No. ___

IN THE

Supreme Court of the United States

BAY VIEW, INC.

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress, in legislation enacted at the request of one of the parties to litigation, may retroactively terminate vested property rights in transactions long completed without the United States incurring liability under the Fifth Amendment?

2. Whether the Court of Appeals for the Federal Circuit violated the standards set by this Court in dismissing *on the pleadings* petitioner's fact intensive complaint of a retroactive taking of its property rights by Congress.

3. Whether the Court of Appeals has ignored the plain meaning and Congressional intent of a key provision of the Alaska Native Claims Settlement Act (ANCSA) that requires the Alaskan Regional Corporations to share with each other and then with the village corporations "70 percent of *all* revenues received by each Regional Corporation from the timber resources and sub-surface estate patented to it." 43 U.S.C. § 1606(i) (emphasis added).

4. Whether the decision of the Court of Appeals for the Federal Circuit in depriving over 200 Alaska Villages of their share of revenues from the sale of timber and mineral resources, conflicts with the settled construction of ANCSA, and a similar act, by the Ninth Circuit and the Alaska Federal Court?

CORPORATE DISCLOSURE

Bay View Inc. is a corporation established in accordance with the Alaska Native Claims Settlement Act. It does not have a parent corporation nor is there any publicly held corporation owning 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Bay View, Inc. petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in *Bay View, Inc. v. United States*, 278 F.3d 1259 (Fed. Cir. 2001), *reh'g denied*, 285 F.3d 1035 (Fed. Cir. 2002).

OPINIONS BELOW

The opinion of the United States Court of Federal Claims (App. B) is reported at 46 Fed. Cl. 494 (Fed. Cl. 2000); the majority and dissenting opinions of the United States Court of Appeals for the Federal Circuit (App. A) are reported at 278 F.3d 1259 (Fed. Cir. 2001); the Order of that Court denying a petition for rehearing and the dissenting opinion of four judges of that Court (App. C) are reported at 285 F.3d 1035 (Fed. Cir. 2002).

JURISDICTION

The judgment of the court of appeals (App. A) was issued on December 3, 2001. A timely petition for rehearing was denied on March 26, 2002 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 7(i) of the Alaska Native Claims Settlement Act (hereinafter "ANCSA"), Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 7, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. § 1606(i)), provides:

> Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this Act shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region . . . .

Section 7(j) of ANCSA, 43 U.S.C. § 1606(j), provides:

> Not less than 45% of funds from such sources [revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this Act] during the first five-year period, and 50% thereafter, shall be distributed among the Village Corporations in the region.

The 1995 amendment to Section 7(i), Alaska Native Claims Settlement Act, Amendments—Hawaiian Home Lands

Recovery Act, Pub. L. No. 104-42, § 109, 109 Stat. 353, 357 (1995) (codified in part at 43 U.S.C. § 1606), provides:

> For purposes of this subsection, the term "revenues" does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.
>
> This amendment shall be effective as of the date of enactment of the Alaska Native Claims Settlement Act, Public Law 92-203 (43 U.S.C. 1601, *et seq.*).

STATEMENT OF THE CASE

This case arises out of a retroactive taking by Congress of vested property rights as part of a deliberate interference with ongoing litigation. Congress "wiped out any claim [Bay View and some 200 Alaska Native villages] might have had" to share in certain revenues. *Bay View v. Ahtna*, 105 F.3d 1281, 1284 (9th Cir. 1997) (Kozinski, J.). But, primarily, it concerns a dangerous failure by the Court of Appeals for the Federal Circuit to protect the villages from Congress' retroactive taking, as required by the Fifth Amendment to the Constitution and precedents of this Court.

1. ANCSA's requirement that all revenues from mineral and timber transactions be shared with native villages.

When adopting the Alaska Native Claims Settlement Act ("ANCSA"), Congress extinguished all aboriginal Native land claims in Alaska in return for the transfer of 40 million acres of land and a cash payment to Native Alaskan entities. The 40 million acres were divided among 12 Regional Native Corporations and some 200 Native Village Corporations. The subsurface estates to all 40 million acres and vast timber resources were conveyed to the Regional Corporations only, but subject to an important condition.

