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Yellen v. Confederated Tribes of the Chehalis Reservation: Brief of Professors and Historians as Amici Curiae Supporting Respondents

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Nos. 20-543, 20-544

In the Supreme Court of the United States

JANET L. YELLEN, in her official capacity as Secretary of the Treasury,
Petitioner,

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, *et al.*,
Respondents.

ALASKA NATIVE VILLAGE CORPORATION ASSOCIATION, INC., ET AL.,
Petitioners,

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PROFESSORS AND HISTORIANS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are law professors who teach and write in the area of federal Indian law and Native American legal history. They file this brief to explain the history of the federal government's practice of "recognizing" Indian tribes generally, as well as the specific history of recognition of Alaska Native tribes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title V of the CARES Act provided $150 billion in funding for "States, Tribal governments, and units of local government" to mitigate the impacts of the COVID-19 pandemic. Congress reserved $8 billion of these funds for "Tribal governments," defined as "the recognized governing body of an Indian Tribe." 42 U.S.C. §§ 801(a)(2) & 801(g)(5).

The CARES Act defined "Indian Tribe," 42 U.S.C. § 801(g)(1), by referencing the definition in the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975) ("ISDEAA"). The ISDEAA states:

> "Indian tribe" or "Indian Tribe" means any Indian tribe, band, nation, or other

[1] The parties have consented to the filing of this brief. No counsel for either party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution to fund the preparation or submission of this brief. Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.

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> organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), *which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians*.

25 U.S.C. § 5304(e) (emphasis added). The U.S. Court of Appeals for the District of Columbia Circuit held that the emphasized clause (commonly referred to as the "recognition" clause) requires a Native entity to be federally recognized before becoming eligible to receive funds under the ISDEAA, and thus, the CARES Act. *Confederated Tribes of the Chehalis Rsrv. v. Mnuchin*, 976 F.3d 15, 22-25 (D.C. Cir. 2020). Because regional and village corporations organized under the Alaska Native Claims Settlement Act ("ANCs") are not on the current list of federally recognized tribes, the D.C. Circuit concluded that they were not eligible to receive Title V payments. *Id.* at 23; Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 86 Fed. Reg. 7,554 (Jan. 29, 2021).

Petitioners Alaska Native Village Corporation Association, Inc. ("Petitioners"), argue that this decision is "untenable" because Congress explicitly included ANCs in the ISDEAA definition of "Indian tribe," and the D.C. Circuit's decision renders this language "superfluous," or "a nullity." Pet. Br. 30-31; Fed. Br. 37-39. The D.C. Circuit correctly rejected this argument, noting that the Alaska Native Claims

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Settlement Act ("ANCSA") was enacted just a few years before the ISDEAA. Since ANCSA was still in the early stages of implementation, Congress was unsure whether Alaska Native villages, ANCs, or other Alaskan Native entities would be considered federally recognized tribes in the future. It made sense, then, for Congress to list all these entities (disjunctively) in the ISDEAA's definition of "Indian tribe," to ensure that any Alaska Native entities ultimately recognized by the federal government could benefit from the Act. *Chehalis*, 976 F.3d at 25-26.

Petitioners claim that the D.C. Circuit's reasoning was not sound, because status as a federally recognized tribe requires "historical claims to sovereignty and sovereign control over land," Pet. Br. 34, and that recognition for ANCs "has always been off the table." Pet. Br. 14; *see also* Fed. Br. 42. The D.C. Circuit's decision, according to the Petitioners, is therefore "ahistorical." Pet. Br. 35.

But it is the Petitioners that are rewriting history. Prior to 1978, the Bureau of Indian Affairs ("BIA") had no formal criteria for recognizing Indian tribes, and decisions were made on an ad hoc basis. *See, e.g.*, William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 Am. Indian L. Rev. 37, 40-41 (1992) (noting that "from [1934] to the mid-1970s, the methods by which . . . tribes attained federal acknowledgment were varied and random. It was not until the promulgation of the acknowledgment regulations in 1978 . . . that a systematic, uniform method … was established").

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Furthermore, no official list of recognized tribes existed when the ISDEAA was passed. *Id.* at 38 ("Among the many small oddities found in the history of United States-Indian relations is that not until 1979, fully 157 years after the establishment of the BIA in 1822, was there a comprehensive list of exactly which Indian tribes are federally acknowledged and by exclusion from that list which Indian groups are not").

The BIA, the courts, and Congress frequently changed their minds about the criteria to be used for federal recognition, as well as the application of that criteria to particular groups. The BIA recognized some tribes that it later claimed it had "created." And when the BIA tried to limit the powers of these "created" tribes, as compared to "historic" tribes, Congress intervened and passed the 1994 amendments to the IRA, Act of May 31, 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 707, 709, requiring that all federally recognized tribes be treated the same. Additionally, while lack of a federally protected land base sometimes inadvertently led officials to cease providing services to a tribe, trust lands are not a prerequisite to federal recognition.

