remaining areas covered by the paramountcy doctrine must be made by Congress, not, as petitioners propose, by the courts.

---

resolve claims of an intra-circuit conflict. See, *e.g.*, *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

[7] Here, petitioners claim both sovereignty and property interests: "exclusive use of the ocean resources and regulatory power over third parties, including officials of our executive branch of government, subject only to the laws of Congress." Pet. App. 14-15; accord Pet. 12-13. In *Alaska* v. *Native Village of Venetie*, 522 U.S. 520 (1998), this Court recently held that ANCSA had the effect of extinguishing most "Indian country" in Alaska. In this case, petitioners appear to argue that Indian country, generally absent on the Alaska mainland, nonetheless exists on the OCS. See Pet. 12-13.

[8] Although petitioners appear to suggest otherwise (Pet. 15), that legislation did not somehow "revers[e]" this Court's paramountcy decisions, as the Court itself has emphasized. See *Maine*, 420 U.S. at 524-525.

2. Petitioners alternatively argue that, through legislation, Congress has in fact ceded federal paramountcy over the relevant areas. Pet. 14-19. That is incorrect.

Petitioners principally rely (Pet. 15-16) on a provision of the Magnuson-Stevens Fishery Conservation and Management Act permitting the Secretary of Commerce to issue emergency regulations to achieve consistency with national standards set forth in the Act and "any other applicable law." 16 U.S.C. 1853(a)(1)(C), 1854(a)(1)(B) (1994 & Supp. III 1997). Petitioners cite no decision, however, for the proposition that claims of exclusive fishing rights based on aboriginal title could constitute "applicable law" for purposes of the quoted provision.[9] And that proposition is in any event mistaken. In relying on the Magnuson-Stevens Act, petitioners must demonstrate not just that they have exclusive aboriginal rights and that those rights constitute "law," but that such law is "applicable" in this context. But otherwise applicable legal principles recognizing exclusive aboriginal rights could *not* be "applicable" in the EEZ, precisely because, as discussed above, the paramountcy doctrine forecloses them. Petitioners' arguments under the Magnuson-Stevens Act are thus

---

[9] In *Parravano* v. *Babbitt*, 70 F.3d 539 (1995), cert. denied, 518 U.S. 1016 (1996), upon which petitioners rely (Pet. 15), the Ninth Circuit held that Indian fishing rights derived from two Executive Orders constituted "applicable law" justifying emergency measures under the Magnuson-Stevens Act regulating the number of fish available for an in-river Indian fishery. The Court reasoned that "Indian rights arising from executive orders are entitled to the same protection against non-federal interests as Indian rights arising from treaties." 70 F.3d at 547. *Parravano* nowhere suggests that the Act recognizes exclusive aboriginal rights against federal interests in the ocean.

derivative of, and no sounder than, their principal argument that the paramountcy doctrine does not apply to Native claims.

Petitioners also rely (Pet. 16-17) on a savings clause in the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, which provides that the Act shall not "affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this subchapter." 43 U.S.C. 1342. Petitioners' reliance on the OCSLA would lack merit even if that Act, which addresses the subsoil and seabed of the outer continental shelf, could otherwise be relevant to this dispute about fishing rights in the EEZ (see note 1, *supra*). As the district court indicated (Pet. App. 43), the savings clause at issue would not apply to aboriginal rights, which are not "acquired under * * * law[s] of the United States," but instead arise from aboriginal use and occupancy. Moreover, contrary to petitioners' suggestion (Pet. 17-18), the legislative history of the OCSLA indicates that Congress included the savings clause not to recognize any particular type of right, but to avoid affecting the result of ongoing litigation involving disputed private claims to offshore areas under the Mineral Leasing Act, 30 U.S.C. 181 *et seq.* See *Submerged Lands: Hearings on S.J. Res. 13, S. 294, S. 107, S. 107 Amendment, and S.J. Res. 18 Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 238- 242, 761, 824-829, 908-909 (1953); see also S. Rep. No. 133, 83d Cong., 1st Sess. 13 (1953).

Also without merit is petitioners' reliance (*e.g.*, Pet. 29) on exemption provisions in statutes dealing with marine mammals and endangered species. To begin with, petitioners are incorrect in claiming that those statutes provide "exclusive" exemptions for Natives.

See, *e.g.*, 16 U.S.C. 1371 (exempting, from general moratorium on animal takings, takings pursuant to permits for scientific research, incidental takings in course of commercial fishing operations, takings in defense of self or others, and takings to avoid injury or death). In any event, even if Natives alone were exempted, that would not mean that Congress had recognized a pre-existing exclusive right to take the species in question, much less the plenary and exclusive aboriginal title rights asserted here.[10]

3. Finally, petitioners are mistaken in contending (Pet. 20-24) that the decision below conflicts "in principle" with certain decisions of this Court. None of the cases in question involved claims remotely similar to those presented here. In *Oneida County* v. *Oneida Indian Nation*, 470 U.S. 226 (1985), for example, the Oneida Nation sought the fair rental value of certain land occupied by two New York counties in violation of possessory rights of the Oneida Nation that the United States had promised by treaty to secure, and this Court recognized a federal common-law right of action to vindicate those rights. The Court had no occasion to address whether Tribes may assert exclusive fishing rights, based on aboriginal title, in navigable waters, let alone in waters of the EEZ subject to the doctrine of federal paramountcy.

---

[10] Petitioners' reliance (Pet. 19-20) on a 1942 opinion of the Solicitor of the Department of the Interior is unsound. The opinion, *Aboriginal Fishing Rights in Alaska*, 57 Interior. Dec. 461 (1942), predates this Court's decisions in the paramountcy cases. Moreover, the opinion addresses Indian fishing rights in near-shore waters, not claims of aboriginal title to offshore waters, much less to the EEZ. And the opinion does not suggest that Indians could enforce exclusive rights against the United States.

The fishing rights asserted in *United States* v. *Winans*, 198 U.S. 371, 381 (1905), and *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 678-681 (1979), were based on treaties, not on aboriginal title, and presented no issue concerning the paramountcy doctrine; the asserted rights were also non-exclusive to the extent they involved fishing outside of reservation boundaries. *Damon* v. *Hawaii*, 194 U.S. 154 (1904), and *Carter* v. *Hawaii*, 200 U.S. 255 (1906), involved near-shore fisheries that had been granted by a previous sovereign to private parties; neither case has any bearing on the questions of aboriginal title presented here. Finally, petitioners are mistaken in contending (Pet. 24) that footnote 4 of this Court's decision in *Amoco*, *supra*, is somehow inconsistent with the Ninth Circuit's decision here. That footnote simply quoted the Ninth Circuit's own definition of "aboriginal title," which, as that court had noted, can extend to "lands and waters." 480 U.S. at 536 n.4 (quoting *Gambell I*, 746 F.2d at 574). Nothing in the decision below draws that unremarkable proposition into doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
ROBERT L. KLARQUIST
DAVID C. SHILTON
Attorneys

MAY 1999