To achieve an equitable division among all Alaska Natives, and to avoid "pockets of poverty" that would have occurred from the uneven location of mineral and timber wealth,[1] Congress in Section 7(i) provided that "70 percent of *all* revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it" had to be shared with the other Regional Corporations. 43 U.S.C. § 1606(i) (emphasis added). Section 7(j) in turn requires each Regional Corporation to share 50 percent of all Section 7(i) revenues with the Village Corporations within its Region. *Id.* § 1606(j).[2] Sections (i) and (j) were not written narrowly merely to require *oil royalties* or *stumpage fees* from timber leases to be shared, but broadly to mandate that 70 percent of "*all revenues*" from these estates be shared. In this way, wealth generated from the oil-rich but lightly populated North Slope Native lands and the vast timber resources in southeastern Alaska would be shared with all other Alaska Native Regional and Village Corporations throughout the State. In return, Congress extinguished all aboriginal titles in Alaska's remaining 335 million acres.

The critical importance of the sharing provision is apparent when it is understood that in earlier versions of ANCSA, the Administration had proposed a statewide Native corporation

[1] *To Provide for the Settlement of Certain Land Claims of Alaska Natives:* Hearings Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, 92d Cong. 237 (1971) (hereinafter "House Hearing").

[2] For the first five years, the Regional Corporations were required to share only 45 percent of the 7(i) revenues with the Village Corporations. Subparagraphs (k), (l) and (m) of section 1606 provide that the funds paid to the village corporations shall be computed by the relative number of the shareholders in the village corporations, that the regional corporations may require a village corporation to present a plan for use of the funds (subject to arbitration if there is disagreement), and that "an equitable portion" may be withheld for mutually agreeable region wide projects. 43 U.S.C. § 1606(k), (l) & (m).

to own and exploit all the mineral and timber estates so that all natives would share in all the proceeds of the timber and subsurface estates. *See* House Hearing at 98, 101 & 149-50. In the Conference Report that led to the Act, however, this was changed to 12 Regional Corporations. But the sharing provisions were added as an essential feature to maintain equality despite the different locations of the corporations. In discussing the creation of Regional and Village Corporations, Congress described the sharing principal as insuring "that all Natives may benefit equally from any minerals discovered." H.R. REP. NO. 92-523 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2196 (1971). Congress, recognizing that the responsibility of administering the sharing provisions now rested with board members of several regional corporations, admonished that "[t]he conference committee anticipates that there will be responsible action by the board members and officers of the corporations *and there will not be any abuses of the intent of this Act.*" H.R. CONF. REP. NO. 92-746 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2247, 2250 (1971) (emphasis added) (hereinafter "Conference Report").

2. ANCSA's attention to the tax status of the shared estates.

Congress in ANCSA was careful to assure that the shared timber and subsurface estates received favorable tax treatment to preserve their full value to the Alaska Natives. The tax treatment was an essential part of the settlement. If ANCSA had not addressed the issue, the tax basis in the resources might have been considered zero, with all subsequent revenues taxed as a gain. But Congress provided in ANCSA that the tax basis for the Section 7(i) resources would be their value at the time the lands were patented to the Regional Corporations, thus minimizing taxes that would have to be paid on sale of the resources. 43 U.S.C. § 1620(c). In 1980, delays in the actual patenting of lands to the Regional Corporations led Congress to amend ANCSA to add

that the tax basis for timber and mineral estates would be either their value at the date of their patent, or their value at the date of their first commercial development, whichever was higher. Act of Dec. 2, 1980, Pub. L. No. 96-487, § 1408, 94 Stat. 2371, 2495-96 (1980) (codified at and amending 43 U.S.C. § 1620(c)). This amendment made the tax status of the timber and mineral estates that much more important as a part of the value of the timber and subsurface estates transferred under ANCSA.