More specifically, with respect to Alaska Native entities, there was, until recently, much confusion about their status. At times, the federal government refused to recognize any Alaska Native tribes, and it claimed that it owed no trust responsibility to Alaska Natives. On other occasions, the federal government encouraged Alaska Natives to form constitutional governments, federal corporations, and state corporations, and it provided recognition to entities

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organized in each of these ways. ANCSA created 200 additional regional and village corporations, and those ANCs overlapped (in terms of geography and membership) with existing Alaska Native tribal and non-profit organizations, creating uncertainty. Given this, it makes sense that Congress referenced Alaska Native villages and ANCs in the ISDEAA's definition, yet still provided that only those entities that were federally recognized would be entitled to benefit from the Act. The decision of the D.C. Circuit is sound and should be affirmed.

ARGUMENT

I. WHEN THE ISDEAA WAS PASSED, THERE WAS NO OFFICIAL LIST OF FEDERALLY RECOGNIZED TRIBES, NO UNIVERSAL CRITERIA FOR FEDERAL RECOGNITION, AND NO FORMAL PROCESS FOR MAKING RECOGNITION DECISIONS.

A. The Term "Indian Tribes" in the U.S. Constitution Has Been Broadly Interpreted, and Federal Courts Have Deferred to Congress' and the Executive Branch's Changing Recognition Decisions.

The U.S. Constitution provides that Congress "shall have the power" "to regulate Commerce . . . with the Indian tribes." U.S. Const., art. 8, cl. 3. Using this power, early in this country's history, Congress began enacting statutes that applied to "Indian country,"

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"Indian tribes,"[2] "Indian nations,"[3] "Indians,"[4] and "Indians not citizens of the United States."[5] These terms were rarely defined, however, and it fell on the executive branch and the federal courts to determine, on an ad hoc basis, to whom they should apply.

If Congress or the executive branch had previously recognized a particular tribe, federal courts generally refused to disturb that finding, and concluded that statutes relating to Indians were applicable. In *United States v. Holliday*, 70 U.S. 407 (1865), for example, this Court was asked to determine whether federal law prohibited the sale of liquor a member of the Saginaw Chippewa Tribe, or whether the alleged dissolution of the tribe by treaty had dissolved his Indian status. *Id.* at 418-419. This Court deferred to the executive branch, noting:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those

[2] The Trade & Intercourse Acts referred to "Indians," "Indian tribes," and "Indian country." *See, e.g.*, Act of July 22, 1790, ch. 33, 1 Stat. 137.
[3] Government trading factories were established in the "Indian country," so that trade could be conducted with "Indian nations" and "Indians." Act of Apr. 18, 1796, ch. 13, 1 Stat. 452.
[4] *See, e.g.*, Major Crimes Act, § 9, 23 Stat. 385 (1885); Snyder Act, ch. 115, 42 Stat. 208 (1921).
[5] *See, e.g.*, Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 570-71 (prohibiting certain contracts with "any tribe of Indians, or individual Indian not [a] citizen of the United States").

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> Indians are recognized as a tribe, this court must do the same.

Id; *see also The Kansas Indians*, 72 U.S. 737, 755 (1866); *Chippewa Indians v. United States*, 307 U.S. 1, 4-5 (1939).

Situations necessarily arose, however, where neither Congress nor the executive branch had previously acknowledged the existence of a particular tribe. In these cases, federal courts were required to decide whether that group constituted an Indian tribe for statutory purposes. This Court eventually provided a definition of the term "tribe" to aid lower courts:

> By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory[.]

Montoya v. United States, 180 U.S. 261, 266 (1901).

Complicating matters was the fact that tribal status was not static. Congress and the executive often reversed previous determinations of tribal status. *See United States v. Lara*, 541 U.S. 193, 202-03 (2004). For example, the United States sought to convince certain "civilized" tribes to abandon their tribal relations by treaty. *See, e.g.*, Treaty with the Wyandott, 10 Stat. 1159 (Jan. 31, 1855); Treaty with the Ottawa of Blanchard's Fork, 12 Stat. 1237 (June 24, 1862). But many tribes that agreed to such

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provisions continued their traditional governmental structures. While they may have been considered disbanded for a short period of time, the United States often reestablished its recognition of these tribes at a later date.[6]

In other cases, Congress reacted to alter the decision of a federal or state court. The Pueblo Indians provide an excellent historical example. The Trade & Intercourse Act precluded individuals from settling "any lands belonging, secured, or granted by treaty with the United States to any Indian tribe." Act of June 30, 1834, ch. 161, § 11, 4 Stat. 729, 730. After the Treaty of Guadalupe Hidalgo, Congress clarified that the Act "extended over the Indian tribes in the Territories of New Mexico and Utah." Act of Feb. 27, 1851, ch. 14, § 7, 9 Stat. 574, 587. In *United States v. Joseph*, 94 U.S. 614 (1876), this Court was called upon to determine whether the Taos Pueblo constituted an "Indian tribe" under these acts.

This Court concluded that the Pueblo Indians were a peaceful, sedentary, Christian people, whose livelihood revolved around agriculture. *Joseph*, 94

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[6] For example, in the 1830s, the Cherokee Nation was relocated west of the Mississippi River. Tribal members opposed to removal were, by terms of the treaty, permitted to remain and became state citizens. *Eastern Band of the Cherokee Indians v. United States*, 117 U.S. 288, 303 (1886) (non-removing Indians "ceased to be part of the Cherokee nation," "and were subject to the laws of the state in which they resided"). Later, however, these Indians "were restored to . . . their former status as an Indian tribe under the protection of the United States." *United States v. Wright*, 53 F.2d 300, 303 (4th Cir. 1931). The Eastern Cherokee are a federally recognized tribe today. 86 Fed. Reg. 7,554, 7,555 (Jan. 29, 2021).

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U.S. at 616-17. They were "Indians only in feature, complexion, and a few of their habits." *Id.* at 616. They had been fully assimilated in western society, and therefore, no longer constituted an "Indian tribe." *Id.* at 617. If the defendant was indeed trespassing on Pueblo lands, this Court concluded that he could only be punished under the territorial laws. *Id.* at 619.

Forty years later, however, this Court arrived at a very different conclusion. *United States v. Sandoval*, 231 U.S. 28 (1913), involved a criminal prosecution for distributing alcohol within Indian country (the Santa Clara Pueblo), and the New Mexico enabling act provided that Indian country included "all lands now owned or occupied by the Pueblo Indians of New Mexico." Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557. The statute, by its explicit terms, applied to the Pueblos, and the question was whether Congress possessed the constitutional power to regulate the Pueblos as Indian tribes.

This Court concluded that it did. While Congress may not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe," so long as they were "distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Sandoval*, 231 U.S. at 47; *see also United States v. Candelaria*, 271 U.S. 432 (1926) (applying *Montoya* and concluding that the Pueblos were included within the Trade & Intercourse Acts).

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Over the past 100 years, Congress has continued to use its power to recognize Indian tribes. *E.g.*, Act of Sept. 18, 1978, 92 Stat. 712 (Pascua Yaqui); Act of Oct. 18, 1983, 97 Stat. 851 (Mashantucket Pequot Indian Tribe); Act of Sept. 21, 1994, 108 Stat. 2156 (Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians); *see also* Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 Ind. L. J. 955, 1008-09 (2016). To date, no court has overturned a federal statute recognizing an Indian tribe. L.R. Weatherhead, *What is an "Indian Tribe"? – The Question of Tribal Existence*, 8 Am. Indian L. Rev. 1, 4 (1980).

B. In the Early Twentieth Century, Congress and the Executive Branch Sought to Reverse the Impacts of Federal Assimilationist Policies Through Reconstituting and Reviving Tribal Governments.

In the latter half of the nineteenth century, the federal government aggressively pursued a policy of assimilation designed to destroy tribes, while transforming individual Indians into citizens and individual property holders. By the early twentieth century this policy was viewed as a failure. *See,* 2 Francis Paul Prucha, *The Great Father* 808-13 (1984) (discussing the conclusions of the 1928 Meriam report, *The Problem of Indian Administration*,). The election of President Franklin Roosevelt in 1932, and his appointment of John Collier to direct the BIA in 1933, prompted a dramatic shift in federal Indian policy. Now the federal government sought to revive

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tribal institutions and culture,and promote a program for tribal economic rehabilitation.

The Indian Reorganization Act ("IRA"), 48 Stat. 984, was the primary statute designed to achieve these goals. The original proposed bill would have permitted "Indians living under Federal tutelage and control" to organize "for municipal and other purposes." H.R. 7902, 73rd Cong., 2d Sess. at § 1, *reprinted in The Indian Reorganization Act: Congresses and Bills* 8 (ed. Vine Deloria, Jr. 2002). The bill stated that the BIA possessed authority to issue charters to "community group[s]" providing them with "such powers of government and such privileges of corporate organization and economic activity, hereinafter enumerated, as may seem fitting." *Id.* at § 2; *see also id.* at § 4(a) (authorizing groups to "organize and act as a Federal municipal corporation"). The bill also explicitly authorized the Secretary of the Interior to acquire land "for the purpose of establishing [] new Indian communit[ies]," with persons of at least one-quarter Indian blood entitled to become members of the same. *Id.* at § 2.

Many of these provisions survived in the final bill adopted by Congress, which provided the right to organize a constitutional government, charter a federal corporation, or vote on application of the Act to "any "Indian tribe, or tribes, residing on the same reservation."[7] §§ 16-18, 48 Stat. 984. The term "tribe" was defined to include "any Indian tribe, organized

[7] The reservation requirement was deleted from the IRA by Congress in 1988. Act of Nov. 1, 1988, Pub. L. No. 100-581, 102 Stat. 2938; *see also* S. Rep. 100-577 (1988).

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band, pueblo, or the Indians residing on one reservation." *Id.* at § 19. The Secretary was authorized to acquire new lands "for the purpose of providing land for Indians," and to "proclaim new Indian reservations" on such newly acquired lands. *Id.* at §§ 5, 7.

Upon passage of the IRA, the BIA drew up a list of 258 tribes and groups of Indians that already had federally protected reservations or trust lands. William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 356 (1990) (hereinafter, Quinn, *Historical Development*). Under the IRA's terms, these were the groups that could initially adopt a constitution, request a corporate charter from the federal government, or both. Contrary to Petitioners' claims, some of these tribes had recent and unique histories.