3. Early attempts by the resource rich Regional Corporations to avoid sharing income from the timber and subsurface estates.

When it came to sharing their assets, the Regional Corporations did not behave as Congress intended. Instead, from the beginning, the more resource-rich Regional Corporations repeatedly resisted ANCSA's sharing requirement. In a series of cases, the federal courts rebuffed these efforts to evade ANCSA's mandate, ultimately leading to a judicially approved "Section 7(i) Settlement Agreement." In that Agreement, the Regional Corporations agreed that:

> *[A]ll* revenues (including money, benefits and *any other thing of value*) received by a [Regional] Corporation that are attributable to, directly related to, *or generated from* the exploration, development, production, lease, sale *or other exploitation* of, or *the disposition of any interest in*, the Corporation's Section 7(i) Resources shall be included in Gross Section 7(i) Revenues.

See, e.g., Aleut Corp. v. Arctic Slope Regional Corp., 484 F. Supp. 482, 485 (D. Alaska 1980) ("*Aleut IV*") (emphasis added) (approving a settlement agreement concerning revenues to be shared under Section 7(i)).[3] And, of course,

[3] We are lodging a copy of the Settlement Agreement with the Clerk.

50 percent of all Section 7(i) revenues received by the Regional Corporations must be shared with the Village Corporations under Section 7(j).

4. The attempt by the resource rich Regional Corporations to avoid sharing income from sales of net operating losses created by sales of timber and minerals at below market prices.

Notwithstanding the 7(i) Settlement Agreement, the resource-rich Regional Corporations undertook a new scheme to avoid ANCSA'S sharing mandate in the late 1980s. Thanks to tax law changes and depressed oil and timber prices, they began to sell off huge quantities of subsurface and timber resources at reduced prices—for the express purpose of generating tax losses (hereinafter "net operating losses" or "NOLs"), that under the tax law then in effect, could be sold at huge profits to third parties which could then use the NOLs to shelter other income. The sale of the NOLs brought hundreds of millions of dollars to the resource rich Regional Corporations, *none of which they shared with one another under Section 7(i) or with the village corporations under Section 7(j).* Although these Regional Corporations shared the small proceeds of the actual sale of the timber or minerals with the other Regions and Villages, the majority of the revenue lay in the simultaneous sale of the NOLs; and *that* value they kept to themselves (Comp. at ¶¶ 13-22).[4] As a result, the Villages not only did not receive a share of the major revenue produced from the sales, contrary to ANCSA's mandate, but forever lost their ability to share in revenues from the nonrenewable timber and mineral resources that had been disposed of and are gone forever.

When the resource rich Regional Corporations began these transactions, a number of them secretly agreed among

[4] "Comp." refers to Bay View's complaint in the United States Court of Federal Claims.

themselves not to share any of the revenues generated from these NOL sales with either the other regional corporations or with the villages. When the largest resource-*poor* Regional Corporation discovered the agreement and threatened suit, the others quickly bought it off, guaranteeing substantial loans and providing other benefits. The resource rich Regional Corporations also agreed among themselves to seek to have Congress change the law to support what they had done (*see* Comp. at ¶¶ 24-27).

5. Bay View's class action against the Regional Corporations, and Congress' retroactive legislation.

In 1994, Bay View, on behalf of itself and other Village Corporations, sued the Regional Corporations to recover the Villages' share of the NOL revenues. The federal district court, inexplicably, dismissed the suit for lack of standing. *Bay View, Inc. v. Ahtna, Inc.*, No. A94-0551 (D. Alaska, July 7, 1995). While the case was on appeal to the Ninth Circuit, the Regional Corporations—apparently fearing a loss in the Court of Appeals as they had suffered in all their previous schemes to avoid ANCSA's sharing mandate—successfully persuaded Congress to amend Section 7(i), *retroactively*, to exclude from the Act's sharing mandate all NOL revenues, even those generated on long completed transactions. The 1995 amendment—which was tacked on to a bill on another subject and passed without hearings—provides:

> For purposes of this subsection, the term "revenues" does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.
>
> This amendment shall be effective as of the date of enactment of the Alaska Native Claims Settlement Act, Public Law 92-203 (43 U.S.C. 1601, *et seq.*).