California illustrates the point. In the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (Feb. 2, 1848), the United States agreed to protect Indian land that had been previously recognized by the Mexican and Spanish governments. *New Mexico v. Aamodt*, 537 F.2d 1102, 1108-09 (10th Cir. 1076). In 1851 and 1852, federal officials negotiated 18 treaties with more than 100 Indian tribes in central and northern California. Although the treaties promised to reserve millions of acres of land for tribal use, California's Senators convinced the Senate to reject them. Larisa K. Miller, "The Secret Treaties with California's Indians," *Prologue* 38-45 (Fall/Winter 2013); *County of Amador v. U.S. Dep't of Interior*, 872 F.3d 1012, 1015-16 (9th Cir. 2017).

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Fifty years later, upon discovering this troubling history, Congress authorized and appropriated funds for the acquisition of lands for "homeless" and "landless" Indians in central and northern California. Act of June 21, 1906, 34 Stat. 325, 333; Act of April 20, 1908, 25 Stat. 70, 76-77; William Wood, *The Trajectory of Indian Country in California: Rancherías, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias*, 44 Tulsa L. Rev. 317, 356-58 n.224-227 (2008) (collecting additional statutes).

BIA officials purchased small tracts of land (known as "rancherias") with these Congressionally appropriated funds and typically allowed any Indians living in the area to relocate thereon, regardless of tribal affiliation. *See Duncan v. United States*, 667 F.2d 36, 38 (Ct. Cl. 1981). After passage of the IRA, Indians residing on these trust lands were permitted to organize constitutional governments, and to request federal corporate charters. As a result, these IRA tribes have recent origins – contrary to the assertions of the Petitioners that sovereign recognition turns on a tribe's "historic" status – with members who descend from many different historic tribes. For example, the federally recognized Bear River Band of Rohnerville Rancheria contains Wiyot, Mattole, Nongatl, and Bear River descendants.[8] And the Graton Rancheria, which consists of descendants of Indians from several different tribes who, in 1920,

[8] Memorandum from NIGC Acting General Counsel to NIGC Chairman, dated Aug. 5, 2002, available at https://www.nigc.gov/images/uploads/indianlands/2002.08.05%20Bear%20River%20Band%20ILO.pdf.

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were living in areas of Marion and Sonoma County, was also permitted to organize under IRA.[9] One federally recognized tribe – the Greenville Rancheria – was organized under the IRA by Indians who moved onto property previously used as a BIA boarding school.[10] More than thirty tribes were organized in this manner in California. Tribes in other states were organized under similar circumstances. *E.g.*, *United States v. McGowan*, 302 U.S. 535, 537 (1938) (noting the Reno Sparks Indian Colony was formed when Congress appropriated money to purchase 28 acres of land "to provide lands for needy Indians scattered over the State of Nevada").

The IRA also anticipated the creation of new reservations for landless Indians, who could then organize corporate and constitutional forms of government. The federal government used this provision on at least seven occasions. *Cohen's Handbook of Federal Indian Law* 148 & n.107 (2012 ed.) (noting that the BIA acquired land for the St. Croix Chippewa Indians of Wisconsin, the Mississippi Band of Choctaw Indians, the Quartz Valley Indian Community, the Duckwater Shoshone Tribe, the Yomba Shoshone Tribe, the Port Gamble Indian Community, and the Sokaogon Chippewa Community). Federal officials did not require that

[9] Jay Petersen, *The Federated Indians of Graton Rancheria: Background Information Concerning Tribal Restoration* 1, 3 (Sept. 1997), available at file:///C:/Users/colet/Downloads/FIGR%20Report%201997.pdf. The Graton Rancheria was terminated by Congress, and later restored to federal recognition through legislation. Pub. L. No. 106-568, title XIV, § 1402, 114 Stat. 2939 (Dec. 27, 2000).

[10] http://www.greenvillerancheria.com/maidu_tribe_history.

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those Indians be part of an existing Indian tribe prior to reorganization under the IRA. *See, e.g.*, 1 *Solicitor's Opinions* 725 (Feb. 8, 1937) (noting that the St. Croix Indians, "[at] present [possess] no characteristics entitling them to recognition as a band, particularly as there exists no form of band organization").

But how were tribes not included on the BIA list to gain recognition if the federal government did not acquire land for them? This became the "predominant concern" of the BIA from the 1930s through the mid-1970s. Quinn, *Historical Development* at 357. In his famous *Handbook of Federal Indian Law*, Felix Cohen outline five criteria which "singly or jointly, have been particularly relied upon" when deciding if a tribe should be federally recognized:

(1) That the group has had treaty relations with the United States;
(2) That the group has been denominated a tribe by an act of Congress or Executive order;
(3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe;
(4) That the group has been treated as a tribe or band by other Indian tribes; or
(5) That the group has exercised political authority over its members, through a tribal council or other governmental forms.

Felix Cohen, *Handbook of Federal Indian Law* 271 (1942). Other factors "entitled to great weight," but "not conclusive" included past governmental appropriations on the group's behalf, the social

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solidarity of the group, as well as its ethnology and history. *Id.*

Federal officials struggled to apply this test. There was still no formal list of federally recognized tribes, and confusingly, some tribes found themselves recognized by the federal government one moment and denied recognition and services in another.[11]

C. At the Time of ISDEAA, the Administrative Process and Criteria for Recognizing Indian Tribes was Still in Flux.

During the 1970s, many Indian groups began petitioning the BIA for federal recognition. The dramatic increase in tribal petitions, along with federal court opinions mandating prompt BIA decisions, led the agency to promulgate recognition regulations. On September 5, 1978, after hundreds of meetings, hearings and conversations with interested parties, final "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe" were published in the Federal Register. 43 Fed. Reg. 39,361 (Sept. 5, 1978). These regulations created an

[11] For example, the Karuk Tribe entered into a treaty with the United States in 1852, and was recognized by the federal government as an Indian tribe as late as 1944. But Karuk was not permitted to organize under the IRA because it lacked a land base. From the 1940s through the 1970s, the BIA denied services to the tribe claiming that it was not federally recognized. In 1979, the federal government finally acknowledged Karuk as such. Letter from NIGC Chairwoman Tracie L. Stevens to Karuk Chairman Russell Attebery, April 9, 2012, *available at* https://www.nigc.gov/images/uploads/indianlands/Karuk4912.pdf .

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elaborate process governing the federal recognition of Indian tribes in the Lower 48 states.[12] *Cohen's Handbook*, at 155-57.

In 1979 – nearly four years after passage of the ISDEAA – the first formal list of federally recognized tribes was published. Tribal Entities That Have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7,235 (Feb. 6, 1979). But problems persisted. The BIA still occasionally withdrew recognition from tribes or tribal leaders without any supporting Congressional legislation, and without providing any formal process to the affected tribe.

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[12] This administrative process is not generally used in Alaska, because the Alaska IRA (discussed in Section II(A) below) created separate standards. 43 Fed. Reg. at 39,361 ("These regulations … are not intended to apply to groups, villages, or associations which are eligible to organize under the [Alaska IRA.]"); *see also* Requests for Administrative Acknowledgement of Federal Indian Tribes, 80 Fed. Reg. 37,538-02, 37,539 & n.1 (July 1, 2015) (noting that the Alaska IRA provides a separate acknowledgment process).

The OFA process has been widely lambasted due to the enormous delay in issuing decisions, and the exorbitant cost to tribes of assembling the required documentation. *See, e.g.*, U.S Gov't Accountability Off., GAO-02-49, *Indian Issues: Improvements Needed in Tribal Recognition Process* (2001). While the regulations have been amended on several occasions in an attempt to clarify ambiguities and streamline the process, little improvement has occurred. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9,280 (Feb. 25, 1994); Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7,052-01 (Feb. 11, 2000); Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37861-01 (July 1, 2015).

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For example, in 1935, Congress organized the Tlingit and Haida Indians under a central council to interact with the BIA on land claims litigation. Act of June 19, 1935, § 7, 49 Stat. 388, 389-90. But in the early 1990s, the BIA unilaterally removed the Central Council of the Tlingit and Haida tribes from its list of federally recognized tribes, even though it had appeared on every list of recognized tribes since 1982. When Representative Thomas of Wyoming introduced a bill in 1994 to cabin the discretion of the BIA, he provided the Central Council example, and also noted that:

> in a recent letter to Chairman Miller, the BIA has presaged more problems to come. In that letter, and in a hearing before the Subcommittee on Native American Affairs last April, the Bureau indicated that it intends to differentiate between federally recognized tribes as being created or historic. The BIA has taken the position that created tribes do not possess all the powers of a sovereign tribal government: they cannot zone, regulate law and order, or tax.
>
> However, this whole convoluted dichotomy is not mandated by Congress . . . When Federal recognition was extended to the tribes the BIA now terms "created," we gave absolutely no indication that they were to have anything less than full sovereign authority. Yet now the BIA has

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> unilaterally decided that they are not fully sovereign.

Introduction of Bill H.R. 4180, Apr. 12, 1994, 140 Cong. Rec. H2217-02.

The concerns of Representative Thomas and others were ultimately addressed by Congress through the passage of the Federally Recognized Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, and the 1994 amendments to the IRA, Act of May 31, 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 707, 709. In those statutes, Congress (1) required the BIA to publish an annual list of all federally recognized tribes, (2) provided that tribes on this list are eligible for all federal services and benefits and must be accorded the same treatment regardless of the time or manner of their recognition, and (3) prohibited the BIA from removing or omitting tribes once they have been placed on the list.[13] Only Congress has the power to terminate the government-to-government relationship between the tribe and the United States.

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[13] Concurrent with the List Act, Congress also explicitly reaffirmed its recognition of the Tlingit and Haida Central Council. § 203, 108 Stat. 4791.

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II. THE STATUS OF ALASKA NATIVE TRIBES REMAINED UNCERTAIN LONG AFTER ISDEAA WAS ENACTED.

A. Prior to the Adoption of ANCSA, the History of Alaska Native's Interactions with the Federal Government is Similar to that of Indian Tribes in the Lower 48 States.

Petitioners and their *amici* claim that Alaska is unique. But when it comes to the history of tribal recognition, Alaska is not very different from the Lower 48 states; both faced shifting federal policies and in neither case was historic sovereign status necessary to ultimate federal recognition.