Alaska Native Claims Settlement Act, Amendments—Hawaiian Home Lands Recovery Act, Pub. L. No. 104-42, § 109, 109 Stat. 353, 357 (1995) (codified in part at 43 U.S.C. § 1606).

When Bay View's case against the Regional Corporations reached the Ninth Circuit, that court held that "Congress wiped out any claim [Bay View] might have had to shared NOL revenue" and that "Congress now has taken away whatever rights they may have had." *Bay View v. Ahtna*, 105 F.3d at 1284. As Judge Kozinski held, the issue of taking "will have to be answered by the Court of Federal Claims." *Id.* at 1286.

6. Bay View's suit in the Court of Federal Claims and Court of Appeals for the Federal Circuit.

Bay View then filed this suit against the United States in the Court of Federal Claims for taking its property without payment of just compensation. The Court of Federal Claims dismissed the case on the pleadings, holding:

> The court concludes, on the basis of section 1606(i)'s plain language, that NOL revenues were not shareable revenues under section 1606(i) as enacted . . . . [a]ccordingly, plaintiff had no property interest in the NOL revenues, and Congress took nothing when it enacted the 1995 amendment . . . .

App. B at 20a.

A divided Court of Appeals for the Federal Circuit affirmed. The majority, apparently as a factual conclusion, held that "[t]he sale of the NOLs themselves . . . is a separate business transaction without any direct relationship to the tangible resources patented to the Regional Corporations." App. A at 5a. The Court made no reference to plaintiff's complaint, to material presented in opposition to the motion to dismiss, or to the discussion of NOLs transactions in the decision of the Ninth Circuit that led to the claim. The majority concluded that the 1995 Amendment did not change the law and upheld the dismissal on the pleadings. App. A at 9a.

Judge Newman dissented, citing this Court's decision in *Eastern Enterprises v. Apfel*, 534 U.S. 498 (1998), disfavoring retroactive application of laws and emphasizing the need for factual determinations in cases alleging legislative takings. She also referred to the Alaska District Court and Ninth Circuit decisions interpreting ANCSA's sharing duties broadly, and to the Ninth Circuit's decision in *Peabody Coal v. Navajo Nation*, 75 F.3d 457 (9th Cir. 1996), interpreting "proceeds" in a similar statute to include the sharing of tax revenues from subsurface estates. She concluded that:

> Statute and precedent make quite clear that Bay View had a property right in the full proceeds of the timber sales. The retroactive legislation which deprived Bay View of its share raised a claim cognizable under the Fifth Amendment.

App. A at 13a.

On petition for rehearing with suggestion of rehearing *en banc*, the Court of Appeals affirmed without opinion. Judge Gajarsa, joined by Judges Newman, Clevenger and Linn, filed a dissenting opinion. They described as "grave error" the majority's "fail[ure] to comprehend that the NOLs are in fact revenues derived from the timber sales." App. C at 32a-33a.

The dissent also notes the broad dictionary definition of "revenues," concluding that the plain meaning of the pre-amendment duty to share "*all revenues*" from the timber and subsurface estates clearly included revenues from NOLs produced by the sale of the timber and subsurface estates. *Id.* at 34a. The dissent concludes that the 1995 amendment was a taking of property. "That claim should have been heard on the merits, not dismissed on pleadings." *Id.* at 35a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SERIOUS THREAT TO THE JUDICIAL SYSTEM IF CONGRESS IS ALLOWED TO INTERVENE IN ONGOING LITIGATION RETROACTIVELY CHANGING LONG VESTED PROPERTY RIGHTS WITHOUT THE DUTY TO PAY JUST COMPENSATION.

The high-handed actions of the Regional Corporations, using their political muscle to have Congress pass a retroactive law to preempt the Ninth Circuit from hearing the Villages' case, was a disreputable use of influence to override property rights in transactions long completed and to interfere in the judicial process. Where Congress intervenes in private litigation, as it did here, especially by passing retroactive legislation, the Courts should be particularly sensitive to protect the rights of the party whose case was thus ended. If a taking claims can be dismissed on the pleadings in the circumstances of this case, protection of property rights is insecure. But there is even more at stake here. Enforcement of the takings clause, real enforcement, not lip service, not only protects property rights, but also serves as a strong disincentive to Congress from inappropriately intervening in the judicial process. It thus protects the separation of powers and helps preserve an independent judiciary. Absent application of the Fifth Amendment's just compensation' requirement, there will be no limit to litigants going to Congress to change the law to keep from losing lawsuits, thus interfering with the integrity of an independent judiciary. It is one thing to make a law of general application. It is another to make one to decide a pending case one way rather than another. "[O]ne legislative interference is but the first link of a long chain of repetitions." THE FEDERALIST NO. 44 (James Madison).

When an Act of Congress is not only passed at the instance of a litigant, specifically to affect that litigation, but is expressly retroactive, it particularly requires close scrutiny. As Justice O'Connor stated in *Eastern Enterprises*:

> Retroactivity is generally disfavored in the law, in accordance with "fundamental notions of justice" that have been recognized throughout history . . . "[i]t is a principle in the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect" . . . .

Eastern Enterprises v. Apfel, 524 U.S. 498, 532-33 (1998) (citations omitted).

Because this case concerns a serious interference by Congress with transactions long completed and property rights long vested, and because it affects over 200 villages in Alaska and alters the fundamental sharing principle that made the Alaska Native Claims Settlement Act equitable to natives in all regions, rich or poor, this case is worthy of this Court's review.

II. THE RIGHTS THAT WERE TAKEN WERE VESTED PROPERTY RIGHTS PROTECTED BY THE FIFTH AMENDMENT.

The dissenting panel opinion noted, relying on decisions of this Court:

> For these sales, already completed and proceeds already realized, the villages' right to their statutory share was fully vested. Legislation that retroactively affects vested rights is "not favored in the law." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). It violates fundamental concepts of justice and fairness, to change the rules after the game is played.

App. A at 12a.

Bay View's rights were property rights long vested before the 1995 retroactive change in ANCSA. As this Court observed in *Tulsa Collection Services v. Pope*, 485 U.S. 478 (1988), concerning an unsecured claim against an estate "[l]ittle doubt remains that such an intangible interest is property protected by the Fourteenth Amendment." *Id.* at 485. There is even less doubt about a federally created right to share the income in a transaction that has long been completed. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("as has been implicit in our prior decisions . . . the interest of an individual in continued receipt of [federally created] benefits is a statutorily created 'property' interest protected by the Fifth Amendment") (citations omitted); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (a corporation's intangible rights to receive money are protected under the Fifth Amendment). See also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.), where the Court observed "[i]t is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A and gives it to B"—or, as *now* interpreted, without an obligation to pay just compensation.

Congress may have been free to change ANCSA's sharing provisions prospectively (an issue not presented in this case) but it certainly was not free to change the sharing provisions retroactively to eliminate the rights of the villages to share in money from transactions long completed, without payment of just compensation. As the Court explained in *Eastern Enterprises*, the Taking Clause provides a "safeguard against retrospective legislation concerning property rights." 524 U.S. at 534.

III. THE COURT OF APPEALS FLAGRANTLY VIOLATED THE STANDARDS OF THIS COURT FOR DISMISSING A LEGISLATIVE TAKING CLAIM ON THE PLEADINGS.