The United States' interactions with Alaska Natives began in 1867, when Russia ceded Alaska to the United States via the Treaty Concerning the Cession of Russian Possessions in North America, 15 Stat. 539 (1867). At this time, some 400 whites and approximately 60,000 Alaska Natives lived within the ceded territory. Kirke Kickingbird & Karen Ducheneaux, *One Hundred Million Acres* 34-35 (1973). Article III of the Treaty provided that the "uncivilized tribes," rather than becoming citizens, "will be subject to such laws and regulations as the United States may from time to time, adopt with regard to the aboriginal tribes of that country." *Id.* 15 Stat. 539.

It is unclear whether Russia and the United States believed that all Alaska Natives were "uncivilized" and subject to federal statutes

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applicable to Indians, or whether there were some "civilized" Alaska Natives who should be considered citizens of the United States. David S. Case & David A. Voluck, *Alaska Natives and American Laws* 6 (2d ed.2002). As a practical matter, the federal government was uneven in its application of federal Indian law to Alaska Natives, just as it was with many Indian groups in the Lower 48 states, such as the Pueblo Indians.

For example, when the army attempted to stop the introduction of liquor in Sitka, Alaska in the 1870s, a federal district court held that Alaska was not "Indian country." *United States v. Seveloff*, 1 Alaska Fed. 64 (D. Alaska 1872). In response, Congress quickly amended the Trade & Intercourse Act to explicitly apply the liquor control sections to Alaska, and federal courts thereafter upheld prosecutions for supplying liquor to Alaska Natives. *In re Carr*, 1 Alaska Fed. 75 (D. Alaska 1875). Yet other provisions of the Trade & Intercourse Act – such as the Indian trader licensing requirement – continued to be held inapplicable in Alaska. *Waters v. Campbell*, 1 Alaska Fed. 91 (D. Alaska 1876).

In April 1873, the Secretary of the Interior appointed an Indian agent to ensure that services were delivered to Alaska Natives in the same manner as in the Lower 48 states. But almost immediately, the Comptroller of the Treasury decided that the BIA had no such authority without explicit authorization from Congress. Case & Voluck, at 187 n.2. This time, Congress did not intervene. In fact, in 1884, when Congress passed the Alaska Organic Act, which established the first civil government in the territory,

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it stated that federal educational services should be provided in Alaska "without reference to race." The Organic Act of May 17, 1884, ch. 53, §§ 8, 13, 23 Stat. 24, 27.

This was not surprising because the federal government was pursuing a policy of assimilation during this period. One way to achieve this goal was by terminating federal services and programs directed to Indian people. Thus, the Interior Solicitor's 1894 opinion concluding that Alaska Natives did not have the same relationship to the federal government as Indians in the Lower 48 states, *Alaska Legal Status of Natives*, 19 L.D. 323 (1894), reflected an attempt to end the "Indian problem" in Alaska. Not long thereafter, federal courts held that even if Alaska Natives were federal "wards," they did not possess a "tribal" form of government, or inherent sovereignty. *In re Sah Quah*, 31 F. 327 (D. Alaska 1898).

In the twentieth century, however, the legal landscape began to shift for Alaska Natives, just as it did for the Pueblo Indians. In 1904, federal courts held that Article III of the 1867 Treaty applied the body of federal Indian law to Alaska Natives. *In re Minook*, 2 Alaska Fed. 200, 200-21 (D. Alaska 1904). In 1905, Congress passed the Nelson Act, which reversed the directive in the Organic Act by requiring separate educational instruction for white and Native children, while also increasing appropriations for Native services in Alaska. Act of January 27, 1905, 33 Stat. 616, 619. And in 1910, the President was given the authority to withdraw land from the public

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domain "for the Natives of the indigenous Alaskan race." Kickingbird & Ducheneaux, at 37-38.

By the 1930s, the federal government finally seemed consistent in its understanding that Alaska Natives should be treated similarly to Indians in the Lower 48 states. In 1932, the Solicitor issued an opinion concluding that the federal government owed a trust responsibility to Alaska Natives, whose "status is in material respects similar to that of the Indians of the United States," and who "are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States." *Status of Alaska Natives*, 53 I. D. 593, I Ops. Sol. 303, 310 (1932). And when Congress passed the IRA in 1934, it expressly applied portions of the Act to Alaska, including the ability of Indians residing on a reservation to adopt a constitution. IRA § 13, 48 Stat. at 986.

Unfortunately, there were very few areas in Alaska that could be considered "reservations" under the IRA, and as a result, most Alaska Natives were unable to take advantage of the Act. Congress thus amended the IRA in 1936, establishing alternative means to allow Alaska Native entities to become eligible for its benefits. Pub. L. No. 74-538, § 1, ch. 254, 49 Stat. 1250 (May 1, 1936) ("Alaska IRA"). The Alaska IRA stated:

> Groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to

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> adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 16, 17, and 10 of the [IRA.]

The BIA approved the organization of over 70 Alaska Native groups under this "common bond" standard, each of which is a federally recognized tribe today. Procedures for Federal Acknowledgment of Alaska Native Entities, 85 Fed. Reg. 37, 38 (Jan. 2, 2020).

In 1963, the federal government also began encouraging Native villages to incorporate as cities under Alaskan law. In communities already organized under the IRA, the IRA constitution and bylaws were revised and incorporated in the city charter. While the city council became the primary political entity for the community, the IRA council continued to operate and control federally financed business enterprises. By 1973, 84 Native villages had organized as Alaskan municipalities. *Alaska Native Villages*, 3(5) Am. Indian J. 7, 8 (1977).

As a result of what had become a patchwork of laws, by 1970, there were several types of governments for Native Alaskans, including IRA councils and "common bond" communities, traditional, non-IRA tribal governments, and state-incorporated municipalities. *Alaska Native Villages*, at 7, 8.

While Alaska Natives were now organized in many different forms, confusion as to the status of their lands remained. Land issues came to the forefront in 1958, when Alaska was finally admitted as a state. Section 6 of the Alaska Statehood Act gave

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state officials 25 years to select approximately 100 million acres from "vacant, unappropriated, and unreserved" federal lands. Act of July 7, 1958, § 6(a), (b), 72 Stat. 339. But the Act disclaimed "[a]ll right or title . . . to any lands or other property . . .which may be held by any Indians, Eskimos or Aleuts," and noted that these lands remained "under the absolute jurisdiction and control of the United States until disposed of under its authority." *Id.* at § 4, 72 Stat. 339. Six months later, the U.S. Court of Claims affirmed the aboriginal title of the Tlingit and Haida Indians to virtually all of southeast Alaska. *Tlingit and Haida v. United States*, 177 F. Supp. 452 (Ct. Cl. 1959).

Despite this decision, the State began to select lands that were in direct conflict with use and occupancy by Alaska Natives. By 1967, administrative protests of state selections by Alaska Natives covered virtually the entire state. Case & Voluck at 156. Secretary of the Interior Stewart Udall issued a "land freeze" on all federal lands until Congress could enact legislation to settle the Native claims. *Edwardsen v. Morton*, 369 F. Supp. 1359, 1364 (D.C. Alaska 1973).

B. The Impact of ANCSA on Federal Recognition of Alaska Native entities was not Realized Until the 1990s.

In 1971, Congress passed the Alaska Native Claims Settlement Act. Pub. L. No. 92-203, 85 Stat. 688 (1971) ("ANCSA"). ANCSA extinguished aboriginal title in Alaska in exchange for approximately 40 million acres of land and almost $1

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billion. 43 U.S.C. §§ 1605, 1611. ANCSA authorized the creation of two tiers of Native corporations to receive land and money on behalf of Alaska Natives. 43 U.S.C. §§ 1606-1607. The Act divided Alaska into twelve geographic regions, which, much like the 1936 Alaska IRA, attempted to group together Natives "having a common heritage and sharing common interests." 43 U.S.C. § 1606(a). Each region was directed to incorporate under Alaska state law as a for-profit business. 43 U.S.C. § 1606(d) & (g). At the second tier of organization, were more than 200 Native village corporations. 43 U.S.C. § 1607(a);[14]

ANCSA is a complex and novel statute. Many of its provisions generated significant litigation due to differing interpretations, and that litigation led to delays in implementation. For example, all of the regional corporations were not formed until 1975. And while Alaska Natives were entitled to 45 million acres under the Act, by 1986, they had only received patents to 8% of these lands. H.R. Rep. No. 31, 100th Cong., 1st Sess. 3, at 4 (1987).

Prior to ANSCA, for a brief moment, it seemed as though Alaska Natives were entitled to the federal services provided to Indians, and federal officials were attempting to determine which of the many overlapping Alaska Native entities should be formally recognized. But both federal recognition and the

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[14] Most Alaska Natives received 100 shares of stock from their regional corporations and 100 shares of stock from their village corporations. Alaska Natives associated with a region who did not reside in an eligible village received only regional stock. Thomas Berger, *Village Journey* 24 (1985). Stock was inalienable for twenty years. 43 U.S.C. § 1606(h)(1).

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federal government's trust responsibility were questioned following ANCSA. Some argued that the sovereignty of Alaska Natives and the government's trust responsibility had been terminated by the Act. They pointed to Section 2(b), stating that ANCSA was not "establishing any permanent racially defined institutions," and did not "creat[e] a reservation system or lengthy wardship or trusteeship." *See e.g.*, Sarah Arnott, *Legislation: The Alaska Native Claims Settlement Act: Legislation Appropriate to the Past and the Future*, 9 Am. Indian L. Rev. 135, 148, 155 (1981) (claiming that "[a] trust relationship with the federal government was rejected" by ANCSA); Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 Am. Indian L. Rev. 421, 443-50 (2001) (arguing that ANCSA accomplished a *de facto* termination of tribal sovereignty).

But ANCSA did not contain any language that purported to terminate tribal sovereignty, and while Congress had explicitly terminated many Indian tribes by statute in the preceding years, the federal government had recently embarked on an era of self-determination, which sought to acknowledge and preserve tribal sovereignty. This led many more to rightly argue that ANCSA was simply a land claims settlement.

Still, ANSCA added several layers to the already varied ways in which Alaska Natives were organized. ANCSA created over 200 new legal entities that overlapped with existing tribes and tribal non-profit service organizations. It was unclear when ISDEAA was enacted just a few years later, whether

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and which entities would be recognized as Indian tribes by the federal government. As discussed above, there was no formal recognition process at this time, nor were there clear criteria for federal recognition.

The Petitioners argue that regional and village ANCs created by ANCSA could never obtain federal recognition due to their recent origin. Pet. Br. 33-35; Fed. Br. 42-43. But as discussed above, many Indian tribes were reconstituted and reorganized following the adoption of the IRA, and when the BIA at one point attempted to differentiate between "created" and "historic" tribes, Congress intervened and precluded their disparate treatment. § 5(b), 108 Stat. 707, 709. Additionally, in the Alaska IRA, Congress expanded the entities that were permitted to organize to include groups of Natives based on a "common bond of occupation, or association, or residence," even though they had "not heretofore [been] recognized as bands or tribes" historically. 25 U.S.C. § 5119. H.R. Rep. No. 74-2233, at 1-3 (1936). The Interior Secretary issued guidance in 1937 claiming that groups organized under the "common bond" provision of the Alaska IRA did not possess governmental powers, but the BIA has since reversed that position, and today, acknowledges that they are federally recognized tribes with full sovereign powers. Sansonetti Op. 31-33 (discussing Interior, *Instructions for Organization in Alaska Under the Reorganization Act* (Dec. 22, 1937); 58 Fed. Reg. 54,364-01, 54,365 (Oct. 21, 1993).

Similar to the Alaska IRA, ANCSA authorized "Natives having a common heritage and sharing common interests" to form twelve regional for-profit

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corporations. 42 U.S.C. § 1606(a) & (d). Congress used twelve existing regional nonprofit associations as the basis for these corporations. At the time, corporate form was not seen as an impediment to tribal existence. Many tribes were organized as federal corporations, as well as non-profit and for-profit state corporations, both before and after their recognition as Indian tribes by the federal government.[15] And Felix Cohen's *Handbook of Federal Indian Law* had indicated that one of the criteria that could lead to federal recognition, "singly" was whether "the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe." *Id.* at 271. ANCSA had certainly provided the ANCs collective rights to both lands and money.

For many years, the State of Alaska and its courts resisted acknowledging any Alaska Native groups as tribes. *See*, *e.g.*, *Native Village of Stevens v. Alaska Management and Planning*, 757 P.2d 32, 34, 35-36 (Alaska 1988) ("There are not now and never have been tribes of Indians in Alaska," and the Stevens Village "is not self-governing or in any

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[15] *See, e.g.*, *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986) (noting that the Catawba Indian Tribe was organized as a South Carolina corporation, and the court "assume[d] that [it] is the successor in interest of the Catawba Indian Tribe of South Carolina"); *Toineeta v. Andrus*, 503 F. Supp. 605 (W.D. N.C. 1980) (noting that the Eastern Band of Cherokee was issued a corporate charter by the State of North Carolina, and operated under that charter prior to recognition by the federal government); *Huron Potawatomi, Inc. v. Stinger*, 574 N.W.2d 706 (Mich. Ct. App.) (discussing Huron Potawatomi's organization as a Michigan non-profit corproation prior to federal recognition).

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meaningful sense sovereign."). In 1993, however, the Interior Solicitor issued a lengthy opinion examining the historical status of Alaska Natives. The opinion concluded:

> In our view, Congress and the Executive Branch have been clear and consistent in the inclusion of Alaska Natives as eligible for benefits provided under a number of statutes passed to benefit Indian tribes and their members. Thus we have stated that it would be improper to conclude that no Native village in Alaska could qualify as a federally recognized tribe.

Governmental Jurisdiction of Alaska Native Villages Over Land and Non-Members (M-36975, January 11, 1993).

Later that year, Interior issued a list of more than 220 villages and regional tribes in Alaska that it definitively as recognized as Indian tribes eligible to receive federal Indian Affairs services. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,368 (Oct. 21, 1993). Alaska Native villages have been included in every subsequent publication of the list of federally recognized tribes. And in 1999, the Alaska Supreme Court finally acknowledged the tribal status and sovereignty of Native villages. *See John v. Baker*, 982 P.2d 738 (Alaska 1999). Today, there are 229 federally recognized tribes in Alaska. 86 Fed. Reg. 7,554 (2021).

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Regional and village ANCs, however, are not recognized as tribes by Congress or the BIA. While Congress has the power to extend federal recognition to ANCs through legislation, it has considered, but not adopted bills that would have done so. *See, e.g.*, H.R. 3662, § 121, 104th Cong., 2d Sess. (1996) (bill proposing to recognize the Cook Inlet Regional Corporation). This modern fact, however, does not render Congress' decision to include ANCs in ISDEAA's definition of Indian tribes, as "superfluous." Petitioners' claim that all groups that are federally recognized as Indian tribes today, and that exercise governmental authority under the ISDEAA by virtue of that status, can demonstrate a continuous historic existence as sovereign governments is belied by the history of the federal government's relations with Indians in both the Lower 48 states and Alaska.

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CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

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