Before dismissing Bay View's case on the pleadings, the court below was required to accept all Bay View's allegations as true, to draw all inferences in Bay View's favor, and to dismiss under Rule 12(b)(4) only if it is "beyond doubt that the plaintiff can prove *no* set of facts in support of his claim [that] would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis added); 2 Moore's Federal Practice, § 12.34 [1][b] (3d ed. 1997). The courts below, though enunciating these standards, did not even come close to following them—standards particularly important when a legislative taking is alleged, which this Court has recognized as necessarily fact intensive. *See Eastern Enterprises*, 524 U.S. at 523; *see also Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The lower court's out-of-thin-air conclusion that the NOL sales were not related to the timber and mineral sales that generated them is not only patently wrong, it does not give the plaintiff any benefit of the doubt or even refer to the plaintiff's pleadings. It also ignores Judge Kozinski's lucid description of the transactions in *Bay View v. Ahtna*, 105 F.3d 1281 (9th Cir. 1997), which gave birth to this litigation. As Judge Kozinski understood well, it is clear that the Regional Corporations sold their timber and subsurface resources for no reason other than to generate and simultaneously sell the net operating losses. In coordinated transactions, they received a small sum for the timber and a much larger sum for the sale of the tax loss, creating millions of dollars in

resource-generated NOL revenues that were not shared (Comp. at ¶¶ 15-23). As Judge Kozinski explained, the connection was one-to-one:

> [A] native corporation would sell timber valued for tax purposes at $110 for $10. It would then sell the $100 loss to a profitable corporation. The profitable corporation, in turn, would apply the $100 loss against taxable income. If the corporation was in the 34% tax bracket, it would save $34 on each $100 loss it bought. The profitable corporation thus would pay around $30 to the native corporation for the $100 loss.

Bay View, 105 F.3d at 1283 (Kozinski, J.).

That the income from the tax benefit is part of the income from the mineral and timber estates is even clearer when one recalls that ANCSA carefully, not once but twice, provided a favorable tax base to protect the value of the timber and mineral interests, thus linking the two together. *See* 43 U.S.C. § 1620(c) (amended by Act of Dec. 2, 1980, Pub. L. No. 96-487, § 1408, 94 Stat. 2371, 2495-96 (1980)). Thus, tax advantages were part of the "bundle of rights," *see e.g. Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), that made up the timber and subsurface estates granted to the Regions on the condition that *all* revenues from them would be shared with each other and the villages.

Because the decision below so violates the standards of this Court for dismissing cases on the pleadings, so misinterprets the sharing that is a central part of ANCSA, and so deprives defendants of vested property rights without just compensation, the writ should be granted.

IV. THE COURT OF APPEALS MISCONSTRUED THE PLAIN MEANING OF ANCSA.

Although it was clear error to dismiss the case on the pleadings, the court below attempted to support its conclusion on the plain meaning of the statute. But it totally

misconstrued that plain meaning. The majority opinion ignored the breadth of ANCSA's phrase "*all* revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it," 43 U.S.C. § 1606(i), a phrase no less all-inclusive than the phrase "*any* drug-related criminal activity" construed this Term in *Dep't of Housing & Urban Dev. v. Rucker*, __ U.S. __, 122 S. Ct. 1230, 1232 (2002) (emphasis added in each quotation). As in *Rucker*, ANCSA Section 7(i) reflects "Congress' decision not to impose any qualification in the statute," *id.* at 1233, on the revenues from timber and subsurface estates to be shared with other Native corporations.

Congress knew that the timber and mineral estates were very different in different Regions, and the sharing arrangement was a basic way of equalizing the revenues from such estates so that some Regions and Villages would not be "pockets of poverty" while others thrived. *See* House Hearings at 237. Congress required sharing under Section 7(i) "to distribute more evenly among all Natives the benefits of these disparate land grants." *Chugach Natives, Inc. v. Doyon Ltd.*, 588 F.2d 723, 732 (9th Cir. 1978). The revenues from the sales of NOLs, were *from* sales of these timber and mineral resources. They would not have existed but for the timber and minerals sales, and the timber and minerals were sold specifically to produce the NOLs. In *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465 (1997), this Court rejected artificial separation of actions in a single scheme. To the contrary, the Court unanimously held that the phrase "transactions in foreign currency" includes transactions in options to buy such currency, holding that the normal meaning of "in" is "in regard to." *Id.* at 470-71. Here, the definition is much broader. "All revenues received from" is about as broad a definition as Congress could write to say that *everything* flowing from the timber and mineral sales must be shared.

Moreover, the lower court's leap to its factual conclusion—that there is no relationship between revenues from NOLs and the timber and mineral estates that produced them—is totally contrary to the purpose of ANCSA. By selling mineral and timber assets at less than their value, but reaping huge profits on the sale of the net operating losses thus created, the revenue rich Regional Corporations made a large profit from the sale of timber and mineral resources, and they did not share that profit with the villages. They created pockets of wealth and pockets of poverty. Vast timber resources were clear cut and are gone forever and the Villages were left with virtually nothing. Moreover, because the Regions did not share NOL revenues with each other, some Regional Corporations were left rich, others were left poor, and most villages were left poor. As a consequence, ANCSA's fundamental principle of equality has been defeated.

Perhaps most tellingly, the lower court's reading of the "plain meaning" of Section 7(i) would make the 1995 Amendment "a blank sheet of paper," an interpretation that is a "disingenuous evasion" of the purpose of the statute. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995) (warning, in those very words, against interpretations of statutes as without meaning, even to avoid a Constitutional problem). The original ANCSA provision was plain and clear, as was its purpose: sharing of *all* revenues in any way produced from the timber and mineral estates that were so unevenly located. It is irrational to consider the 1995 retroactive amendment, so sought by the Regional Corporations, and enacted by Congress, as not actually changing the law at all. Congress' own action shows that new language

was required to remove NOL revenues from the original sharing mandate. Its deliberate retroactivity took petitioner's property.[5]

If there is a plain meaning to sharing "all revenues . . . from the timber resources and subsurface estate" it is that the sales of NOLs are part of that revenue. If there is no plain meaning to this language, then the case should be remanded for a trial to show the relationship between the NOLs and the timber and subsurface estates. In either event, this Court should grant the petition for a writ of certiorari to correct the dismissal on the pleadings by the court below.

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[5] The majority below also attempts to justify excluding NOL sales from ANCSA's "all revenues" by relying on a fragment of the Conference Report that in no way mentions NOLs. App. A at 6a. But in context the cited passage supports the opposite conclusion. It distinguishes between the payment of settlement money and subsurface revenues, both of which must be shared, and revenues from the Regional Corporations' investments in business activities, which need not be shared:

> Each Regional Corporation must distribute among the Village Corporations in the region not less than 50 percent of its share of the $962,500,000 grant, and 50 percent of all revenues received from the subsurface estate. This provision does not apply to revenues received by the Regional Corporations from their investments in business activities.

Conference Report, 1971 U.S.C.C.A.N. at 2249. The Regional Corporations were expected to invest some of the settlement money in business ventures—such as hotels, manufacturing establishments and the like—and they did so. No one claims that revenues from those investments must be shared. But that is entirely separate from the "subsurface estate and timber" revenues which Congress patented to the Regional Corporation on the express condition that *all revenues* from those estates be shared. The distinction is not between business and non-business—exploiting oil and gas and timber is also a business—but between revenues from mineral and timber estates, no matter how produced, and revenues from investments of cash.

V. THE DECISION OF THE COURT OF APPEALS FUNDAMENTALLY CONFLICTS WITH NINTH CIRCUIT AND ALASKA DISTRICT COURT RULINGS INTERPRETING SECTION 7(i) AND A SIMILAR SHARING STATUTE.

The Ninth Circuit long ago recognized that Section 7(i)'s sharing provision was central to the settlement of Alaska Native land claims:

> Congress did not grant the same amount of land to each Village or Regional Corporation. It realized also that the lands selected by the Corporations would vary greatly in their present and future economic value. In order to distribute more evenly among all Natives the benefits of these disparate land grants, Congress required that 70 percent of all revenues from the development of timber and subsurface resources be distributed among the Regional Corporations.

Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723, 732 (9th Cir. 1979). To achieve this more even distribution, it is necessary that "all revenues" in any way derived from mineral and timber estates be shared, not just some. Otherwise, the unequal distribution of wealth remains. And what must be shared among the Regional Corporations under Section 7(i) must also be shared with the Village Corporations under Section 7(j).

In *Aleut Corp. v. Arctic Slope Regional Corp.*, 410 F. Supp. 1196 ("*Aleut I*") (D. Alaska 1976), the district court ruled that resource income from pre-conveyance transactions in subsurface estates still had to be shared under Section 7(i):

> Given the obvious egalitarian purpose of Section 7(i), the court cannot conceive that Congress intended for tremendous amounts of revenues attributable to the

> subsurface estate to escape the sharing requirement of 7(i) solely for the reason that such revenues are received prior to patent.

Id. at 1200. A contrary ruling, the court noted, would "encourage the resource controlling corporation *to devise all sorts of contractual schemes* for maximizing its present revenues at the expense of its sister corporations." *Id.* (emphasis added). Yet, the majority opinion below countenances precisely such a scheme.

Similarly, in *Aleut Corp. v. Arctic Slope Regional Corp.*, 417 F. Supp. 900, 903 (D. Alaska 1976) ("*Aleut II*"), and *Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F. Supp. 862, 867 (D. Alaska 1976) ("*Aleut III*"), the district court rejected Regional Corporation schemes to cast resource generated revenues as non-monetary, to have them paid to creditors, or to exclude them because no minerals were ultimately discovered. This repeated litigation led to the court-approved stipulation among the Regional Corporations that:

> [A]ll revenues (including money, benefits and *any other thing of value*) received by a [Regional] Corporation that are attributable to, directly related to, *or generated from* the exploration, development, production, lease, sale or *other exploitation* of, or the *disposition of any interest* in, the Corporation's Section 7(i) Resources shall be included in Gross Section 7(i) Revenues.

See supra at 6-7 (emphasis added).

The Ninth Circuit and Alaska district court have thus held that Section 7(i), and Section 7(j), guarantee that revenues from the subsurface estate and timber, *no matter how classified or generated*—whether producing "money" or "benefits" or "any other thing of value"—must be shared. The holding below both ignores and conflicts with those long-established and correct decisions.

We know of only two instances in which Congress required a sharing of mineral or timber resources between two Native entities. One is ANCSA. The other is the Navajo Hopi Land Settlement Act, Pub. L. No. 93-531, 88 Stat. 1712 (1974) (codified as amended at 25 U.S.C. §§ 640d-640d-31). Both Acts affect land within the jurisdiction of the Ninth Circuit, the court that would have decided the Villages' suit against the Regional Corporations except for the retroactive effect of the 1995 amendment. In *Peabody Coal v. Navajo Nation*, 75 F.3d 457 (9th Cir. 1996) (decided by the Ninth Circuit just one year before *Bay View v. Ahtna*), the Ninth Circuit had before it a provision of the Navajo Hopi Land Settlement Act which required a partition of surface ownership but joint ownership of the subsurface estate and provided as to the latter that "the proceeds therefrom shall be divided between the tribes, share and share alike." 25 U.S.C. § 640d-6. The Navajo Nation imposed a tax on the portion of the jointly owned minerals which were under Navajo lands and argued that their tax revenues did not form part of "the proceeds therefrom" of the coal, and thus did not have to be shared with the Hopi Tribe. The Ninth Circuit held to the contrary:

> We hold that the plain meaning of "proceeds" is "all economic benefit derived from the coal," and that the [taxes] are benefits derived from and are entirely related to the coal.

Peabody Coal, 75 F.3d at 469.

The term "all revenues received . . . from the timber resources and subsurface estate" in ANCSA is even broader than the term "proceeds" from the mineral estate at issue in *Peabody Coal*. The decision of the Court of Appeals for the Federal Circuit conflicts with this Ninth Circuit precedent, a particularly important precedent because that very court would have adjudicated the Villages' rights but for Congress' intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES