No. 12-668

In the Supreme Court of the United States

NATIVE VILLAGE OF EYAK, ET AL., PETITIONERS

v.

PENNY PRITZKER, 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

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QUESTION PRESENTED

Whether the court of appeals correctly held, based on the district court's uncontested factual findings, that petitioners failed to demonstrate the historic exclusive use and occupancy of ocean waters beyond the three-mile limit of Alaska's jurisdiction necessary to establish aboriginal title.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Treaty, statutes and regulations: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-37a) is reported at 688 F.3d 619. A prior order of the en banc court of appeals (Pet. App. 72a-73a) is reported at 375 F.3d 1218. The district court's findings of fact and conclusions of law (Pet. App. 76a-101a) are unreported. Prior orders of the district court (Pet. App. 38a-71a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2012. On October 23, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 28, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before 1993, there was no limitation on the number of vessels that could engage in the commercial harvest of halibut or black cod (sablefish) in the waters beyond the three-mile limit of state jurisdiction in the Gulf of Alaska, known as the "exclusive economic zone" (EEZ) and at times referred to as the Outer Continental Shelf (OCS).[1] The result was a rapid rise in the number of vessels engaged in those commercial fisheries and increasingly short seasons, leading to serious safety and allocation concerns. See 57 Fed. Reg. 57,130-57,132 (Dec. 3, 1992). The "race for fish" prompted the Department of Commerce to adopt a fishery management plan. *Alliance Against IFQs* v. *Brown*, 84 F.3d 343, 346 (9th Cir. 1996), cert. denied, 520 U.S. 1185 (1997).

In 1993, the Secretary of Commerce (Secretary) promulgated regulations establishing individual fishing quotas for halibut and sablefish in the EEZ. See 58 Fed. Reg. 59,375 (Nov. 9, 1993).[2] Under the regulations,

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[1] When speaking of fishery resources, however, it is appropriate to refer to the area beyond state jurisdiction as the 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 (Magnuson-Stevens Act), 16 U.S.C. 1811(a). The courts below often referred to the two interchangeably, and the difference in nomenclature makes no substantive difference for the purposes of this case.

[2] The regulations at issue were promulgated pursuant to the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.*, and the Northern Pacific Halibut Act of 1982, 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, U.S.-Can., Mar. 2, 1953, 5 U.S.T. 5. In the Magnuson-Stevens Act, the United States claims "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the [EEZ]." 16 U.S.C. 1811(a).

any boat fishing commercially for halibut or sablefish must have an Individual Fishing Quota (IFQ) permit that limits the amount of fish the vessel may take. See 50 C.F.R. 679.4(d)(1). The Secretary originally allocated IFQs to persons or entities that owned or leased vessels used to catch halibut or sablefish, respectively, and who actually caught such fish, at any time during 1988, 1989, or 1990. See 50 C.F.R. 679.40(a)(2)(i)(A)-(B) and (3)(i). Persons or entities who did not qualify for an IFQ permit may still obtain one from an original participant. See 50 C.F.R. 679.41. And, even without an IFQ permit, the current regulations permit members of recognized "Alaska Native tribe[s]" to engage in "subsistence" fishing, which allows them to catch up to 20 halibut per person per day. See 50 C.F.R. 300.65(g) and (h).[3] Because of the depth at which sablefish are found, the regulations assume there is no subsistence harvest. See Pet. App. 49a-50a.

2. Petitioners, five Native Villages on the southern coast of Alaska, challenged the Secretary's 1993 halibut and sablefish IFQ regulations. In an earlier action filed in 1995, petitioners claimed aboriginal title to the ocean waters beyond the three-mile limit of Alaska's jurisdiction and alleged, among other things, that the regulations violated their exclusive hunting and fishing rights. See Pet. App. 43a-44a, 77a. The Ninth Circuit held that petitioners' claim of exclusive rights conflicts with the

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[3] Before 2003, the regulations did not separately define subsistence fishing for halibut in Alaska but, rather covered such activities under the definition of "sport" fishing. See 50 C.F.R. 300.61 (2002). The 2003 amendments created a new regime for Alaska Natives and other subsistence fishermen and increased the bag limit, as well as the number of hooks allowed and the duration of the season. See 68 Fed. Reg. 18,145 (Apr. 15, 2003).

paramount authority of the federal government over the resources in that area. See *Native Vill. of Eyak* v. *Trawler Diane Marie, Inc.*, 154 F.3d 1090, 1092-1097 (1998) (*Eyak I*). This Court denied a petition for a writ of certiorari. See 527 U.S. 1003 (No. 98-1437).

3. In 1998, petitioners filed a second action, again challenging the 1993 halibut and sablefish regulations. Pet. App. 44a-45a, 78a. This time petitioners asserted *non*-exclusive aboriginal hunting and fishing rights in the EEZ and argued that the Secretary's regulations effectively prohibit their tribal members from exercising such rights. *Id.* at 78a. The Secretary filed a motion for summary judgment arguing, *inter alia*, that petitioners' claim of non-exclusive rights conflicts with the paramount authority of the federal government over the resources in the EEZ and that, in any event, petitioners do not have non-exclusive aboriginal rights to fish or hunt in those waters. *Id.* at 45a, 79a.

a. The district court granted the Secretary's motion. Pet. App. 38a-71a. The court did not decide whether petitioners had non-exclusive aboriginal rights to fish or hunt in the EEZ waters. *Id.* at 71a. Instead, finding "no legal difference between an exclusive claim to hunt and fish in the OCS and a non-exclusive claim when it comes to the doctrine of federal paramountcy," it held that petitioners' assertion of non-exclusive aboriginal rights was precluded by the same federal paramountcy doctrine that disposed of petitioners' initial suit. *Id.* at 61a.

b. The court of appeals decided to hear the case en banc to resolve any conflict between *Eyak I* and *Village of Gambell* v. *Hodel*, 869 F.2d 1273 (9th Cir. 1989) (*Gambell III*), on the issue of federal paramountcy.[4]

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[4] In *Gambell III*, the court of appeals held that Section 4(b) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, which

The court, however, ultimately declined to decide that question. Instead, it vacated and remanded "with instructions that the district court decide what aboriginal rights to fish beyond the three-mile limit, if any, [petitioners] have." Pet. App. 73a. The court of appeals instructed the district court to "assume," contrary to its initial determination, "that the villages' aboriginal rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law." *Ibid.*

c. On remand, the district court explained that "[a]boriginal hunting and fishing rights flow from aboriginal title," and that "[t]o establish aboriginal title, there must be a showing of actual, exclusive and continuous use and occupancy for a long time prior to the loss of the land." C.A. Supp. E.R. 8-9 (quoting *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975)) (internal quotation marks omitted). After a seven-day trial including testimony from experts in anthropology, fisheries biology, and native languages, as well as from tribal elders, the district court found that petitioners failed to establish aboriginal hunting and fishing rights in the claimed area. Pet. App. 76a-101a.

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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. 869 F.2d at 1278-1280. The court further observed, however, that such claims are limited by federal paramountcy principles. See *id.* at 1276 & n.3. The court ultimately held that the paramountcy doctrine did not control that case 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. The court then remanded with instructions that the district court determine "whether the drilling and other activities by the oil companies will interfere significantly with the [plaintiffs'] exercise" of their asserted subsistence rights. *Id.* at 1280.

The district court issued detailed findings of fact and conclusions of law. The court found that petitioners' "predecessor villages were independent, non-political entities" that were "independent of one another" and that sustained themselves by their "own efforts." Pet. App. 91a-92a. The court found no evidence that the villages shared fish camps or that they "joined together to fish" on a "regular basis." *Id.* at 92a. To the contrary, the court found that, during the relevant time period, the predecessor villages "were free-standing, self-supporting, independent entities" that likely kept the other villages "at arm's length," as other "villagers could be expected to poach or steal or raid as often as they sought to visit in a friendly fashion or trade." *Ibid.*; see *id.* at 90a.

The district court also found that "the residents of [petitioners'] ancestral villages made irregular use of the OCS," but that there was "no way of knowing exactly where in the OCS residents of any particular village fished or took game, or the frequency of those efforts, or the size of the take." Pet. App. 92a-93a. The court found that while it was "[m]ore probabl[e] than not" that "a limited amount of fishing took place" during trips across the OCS to outlying islands, "any fishing that was done would have been purely opportunistic—an easy take that would not long delay the travelers—rather than a combined hunting/fishing/trading trip." *Id.* at 93a.

The district court further found that while residents of the ancestral villages likely "made some use (probably seasonal) of the portions of the OCS nearest their respective villages and when traveling to the outlying islands, none of the ancestral villages was in a position to control or dominate access to any part of the OCS."

Pet. App. 94a. The court explained that "there were huge portions of the OCS being claimed by [petitioners] which residents of the ancestral villages seldom if ever visited." *Id.* at 93a-94a. And although the court deemed it "likely that some hunting and fishing took place in the near parts of the OCS," the court found "a dearth of information from pre-contact times as to what resource was actually targeted, who was doing the fishing and hunting, and what the results of the efforts were." *Id.* at 93a. The court additionally found that "[t]he area was too large" and "the number of men of an age who would have been able to defend or control high seas marine areas were too few." *Id.* at 94a. Moreover, the court continued, some of the areas in question were "on the periphery of the Chugach territory[,]" "where the Chugach villagers met up with" other groups who likewise "fished and hunted on a seasonal basis." *Ibid.* Accordingly, the court found that "[n]one of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis." *Ibid.*

4. In a per curiam decision, the same en banc panel of the court of appeals affirmed. Pet. App. 1a-37a.

a. Noting that petitioners did not "challenge the district court's factual findings," the court of appeals first considered "whether the facts found by the district court support [petitioners'] claim to aboriginal rights." Pet. App. 5a. To answer that question, the court assessed whether petitioners had proven "actual, exclusive, and continuous use and occupancy 'for a long time' of the claimed area." *Ibid.* (quoting *Sac & Fox Tribe of Indians* v. *United States*, 383 F.2d 991, 998 (Ct. Cl.), cert denied, 389 U.S. 900 (1967) (Table)). Applying a "liberal approach[,]" the court held that petitioners established

"continuous" use and occupancy of the claimed area, but failed to establish "exclusive" use and occupancy of that area. *Id.* at 6a (citation omitted); see *id.* at 7a-13a.

Relying on the district court's uncontested factual findings, the court of appeals noted that "huge portions of the OCS being claimed were 'seldom if ever visited.'" Pet. App. 11a (quoting *id.* at 93a-94a). As for the remaining portions of the OCS, the court of appeals explained that the district court had found that the "periphery" was used by other groups to hunt and fish, and that the reference to the "periphery" "*include*[*d*] the outer boundary of the claimed area." *Id.* at 9a. But even if the district court meant the word "periphery" to refer to areas outside the claimed territory, the court of appeals continued, the district court also "found that [petitioners'] claimed area was too large and there were too few people who could control it." *Id.* at 10a. The court noted the district court's finding that the villages were independent entities that rarely acted in concert. *Id.* at 12a. The court further explained, however, that even viewed collectively, there were simply too few Natives (between 400 and 1500 total) to control the large areas of ocean claimed. *Id.* at 10a. And, the court continued, there was no other evidence of "full dominion and control of the claimed area." *Id.* at 10a-11a. The court thus concluded that the district court's finding that "none of the ancestral villages was in a position to control or dominate access to any part of the OCS" was supported by the record. *Id.* at 11a (quoting *id.* at 94a).

"Based on the uncontested factual findings of the district court," the court of appeals held that petitioners "failed to establish an entitlement to non-exclusive aboriginal rights on the OCS." Pet. App. 13a. The court therefore found it unnecessary to decide whether peti-

tioners' assertion of rights conflicts "with the federal paramountcy doctrine." *Ibid.*

b. Judge William Fletcher, joined by four other judges, dissented. Pet. App. 14a-37a. Although agreeing that the majority applied the correct "test" and that petitioners satisfied the "continuous" use and occupancy requirement, the dissent would have found that petitioners also satisfied the requirement that the use and occupancy be "exclusive." *Id.* at 15a-33a. The dissent argued that a claimant need not show "that it had the power to exclude other groups" in the absence of "evidence of use or occupancy by another group," *id.* at 24a, and that the district court found "evidence of use or occupancy by another tribe or group" only on the "periphery," which it took to mean an area outside the claimed territory. *Ibid*; see *id.* at 27a-30a. The dissent also faulted the district court for analyzing "the aboriginal rights" of individual villages rather than "the Chugach as a whole." *Id.* at 36a. The dissent ultimately concluded that petitioners had "established aboriginal hunting and fishing rights in at least part of the claimed area of the OCS" and that the case should be remanded for a determination of precisely which areas such rights had been established. *Id.* at 14a.

In a portion of the dissent joined by only three other judges, Judge Fletcher also concluded that petitioners' assertion of aboriginal rights is consistent with federal paramountcy and that the court of appeals should overrule its earlier decision in *Eyak I*. Pet. App. 30a-35a.

ARGUMENT

Petitioners contend that the court of appeals erred in holding that the district court's uncontested factual findings failed to establish that petitioners had "exclusive" use and occupancy of the claimed areas of the

EEZ. The court of appeals' decision is correct, and it does not conflict with any decision of this Court or of another court of appeals. Petitioners' claims, moreover, fail in any event because the sort of aboriginal rights asserted by petitioners cannot exist in ocean areas beyond the limits of state jurisdiction under the federal paramountcy doctrine. That alternative ground for affirmance, which was not passed on by the court of appeals, makes this case a particularly poor vehicle for the Court's review. Further review is not warranted.

1. The court of appeals held that petitioners failed to establish aboriginal hunting and fishing rights in the ocean waters beyond the three-mile limit of Alaska's jurisdiction. See Pet. App. 1a-13a. It is undisputed that the court applied the correct legal test when it required petitioners to establish "actual, exclusive, and continuous use and occupancy" of the claimed area "for a long time." *Id.* at 5a (citation omitted); see Pet. 3. Petitioners nevertheless contend (Pet. 13-23) that the court of appeals erred in concluding, based on the district court's uncontested factual findings, that petitioners failed to satisfy the requirement of "exclusive" use and occupancy of the claimed area. The court of appeals' decision is correct.

"Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *United States* v. *Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941). To decide whether a tribe had established its aboriginal occupation of an area, a court must determine whether "definable territory" was "occupied exclusively by them or whether they were lands wandered over by many tribes." *Ibid.*; see *id.* at 359. "Implicit in the concept of ownership of property is the right to exclude others"; and "[g]enerally speaking,

a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders." *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975). Accordingly, "[i]n order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and occupied the land to the exclusion of other Indian groups." *Ibid.*

As the court of appeals held (Pet. App. 5a-13a), petitioners failed to satisfy that test. The district court expressly found that "[n]one of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis." *Id.* at 94a. As support for that finding, the district court found that "residents of the ancestral villages seldom if ever visited" "huge portions of the OCS." *Ibid.* In other portions of the OCS (namely, the "periphery"), other groups "met up" with members of the ancestral villages to "fish[] and hunt[] on a seasonal basis." *Ibid.* The "residents of the ancestral villages" likely did use portions of the OCS "nearest" to their "respective villages" or "when traveling to the outlying islands," but the district court found that "none * * * was in a position to control or dominate access to *any* part of the OCS." *Ibid.* (emphasis added). As the district court found, the area (*i.e.*, the ocean waters beyond the three-mile limit of Alaska's jurisdiction) was simply "too large" and the population (*i.e.*, between 400 and 1500 total) "too few" for them to do so. *Id.* at 10a, 94a. And there was no other "evidence that the tribes exercised full dominion and control of the claimed area." *Id.* at 11a. None of those factual findings were contested (*id.* at 5a, 13a) and, on that factual record, the court of appeals correctly concluded that petitioners failed to demonstrate ex-

clusive use and occupancy of the claimed area. *Id.* at 13a.

2. Petitioners contend (Pet. 13-23) that the court of appeals' decision is flawed in a number of respects. But petitioners' arguments rest on a fundamentally flawed premise: that there was "no evidence that any other Native group similarly used and occupied the claimed area." Pet. 3.

The district court did not *find* that no other Native group used and occupied the claimed area. To the contrary, it expressly found that other groups used and occupied at least part of the claimed area—namely, the "periphery." Pet. App. 94a. The court also found that the ancestral villages did not use or occupy "huge portions of the OCS"—let alone *exclusively* use and occupy such areas. *Ibid.* And although the court did find it "more likely true than not true that residents of the ancestral villages made some use (probably seasonal) of the portions of the OCS nearest their respective villages and when traveling to the outlying islands," *ibid.*, it did *not* find that no other Native groups used and occupied the same portions of the OCS in the same manner.

All of the evidence relating to the use and occupancy of ocean areas in this case, including the evidence of use by members of the ancestral villages, was necessarily inferential. As the district court explained, "there is simply no way of knowing exactly where in the OCS residents of any particular village fished or took game, or the frequency of those efforts, or the size of the take." Pet. App. 93a. "[T]here is a dearth of information" from the relevant time period "as to what resource was actually targeted, who was doing the fishing and hunting, and what the results of the efforts were." *Ibid.* The district court nevertheless inferred that "[m]ore proba-

bly than not, a limited amount of fishing took place" when villagers traveled to the outlying islands, such as "an easy take that would not long delay the travelers[,]" and that village members made "some use" of portions of the OCS "nearest their respective villages." *Id.* at 93a-94a. The district court could reasonably infer that other groups made similar use of the claimed areas. That inference finds support in the district court's finding that the ancestral villages lacked the power to exclude other groups from the claimed areas given the sheer size of the ocean waters relative to the comparatively small number of villagers. *Id.* at 94a.

3. Petitioners contend (Pet. 13-23) that the court of appeals' decision conflicts with several decisions of the Federal Circuit, the Court of Claims, and the Indian Claims Commission on several different issues. Petitioners misstate the holdings in the purportedly conflicting cases and disregard the distinct facts of each case. There is no conflict.

In *United States* v. *Seminole Indians*, 180 Ct. Cl. 375, 385, 387 (1967), the court applied a deferential standard of review and determined that the evidence in the record was sufficient to support the Indian Claims Commission finding that the tribe's use and occupancy sustained "a claim of original title to the Florida peninsula." In that case, there was evidence that "the Seminoles held a virtual 'monopoly'" and an "unrivaled position" over the area in question; that they maintained encampments throughout the area; and that they absorbed any "'foreign' elements into their own ranks." *Id.* at 383. Even though the Seminoles unquestionably "were the exclusive occupants of the land," the court still found it necessary to decide whether "they availed themselves of their exclusive position." *Ibid.*

Contrary to petitioners' contention (Pet. 15), the *Seminole Indians* court did not engage in that additional inquiry *because* there were "scattered groupings of other Indians in the claimed area." The court simply noted that fact in explaining why the Seminoles were nevertheless "exclusive occupants of the land"—the threshold question. 180 Ct. Cl. at 383. The court did not hold that such an inquiry would be unnecessary if (on different facts) no other tribe or group used or occupied the claimed area. *Seminole Indians*, moreover, does not suggest that population density is irrelevant in determining whether exclusive occupancy has been established. Pet. 17-18. The court held only that, given other evidence that the tribe had "[p]hysical control or dominion" over the claimed area, "population thinness" did not defeat exclusivity. *Seminole Indians*, 180 Ct. Cl. at 385-386; see Pet. App. 10a-11a (distinguishing *Seminole Indians*).[5]

Petitioners also rely on *Wichita Indian Tribe* v. *United States*, 696 F.2d 1378 (Fed. Cir. 1983) (*Wichita*). In that case, however, there was no dispute that the Wichitas "had held aboriginal title to various tracts of the claimed lands." *Ibid.* The only issue was whether they had since abandoned such title. *Ibid.* Making clear

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[5] Petitioners also contend (Pet. 18) that, in *Seminole Indians*, the court held that "for purposes of demonstrating exclusive use, the relevant unit is not a village or even necessarily one tribe" but, rather, "a socio-cultural group that uses and occupies a generally definable territory." But the court said nothing about that issue. At most, in discussing "[c]ultural assimilation[,]" the court explained that "whatever land rights were possessed by those absorbed may be recognized as inhering in the culture that emerges." *Seminole Indians*, 180 Ct. Cl. at 386. Here, petitioners do not claim that one of the ancestral villages "absorbed" the others, permitting imputation of the absorbed cultures' land rights.

that its analysis was specific to the issue of "abandonment," the court concluded that the record evidence demonstrated the Wichitas retained aboriginal title to at least some parts of the claimed area. *Id.* at 1380-1384.

Here, the court of appeals held that petitioners failed to demonstrate aboriginal title to *any* part of the ocean waters three miles beyond Alaska's jurisdiction. That does not create a conflict. It simply reflects the different factual records and legal issues in the two cases. Contrary to petitioners' contention (Pet. 20), the court of appeals here did not rest solely on the district court's finding that "neighboring tribes also fished and hunted in waters 'on the periphery.'" The court of appeals also relied on the district court's factual findings that, *inter alia*, "huge portions" of the claimed territory had seldom (if ever) been used by the ancestral villages and that the villages lacked the manpower to exclude others from the vast expanse of the claimed ocean waters. See Pet. App. 10a-12a. To the extent petitioners now suggest that the district court should have subdivided the "inner portion" of the claimed ocean waters (Pet. 22), they did not make any such claim below.[6]

Petitioners' reliance on *Zuni Tribe* v. *United States*, 12 Cl. Ct. 607 (1987) (*Zuni*), is similarly misplaced. In that case, the court found that the Zuni exclusively used and occupied the claimed area even though other tribes also used certain portions of the claimed area. *Id.* at 608. But, as the court explained, the other tribes' uses

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[6] Petitioners also note (Pet. 15-16) that the court in *Wichita* held that "the presence of other Indians in a region as 'guests' of a possessing tribe is not sufficient to defeat the aboriginal rights of the tribe." The court of appeals here, however, did not hold otherwise. If other Indians are merely "guests" of the possessing tribe, the possessing tribe necessarily *has* "the power to exclude" (Pet. 16).

were "either temporary and under agreement with the Zuni or w[ere] of specific short duration and the result of raid or other hostile intrusion." *Ibid.* Because of the "limited extent" of such use, the court concluded that it did not "vitiate or detract" from the court's finding of exclusivity. *Ibid.*

Zuni therefore does not stand for the broad proposition that "aboriginal rights survive[] if neighboring Native groups only used the 'periphery'" of the claimed territory. Pet. 21. Nor did the court of appeals here hold the opposite. As explained above, the court did not rely solely on the district court's finding with respect to the periphery. *Zuni* also does not suggest (Pet. 17-18) that population density is never relevant to an exclusivity determination. In a footnote, the court did reject the government's reliance on the size of the Zuni population, 12 Cl. Ct. at 608 n.2, but, unlike here, "there was other evidence that the tribes involved had dominion and control of their claimed lands," Pet. App. 10a.[7]

4. Contrary to petitioners' contention (Pet. 23-25), the federal paramountcy doctrine is another reason to deny further review, not grant it. Although that issue was not decided by the court of appeals, it would be an alternative ground for affirmance.[8] For the reasons explained by the district court (Pet. App. 57a-67a), peti-

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[7] The other cited cases (Pet. 18, 20-23) fare no better. Each consists of case- and fact-specific rulings by trial tribunals, and none establishes the broad legal principles ascribed to them by petitioners.

[8] The Secretary raised a number of additional arguments that the court of appeals did not address, but that would bar relief even if petitioners possessed aboriginal title to some portion of the claimed area. See, *e.g.*, Resp. C.A. Br. 48-49 (freedom of the seas doctrine); *id.* at 53-56 (IFQ regulations are, in any event, reasonable and nondiscriminatory).

tioners' assertion of aboriginal rights conflicts with the paramount authority of the federal government over the resources in the EEZ.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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TABLE OF CONTENTS

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Cases:

Treaty, statutes and regulations: Page

Miscellaneous:

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STATEMENT

1. Before 1993, there was no limitation on the number of vessels that could engage in the commercial harvest of halibut or black cod (sablefish) in the waters beyond the three-mile limit of state jurisdiction in the Gulf of Alaska, known as the "exclusive economic zone" (EEZ) and at times referred to as the Outer Continental Shelf (OCS).[1] The result was a rapid rise in the number of vessels engaged in those commercial fisheries and increasingly short seasons, leading to serious safety and allocation concerns. See 57 Fed. Reg. 57,130-57,132 (Dec. 3, 1992). The "race for fish" prompted the Department of Commerce to adopt a fishery management plan. *Alliance Against IFQs* v. *Brown*, 84 F.3d 343, 346 (9th Cir. 1996), cert. denied, 520 U.S. 1185 (1997).

In 1993, the Secretary of Commerce (Secretary) promulgated regulations establishing individual fishing quotas for halibut and sablefish in the EEZ. See 58 Fed. Reg. 59,375 (Nov. 9, 1993).[2] Under the regulations,

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[1] When speaking of fishery resources, however, it is appropriate to refer to the area beyond state jurisdiction as the 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 (Magnuson-Stevens Act), 16 U.S.C. 1811(a). The courts below often referred to the two interchangeably, and the difference in nomenclature makes no substantive difference for the purposes of this case.

[2] The regulations at issue were promulgated pursuant to the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.*, and the Northern Pacific Halibut Act of 1982, 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, U.S.-Can., Mar. 2, 1953, 5 U.S.T. 5. In the Magnuson-Stevens Act, the United States claims "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the [EEZ]." 16 U.S.C. 1811(a).

any boat fishing commercially for halibut or sablefish must have an Individual Fishing Quota (IFQ) permit that limits the amount of fish the vessel may take. See 50 C.F.R. 679.4(d)(1). The Secretary originally allocated IFQs to persons or entities that owned or leased vessels used to catch halibut or sablefish, respectively, and who actually caught such fish, at any time during 1988, 1989, or 1990. See 50 C.F.R. 679.40(a)(2)(i)(A)-(B) and (3)(i). Persons or entities who did not qualify for an IFQ permit may still obtain one from an original participant. See 50 C.F.R. 679.41. And, even without an IFQ permit, the current regulations permit members of recognized "Alaska Native tribe[s]" to engage in "subsistence" fishing, which allows them to catch up to 20 halibut per person per day. See 50 C.F.R. 300.65(g) and (h).[3] Because of the depth at which sablefish are found, the regulations assume there is no subsistence harvest. See Pet. App. 49a-50a.

2. Petitioners, five Native Villages on the southern coast of Alaska, challenged the Secretary's 1993 halibut and sablefish IFQ regulations. In an earlier action filed in 1995, petitioners claimed aboriginal title to the ocean waters beyond the three-mile limit of Alaska's jurisdiction and alleged, among other things, that the regulations violated their exclusive hunting and fishing rights. See Pet. App. 43a-44a, 77a. The Ninth Circuit held that petitioners' claim of exclusive rights conflicts with the

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[3] Before 2003, the regulations did not separately define subsistence fishing for halibut in Alaska but, rather covered such activities under the definition of "sport" fishing. See 50 C.F.R. 300.61 (2002). The 2003 amendments created a new regime for Alaska Natives and other subsistence fishermen and increased the bag limit, as well as the number of hooks allowed and the duration of the season. See 68 Fed. Reg. 18,145 (Apr. 15, 2003).

paramount authority of the federal government over the resources in that area. See *Native Vill. of Eyak* v. *Trawler Diane Marie, Inc.*, 154 F.3d 1090, 1092-1097 (1998) (*Eyak I*). This Court denied a petition for a writ of certiorari. See 527 U.S. 1003 (No. 98-1437).

3. In 1998, petitioners filed a second action, again challenging the 1993 halibut and sablefish regulations. Pet. App. 44a-45a, 78a. This time petitioners asserted *non*-exclusive aboriginal hunting and fishing rights in the EEZ and argued that the Secretary's regulations effectively prohibit their tribal members from exercising such rights. *Id.* at 78a. The Secretary filed a motion for summary judgment arguing, *inter alia*, that petitioners' claim of non-exclusive rights conflicts with the paramount authority of the federal government over the resources in the EEZ and that, in any event, petitioners do not have non-exclusive aboriginal rights to fish or hunt in those waters. *Id.* at 45a, 79a.

a. The district court granted the Secretary's motion. Pet. App. 38a-71a. The court did not decide whether petitioners had non-exclusive aboriginal rights to fish or hunt in the EEZ waters. *Id.* at 71a. Instead, finding "no legal difference between an exclusive claim to hunt and fish in the OCS and a non-exclusive claim when it comes to the doctrine of federal paramountcy," it held that petitioners' assertion of non-exclusive aboriginal rights was precluded by the same federal paramountcy doctrine that disposed of petitioners' initial suit. *Id.* at 61a.

b. The court of appeals decided to hear the case en banc to resolve any conflict between *Eyak I* and *Village of Gambell* v. *Hodel*, 869 F.2d 1273 (9th Cir. 1989) (*Gambell III*), on the issue of federal paramountcy.[4]

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[4] In *Gambell III*, the court of appeals held that Section 4(b) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, which

The court, however, ultimately declined to decide that question. Instead, it vacated and remanded "with instructions that the district court decide what aboriginal rights to fish beyond the three-mile limit, if any, [petitioners] have." Pet. App. 73a. The court of appeals instructed the district court to "assume," contrary to its initial determination, "that the villages' aboriginal rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law." *Ibid.*

c. On remand, the district court explained that "[a]boriginal hunting and fishing rights flow from aboriginal title," and that "[t]o establish aboriginal title, there must be a showing of actual, exclusive and continuous use and occupancy for a long time prior to the loss of the land." C.A. Supp. E.R. 8-9 (quoting *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975)) (internal quotation marks omitted). After a seven-day trial including testimony from experts in anthropology, fisheries biology, and native languages, as well as from tribal elders, the district court found that petitioners failed to establish aboriginal hunting and fishing rights in the claimed area. Pet. App. 76a-101a.

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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. 869 F.2d at 1278-1280. The court further observed, however, that such claims are limited by federal paramountcy principles. See *id.* at 1276 & n.3. The court ultimately held that the paramountcy doctrine did not control that case 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. The court then remanded with instructions that the district court determine "whether the drilling and other activities by the oil companies will interfere significantly with the [plaintiffs'] exercise" of their asserted subsistence rights. *Id.* at 1280.

The district court issued detailed findings of fact and conclusions of law. The court found that petitioners' "predecessor villages were independent, non-political entities" that were "independent of one another" and that sustained themselves by their "own efforts." Pet. App. 91a-92a. The court found no evidence that the villages shared fish camps or that they "joined together to fish" on a "regular basis." *Id.* at 92a. To the contrary, the court found that, during the relevant time period, the predecessor villages "were free-standing, self-supporting, independent entities" that likely kept the other villages "at arm's length," as other "villagers could be expected to poach or steal or raid as often as they sought to visit in a friendly fashion or trade." *Ibid.*; see *id.* at 90a.

The district court also found that "the residents of [petitioners'] ancestral villages made irregular use of the OCS," but that there was "no way of knowing exactly where in the OCS residents of any particular village fished or took game, or the frequency of those efforts, or the size of the take." Pet. App. 92a-93a. The court found that while it was "[m]ore probabl[e] than not" that "a limited amount of fishing took place" during trips across the OCS to outlying islands, "any fishing that was done would have been purely opportunistic—an easy take that would not long delay the travelers—rather than a combined hunting/fishing/trading trip." *Id.* at 93a.

The district court further found that while residents of the ancestral villages likely "made some use (probably seasonal) of the portions of the OCS nearest their respective villages and when traveling to the outlying islands, none of the ancestral villages was in a position to control or dominate access to any part of the OCS."

Pet. App. 94a. The court explained that "there were huge portions of the OCS being claimed by [petitioners] which residents of the ancestral villages seldom if ever visited." *Id.* at 93a-94a. And although the court deemed it "likely that some hunting and fishing took place in the near parts of the OCS," the court found "a dearth of information from pre-contact times as to what resource was actually targeted, who was doing the fishing and hunting, and what the results of the efforts were." *Id.* at 93a. The court additionally found that "[t]he area was too large" and "the number of men of an age who would have been able to defend or control high seas marine areas were too few." *Id.* at 94a. Moreover, the court continued, some of the areas in question were "on the periphery of the Chugach territory[,]" "where the Chugach villagers met up with" other groups who likewise "fished and hunted on a seasonal basis." *Ibid.* Accordingly, the court found that "[n]one of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis." *Ibid.*

4. In a per curiam decision, the same en banc panel of the court of appeals affirmed. Pet. App. 1a-37a.

a. Noting that petitioners did not "challenge the district court's factual findings," the court of appeals first considered "whether the facts found by the district court support [petitioners'] claim to aboriginal rights." Pet. App. 5a. To answer that question, the court assessed whether petitioners had proven "actual, exclusive, and continuous use and occupancy 'for a long time' of the claimed area." *Ibid.* (quoting *Sac & Fox Tribe of Indians* v. *United States*, 383 F.2d 991, 998 (Ct. Cl.), cert denied, 389 U.S. 900 (1967) (Table)). Applying a "liberal approach[,]" the court held that petitioners established

"continuous" use and occupancy of the claimed area, but failed to establish "exclusive" use and occupancy of that area. *Id.* at 6a (citation omitted); see *id.* at 7a-13a.

Relying on the district court's uncontested factual findings, the court of appeals noted that "huge portions of the OCS being claimed were 'seldom if ever visited.'" Pet. App. 11a (quoting *id.* at 93a-94a). As for the remaining portions of the OCS, the court of appeals explained that the district court had found that the "periphery" was used by other groups to hunt and fish, and that the reference to the "periphery" "*include*[*d*] the outer boundary of the claimed area." *Id.* at 9a. But even if the district court meant the word "periphery" to refer to areas outside the claimed territory, the court of appeals continued, the district court also "found that [petitioners'] claimed area was too large and there were too few people who could control it." *Id.* at 10a. The court noted the district court's finding that the villages were independent entities that rarely acted in concert. *Id.* at 12a. The court further explained, however, that even viewed collectively, there were simply too few Natives (between 400 and 1500 total) to control the large areas of ocean claimed. *Id.* at 10a. And, the court continued, there was no other evidence of "full dominion and control of the claimed area." *Id.* at 10a-11a. The court thus concluded that the district court's finding that "none of the ancestral villages was in a position to control or dominate access to any part of the OCS" was supported by the record. *Id.* at 11a (quoting *id.* at 94a).

"Based on the uncontested factual findings of the district court," the court of appeals held that petitioners "failed to establish an entitlement to non-exclusive aboriginal rights on the OCS." Pet. App. 13a. The court therefore found it unnecessary to decide whether peti-

tioners' assertion of rights conflicts "with the federal paramountcy doctrine." *Ibid.*

b. Judge William Fletcher, joined by four other judges, dissented. Pet. App. 14a-37a. Although agreeing that the majority applied the correct "test" and that petitioners satisfied the "continuous" use and occupancy requirement, the dissent would have found that petitioners also satisfied the requirement that the use and occupancy be "exclusive." *Id.* at 15a-33a. The dissent argued that a claimant need not show "that it had the power to exclude other groups" in the absence of "evidence of use or occupancy by another group," *id.* at 24a, and that the district court found "evidence of use or occupancy by another tribe or group" only on the "periphery," which it took to mean an area outside the claimed territory. *Ibid*; see *id.* at 27a-30a. The dissent also faulted the district court for analyzing "the aboriginal rights" of individual villages rather than "the Chugach as a whole." *Id.* at 36a. The dissent ultimately concluded that petitioners had "established aboriginal hunting and fishing rights in at least part of the claimed area of the OCS" and that the case should be remanded for a determination of precisely which areas such rights had been established. *Id.* at 14a.

In a portion of the dissent joined by only three other judges, Judge Fletcher also concluded that petitioners' assertion of aboriginal rights is consistent with federal paramountcy and that the court of appeals should overrule its earlier decision in *Eyak I*. Pet. App. 30a-35a.

ARGUMENT

Petitioners contend that the court of appeals erred in holding that the district court's uncontested factual findings failed to establish that petitioners had "exclusive" use and occupancy of the claimed areas of the

EEZ. The court of appeals' decision is correct, and it does not conflict with any decision of this Court or of another court of appeals. Petitioners' claims, moreover, fail in any event because the sort of aboriginal rights asserted by petitioners cannot exist in ocean areas beyond the limits of state jurisdiction under the federal paramountcy doctrine. That alternative ground for affirmance, which was not passed on by the court of appeals, makes this case a particularly poor vehicle for the Court's review. Further review is not warranted.

1. The court of appeals held that petitioners failed to establish aboriginal hunting and fishing rights in the ocean waters beyond the three-mile limit of Alaska's jurisdiction. See Pet. App. 1a-13a. It is undisputed that the court applied the correct legal test when it required petitioners to establish "actual, exclusive, and continuous use and occupancy" of the claimed area "for a long time." *Id.* at 5a (citation omitted); see Pet. 3. Petitioners nevertheless contend (Pet. 13-23) that the court of appeals erred in concluding, based on the district court's uncontested factual findings, that petitioners failed to satisfy the requirement of "exclusive" use and occupancy of the claimed area. The court of appeals' decision is correct.

"Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *United States* v. *Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941). To decide whether a tribe had established its aboriginal occupation of an area, a court must determine whether "definable territory" was "occupied exclusively by them or whether they were lands wandered over by many tribes." *Ibid.*; see *id.* at 359. "Implicit in the concept of ownership of property is the right to exclude others"; and "[g]enerally speaking,

a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders." *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975). Accordingly, "[i]n order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and occupied the land to the exclusion of other Indian groups." *Ibid.*

As the court of appeals held (Pet. App. 5a-13a), petitioners failed to satisfy that test. The district court expressly found that "[n]one of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis." *Id.* at 94a. As support for that finding, the district court found that "residents of the ancestral villages seldom if ever visited" "huge portions of the OCS." *Ibid.* In other portions of the OCS (namely, the "periphery"), other groups "met up" with members of the ancestral villages to "fish[] and hunt[] on a seasonal basis." *Ibid.* The "residents of the ancestral villages" likely did use portions of the OCS "nearest" to their "respective villages" or "when traveling to the outlying islands," but the district court found that "none * * * was in a position to control or dominate access to *any* part of the OCS." *Ibid.* (emphasis added). As the district court found, the area (*i.e.*, the ocean waters beyond the three-mile limit of Alaska's jurisdiction) was simply "too large" and the population (*i.e.*, between 400 and 1500 total) "too few" for them to do so. *Id.* at 10a, 94a. And there was no other "evidence that the tribes exercised full dominion and control of the claimed area." *Id.* at 11a. None of those factual findings were contested (*id.* at 5a, 13a) and, on that factual record, the court of appeals correctly concluded that petitioners failed to demonstrate ex-

clusive use and occupancy of the claimed area. *Id.* at 13a.

2. Petitioners contend (Pet. 13-23) that the court of appeals' decision is flawed in a number of respects. But petitioners' arguments rest on a fundamentally flawed premise: that there was "no evidence that any other Native group similarly used and occupied the claimed area." Pet. 3.

The district court did not *find* that no other Native group used and occupied the claimed area. To the contrary, it expressly found that other groups used and occupied at least part of the claimed area—namely, the "periphery." Pet. App. 94a. The court also found that the ancestral villages did not use or occupy "huge portions of the OCS"—let alone *exclusively* use and occupy such areas. *Ibid.* And although the court did find it "more likely true than not true that residents of the ancestral villages made some use (probably seasonal) of the portions of the OCS nearest their respective villages and when traveling to the outlying islands," *ibid.*, it did *not* find that no other Native groups used and occupied the same portions of the OCS in the same manner.

All of the evidence relating to the use and occupancy of ocean areas in this case, including the evidence of use by members of the ancestral villages, was necessarily inferential. As the district court explained, "there is simply no way of knowing exactly where in the OCS residents of any particular village fished or took game, or the frequency of those efforts, or the size of the take." Pet. App. 93a. "[T]here is a dearth of information" from the relevant time period "as to what resource was actually targeted, who was doing the fishing and hunting, and what the results of the efforts were." *Ibid.* The district court nevertheless inferred that "[m]ore proba-

bly than not, a limited amount of fishing took place" when villagers traveled to the outlying islands, such as "an easy take that would not long delay the travelers[,]" and that village members made "some use" of portions of the OCS "nearest their respective villages." *Id.* at 93a-94a. The district court could reasonably infer that other groups made similar use of the claimed areas. That inference finds support in the district court's finding that the ancestral villages lacked the power to exclude other groups from the claimed areas given the sheer size of the ocean waters relative to the comparatively small number of villagers. *Id.* at 94a.

3. Petitioners contend (Pet. 13-23) that the court of appeals' decision conflicts with several decisions of the Federal Circuit, the Court of Claims, and the Indian Claims Commission on several different issues. Petitioners misstate the holdings in the purportedly conflicting cases and disregard the distinct facts of each case. There is no conflict.

In *United States* v. *Seminole Indians*, 180 Ct. Cl. 375, 385, 387 (1967), the court applied a deferential standard of review and determined that the evidence in the record was sufficient to support the Indian Claims Commission finding that the tribe's use and occupancy sustained "a claim of original title to the Florida peninsula." In that case, there was evidence that "the Seminoles held a virtual 'monopoly'" and an "unrivaled position" over the area in question; that they maintained encampments throughout the area; and that they absorbed any "'foreign' elements into their own ranks." *Id.* at 383. Even though the Seminoles unquestionably "were the exclusive occupants of the land," the court still found it necessary to decide whether "they availed themselves of their exclusive position." *Ibid.*

Contrary to petitioners' contention (Pet. 15), the *Seminole Indians* court did not engage in that additional inquiry *because* there were "scattered groupings of other Indians in the claimed area." The court simply noted that fact in explaining why the Seminoles were nevertheless "exclusive occupants of the land"—the threshold question. 180 Ct. Cl. at 383. The court did not hold that such an inquiry would be unnecessary if (on different facts) no other tribe or group used or occupied the claimed area. *Seminole Indians*, moreover, does not suggest that population density is irrelevant in determining whether exclusive occupancy has been established. Pet. 17-18. The court held only that, given other evidence that the tribe had "[p]hysical control or dominion" over the claimed area, "population thinness" did not defeat exclusivity. *Seminole Indians*, 180 Ct. Cl. at 385-386; see Pet. App. 10a-11a (distinguishing *Seminole Indians*).[5]

Petitioners also rely on *Wichita Indian Tribe* v. *United States*, 696 F.2d 1378 (Fed. Cir. 1983) (*Wichita*). In that case, however, there was no dispute that the Wichitas "had held aboriginal title to various tracts of the claimed lands." *Ibid.* The only issue was whether they had since abandoned such title. *Ibid.* Making clear

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[5] Petitioners also contend (Pet. 18) that, in *Seminole Indians*, the court held that "for purposes of demonstrating exclusive use, the relevant unit is not a village or even necessarily one tribe" but, rather, "a socio-cultural group that uses and occupies a generally definable territory." But the court said nothing about that issue. At most, in discussing "[c]ultural assimilation[,]" the court explained that "whatever land rights were possessed by those absorbed may be recognized as inhering in the culture that emerges." *Seminole Indians*, 180 Ct. Cl. at 386. Here, petitioners do not claim that one of the ancestral villages "absorbed" the others, permitting imputation of the absorbed cultures' land rights.

that its analysis was specific to the issue of "abandonment," the court concluded that the record evidence demonstrated the Wichitas retained aboriginal title to at least some parts of the claimed area. *Id.* at 1380-1384.

Here, the court of appeals held that petitioners failed to demonstrate aboriginal title to *any* part of the ocean waters three miles beyond Alaska's jurisdiction. That does not create a conflict. It simply reflects the different factual records and legal issues in the two cases. Contrary to petitioners' contention (Pet. 20), the court of appeals here did not rest solely on the district court's finding that "neighboring tribes also fished and hunted in waters 'on the periphery.'" The court of appeals also relied on the district court's factual findings that, *inter alia*, "huge portions" of the claimed territory had seldom (if ever) been used by the ancestral villages and that the villages lacked the manpower to exclude others from the vast expanse of the claimed ocean waters. See Pet. App. 10a-12a. To the extent petitioners now suggest that the district court should have subdivided the "inner portion" of the claimed ocean waters (Pet. 22), they did not make any such claim below.[6]

Petitioners' reliance on *Zuni Tribe* v. *United States*, 12 Cl. Ct. 607 (1987) (*Zuni*), is similarly misplaced. In that case, the court found that the Zuni exclusively used and occupied the claimed area even though other tribes also used certain portions of the claimed area. *Id.* at 608. But, as the court explained, the other tribes' uses

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[6] Petitioners also note (Pet. 15-16) that the court in *Wichita* held that "the presence of other Indians in a region as 'guests' of a possessing tribe is not sufficient to defeat the aboriginal rights of the tribe." The court of appeals here, however, did not hold otherwise. If other Indians are merely "guests" of the possessing tribe, the possessing tribe necessarily *has* "the power to exclude" (Pet. 16).

were "either temporary and under agreement with the Zuni or w[ere] of specific short duration and the result of raid or other hostile intrusion." *Ibid.* Because of the "limited extent" of such use, the court concluded that it did not "vitiate or detract" from the court's finding of exclusivity. *Ibid.*

Zuni therefore does not stand for the broad proposition that "aboriginal rights survive[] if neighboring Native groups only used the 'periphery'" of the claimed territory. Pet. 21. Nor did the court of appeals here hold the opposite. As explained above, the court did not rely solely on the district court's finding with respect to the periphery. *Zuni* also does not suggest (Pet. 17-18) that population density is never relevant to an exclusivity determination. In a footnote, the court did reject the government's reliance on the size of the Zuni population, 12 Cl. Ct. at 608 n.2, but, unlike here, "there was other evidence that the tribes involved had dominion and control of their claimed lands," Pet. App. 10a.[7]

4. Contrary to petitioners' contention (Pet. 23-25), the federal paramountcy doctrine is another reason to deny further review, not grant it. Although that issue was not decided by the court of appeals, it would be an alternative ground for affirmance.[8] For the reasons explained by the district court (Pet. App. 57a-67a), peti-

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[7] The other cited cases (Pet. 18, 20-23) fare no better. Each consists of case- and fact-specific rulings by trial tribunals, and none establishes the broad legal principles ascribed to them by petitioners.

[8] The Secretary raised a number of additional arguments that the court of appeals did not address, but that would bar relief even if petitioners possessed aboriginal title to some portion of the claimed area. See, *e.g.*, Resp. C.A. Br. 48-49 (freedom of the seas doctrine); *id.* at 53-56 (IFQ regulations are, in any event, reasonable and nondiscriminatory).

tioners' assertion of aboriginal rights conflicts with the paramount authority of the federal government over the resources in the EEZ.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2013

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No. 12-668

In the Supreme Court of the United States

NATIVE VILLAGE OF EYAK, ET AL., PETITIONERS

v.

PENNY PRITZKER, 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

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QUESTION PRESENTED

Whether the court of appeals correctly held, based on the district court's uncontested factual findings, that petitioners failed to demonstrate the historic exclusive use and occupancy of ocean waters beyond the three-mile limit of Alaska's jurisdiction necessary to establish aboriginal title.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Treaty, statutes and regulations: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-37a) is reported at 688 F.3d 619. A prior order of the en banc court of appeals (Pet. App. 72a-73a) is reported at 375 F.3d 1218. The district court's findings of fact and conclusions of law (Pet. App. 76a-101a) are unreported. Prior orders of the district court (Pet. App. 38a-71a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2012. On October 23, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 28, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before 1993, there was no limitation on the number of vessels that could engage in the commercial harvest of halibut or black cod (sablefish) in the waters beyond the three-mile limit of state jurisdiction in the Gulf of Alaska, known as the "exclusive economic zone" (EEZ) and at times referred to as the Outer Continental Shelf (OCS).[1] The result was a rapid rise in the number of vessels engaged in those commercial fisheries and increasingly short seasons, leading to serious safety and allocation concerns. See 57 Fed. Reg. 57,130-57,132 (Dec. 3, 1992). The "race for fish" prompted the Department of Commerce to adopt a fishery management plan. *Alliance Against IFQs* v. *Brown*, 84 F.3d 343, 346 (9th Cir. 1996), cert. denied, 520 U.S. 1185 (1997).

In 1993, the Secretary of Commerce (Secretary) promulgated regulations establishing individual fishing quotas for halibut and sablefish in the EEZ. See 58 Fed. Reg. 59,375 (Nov. 9, 1993).[2] Under the regulations,

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[1] When speaking of fishery resources, however, it is appropriate to refer to the area beyond state jurisdiction as the 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 (Magnuson-Stevens Act), 16 U.S.C. 1811(a). The courts below often referred to the two interchangeably, and the difference in nomenclature makes no substantive difference for the purposes of this case.

[2] The regulations at issue were promulgated pursuant to the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.*, and the Northern Pacific Halibut Act of 1982, 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, U.S.-Can., Mar. 2, 1953, 5 U.S.T. 5. In the Magnuson-Stevens Act, the United States claims "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the [EEZ]." 16 U.S.C. 1811(a).

any boat fishing commercially for halibut or sablefish must have an Individual Fishing Quota (IFQ) permit that limits the amount of fish the vessel may take. See 50 C.F.R. 679.4(d)(1). The Secretary originally allocated IFQs to persons or entities that owned or leased vessels used to catch halibut or sablefish, respectively, and who actually caught such fish, at any time during 1988, 1989, or 1990. See 50 C.F.R. 679.40(a)(2)(i)(A)-(B) and (3)(i). Persons or entities who did not qualify for an IFQ permit may still obtain one from an original participant. See 50 C.F.R. 679.41. And, even without an IFQ permit, the current regulations permit members of recognized "Alaska Native tribe[s]" to engage in "subsistence" fishing, which allows them to catch up to 20 halibut per person per day. See 50 C.F.R. 300.65(g) and (h).[3] Because of the depth at which sablefish are found, the regulations assume there is no subsistence harvest. See Pet. App. 49a-50a.

2. Petitioners, five Native Villages on the southern coast of Alaska, challenged the Secretary's 1993 halibut and sablefish IFQ regulations. In an earlier action filed in 1995, petitioners claimed aboriginal title to the ocean waters beyond the three-mile limit of Alaska's jurisdiction and alleged, among other things, that the regulations violated their exclusive hunting and fishing rights. See Pet. App. 43a-44a, 77a. The Ninth Circuit held that petitioners' claim of exclusive rights conflicts with the

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[3] Before 2003, the regulations did not separately define subsistence fishing for halibut in Alaska but, rather covered such activities under the definition of "sport" fishing. See 50 C.F.R. 300.61 (2002). The 2003 amendments created a new regime for Alaska Natives and other subsistence fishermen and increased the bag limit, as well as the number of hooks allowed and the duration of the season. See 68 Fed. Reg. 18,145 (Apr. 15, 2003).

paramount authority of the federal government over the resources in that area. See *Native Vill. of Eyak* v. *Trawler Diane Marie, Inc.*, 154 F.3d 1090, 1092-1097 (1998) (*Eyak I*). This Court denied a petition for a writ of certiorari. See 527 U.S. 1003 (No. 98-1437).

3. In 1998, petitioners filed a second action, again challenging the 1993 halibut and sablefish regulations. Pet. App. 44a-45a, 78a. This time petitioners asserted *non*-exclusive aboriginal hunting and fishing rights in the EEZ and argued that the Secretary's regulations effectively prohibit their tribal members from exercising such rights. *Id.* at 78a. The Secretary filed a motion for summary judgment arguing, *inter alia*, that petitioners' claim of non-exclusive rights conflicts with the paramount authority of the federal government over the resources in the EEZ and that, in any event, petitioners do not have non-exclusive aboriginal rights to fish or hunt in those waters. *Id.* at 45a, 79a.

a. The district court granted the Secretary's motion. Pet. App. 38a-71a. The court did not decide whether petitioners had non-exclusive aboriginal rights to fish or hunt in the EEZ waters. *Id.* at 71a. Instead, finding "no legal difference between an exclusive claim to hunt and fish in the OCS and a non-exclusive claim when it comes to the doctrine of federal paramountcy," it held that petitioners' assertion of non-exclusive aboriginal rights was precluded by the same federal paramountcy doctrine that disposed of petitioners' initial suit. *Id.* at 61a.

b. The court of appeals decided to hear the case en banc to resolve any conflict between *Eyak I* and *Village of Gambell* v. *Hodel*, 869 F.2d 1273 (9th Cir. 1989) (*Gambell III*), on the issue of federal paramountcy.[4]

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[4] In *Gambell III*, the court of appeals held that Section 4(b) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, which

The court, however, ultimately declined to decide that question. Instead, it vacated and remanded "with instructions that the district court decide what aboriginal rights to fish beyond the three-mile limit, if any, [petitioners] have." Pet. App. 73a. The court of appeals instructed the district court to "assume," contrary to its initial determination, "that the villages' aboriginal rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law." *Ibid.*

c. On remand, the district court explained that "[a]boriginal hunting and fishing rights flow from aboriginal title," and that "[t]o establish aboriginal title, there must be a showing of actual, exclusive and continuous use and occupancy for a long time prior to the loss of the land." C.A. Supp. E.R. 8-9 (quoting *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975)) (internal quotation marks omitted). After a seven-day trial including testimony from experts in anthropology, fisheries biology, and native languages, as well as from tribal elders, the district court found that petitioners failed to establish aboriginal hunting and fishing rights in the claimed area. Pet. App. 76a-101a.

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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. 869 F.2d at 1278-1280. The court further observed, however, that such claims are limited by federal paramountcy principles. See *id.* at 1276 & n.3. The court ultimately held that the paramountcy doctrine did not control that case 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. The court then remanded with instructions that the district court determine "whether the drilling and other activities by the oil companies will interfere significantly with the [plaintiffs'] exercise" of their asserted subsistence rights. *Id.* at 1280.

The district court issued detailed findings of fact and conclusions of law. The court found that petitioners' "predecessor villages were independent, non-political entities" that were "independent of one another" and that sustained themselves by their "own efforts." Pet. App. 91a-92a. The court found no evidence that the villages shared fish camps or that they "joined together to fish" on a "regular basis." *Id.* at 92a. To the contrary, the court found that, during the relevant time period, the predecessor villages "were free-standing, self-supporting, independent entities" that likely kept the other villages "at arm's length," as other "villagers could be expected to poach or steal or raid as often as they sought to visit in a friendly fashion or trade." *Ibid.*; see *id.* at 90a.

The district court also found that "the residents of [petitioners'] ancestral villages made irregular use of the OCS," but that there was "no way of knowing exactly where in the OCS residents of any particular village fished or took game, or the frequency of those efforts, or the size of the take." Pet. App. 92a-93a. The court found that while it was "[m]ore probabl[e] than not" that "a limited amount of fishing took place" during trips across the OCS to outlying islands, "any fishing that was done would have been purely opportunistic—an easy take that would not long delay the travelers—rather than a combined hunting/fishing/trading trip." *Id.* at 93a.

The district court further found that while residents of the ancestral villages likely "made some use (probably seasonal) of the portions of the OCS nearest their respective villages and when traveling to the outlying islands, none of the ancestral villages was in a position to control or dominate access to any part of the OCS."

Pet. App. 94a. The court explained that "there were huge portions of the OCS being claimed by [petitioners] which residents of the ancestral villages seldom if ever visited." *Id.* at 93a-94a. And although the court deemed it "likely that some hunting and fishing took place in the near parts of the OCS," the court found "a dearth of information from pre-contact times as to what resource was actually targeted, who was doing the fishing and hunting, and what the results of the efforts were." *Id.* at 93a. The court additionally found that "[t]he area was too large" and "the number of men of an age who would have been able to defend or control high seas marine areas were too few." *Id.* at 94a. Moreover, the court continued, some of the areas in question were "on the periphery of the Chugach territory[,]" "where the Chugach villagers met up with" other groups who likewise "fished and hunted on a seasonal basis." *Ibid.* Accordingly, the court found that "[n]one of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis." *Ibid.*

4. In a per curiam decision, the same en banc panel of the court of appeals affirmed. Pet. App. 1a-37a.

a. Noting that petitioners did not "challenge the district court's factual findings," the court of appeals first considered "whether the facts found by the district court support [petitioners'] claim to aboriginal rights." Pet. App. 5a. To answer that question, the court assessed whether petitioners had proven "actual, exclusive, and continuous use and occupancy 'for a long time' of the claimed area." *Ibid.* (quoting *Sac & Fox Tribe of Indians* v. *United States*, 383 F.2d 991, 998 (Ct. Cl.), cert denied, 389 U.S. 900 (1967) (Table)). Applying a "liberal approach[,]" the court held that petitioners established

"continuous" use and occupancy of the claimed area, but failed to establish "exclusive" use and occupancy of that area. *Id.* at 6a (citation omitted); see *id.* at 7a-13a.

Relying on the district court's uncontested factual findings, the court of appeals noted that "huge portions of the OCS being claimed were 'seldom if ever visited.'" Pet. App. 11a (quoting *id.* at 93a-94a). As for the remaining portions of the OCS, the court of appeals explained that the district court had found that the "periphery" was used by other groups to hunt and fish, and that the reference to the "periphery" "*include*[*d*] the outer boundary of the claimed area." *Id.* at 9a. But even if the district court meant the word "periphery" to refer to areas outside the claimed territory, the court of appeals continued, the district court also "found that [petitioners'] claimed area was too large and there were too few people who could control it." *Id.* at 10a. The court noted the district court's finding that the villages were independent entities that rarely acted in concert. *Id.* at 12a. The court further explained, however, that even viewed collectively, there were simply too few Natives (between 400 and 1500 total) to control the large areas of ocean claimed. *Id.* at 10a. And, the court continued, there was no other evidence of "full dominion and control of the claimed area." *Id.* at 10a-11a. The court thus concluded that the district court's finding that "none of the ancestral villages was in a position to control or dominate access to any part of the OCS" was supported by the record. *Id.* at 11a (quoting *id.* at 94a).

"Based on the uncontested factual findings of the district court," the court of appeals held that petitioners "failed to establish an entitlement to non-exclusive aboriginal rights on the OCS." Pet. App. 13a. The court therefore found it unnecessary to decide whether peti-

tioners' assertion of rights conflicts "with the federal paramountcy doctrine." *Ibid.*

b. Judge William Fletcher, joined by four other judges, dissented. Pet. App. 14a-37a. Although agreeing that the majority applied the correct "test" and that petitioners satisfied the "continuous" use and occupancy requirement, the dissent would have found that petitioners also satisfied the requirement that the use and occupancy be "exclusive." *Id.* at 15a-33a. The dissent argued that a claimant need not show "that it had the power to exclude other groups" in the absence of "evidence of use or occupancy by another group," *id.* at 24a, and that the district court found "evidence of use or occupancy by another tribe or group" only on the "periphery," which it took to mean an area outside the claimed territory. *Ibid*; see *id.* at 27a-30a. The dissent also faulted the district court for analyzing "the aboriginal rights" of individual villages rather than "the Chugach as a whole." *Id.* at 36a. The dissent ultimately concluded that petitioners had "established aboriginal hunting and fishing rights in at least part of the claimed area of the OCS" and that the case should be remanded for a determination of precisely which areas such rights had been established. *Id.* at 14a.

In a portion of the dissent joined by only three other judges, Judge Fletcher also concluded that petitioners' assertion of aboriginal rights is consistent with federal paramountcy and that the court of appeals should overrule its earlier decision in *Eyak I*. Pet. App. 30a-35a.

ARGUMENT

Petitioners contend that the court of appeals erred in holding that the district court's uncontested factual findings failed to establish that petitioners had "exclusive" use and occupancy of the claimed areas of the

EEZ. The court of appeals' decision is correct, and it does not conflict with any decision of this Court or of another court of appeals. Petitioners' claims, moreover, fail in any event because the sort of aboriginal rights asserted by petitioners cannot exist in ocean areas beyond the limits of state jurisdiction under the federal paramountcy doctrine. That alternative ground for affirmance, which was not passed on by the court of appeals, makes this case a particularly poor vehicle for the Court's review. Further review is not warranted.

1. The court of appeals held that petitioners failed to establish aboriginal hunting and fishing rights in the ocean waters beyond the three-mile limit of Alaska's jurisdiction. See Pet. App. 1a-13a. It is undisputed that the court applied the correct legal test when it required petitioners to establish "actual, exclusive, and continuous use and occupancy" of the claimed area "for a long time." *Id.* at 5a (citation omitted); see Pet. 3. Petitioners nevertheless contend (Pet. 13-23) that the court of appeals erred in concluding, based on the district court's uncontested factual findings, that petitioners failed to satisfy the requirement of "exclusive" use and occupancy of the claimed area. The court of appeals' decision is correct.

"Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *United States* v. *Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941). To decide whether a tribe had established its aboriginal occupation of an area, a court must determine whether "definable territory" was "occupied exclusively by them or whether they were lands wandered over by many tribes." *Ibid.*; see *id.* at 359. "Implicit in the concept of ownership of property is the right to exclude others"; and "[g]enerally speaking,

a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders." *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975). Accordingly, "[i]n order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and occupied the land to the exclusion of other Indian groups." *Ibid.*

As the court of appeals held (Pet. App. 5a-13a), petitioners failed to satisfy that test. The district court expressly found that "[n]one of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis." *Id.* at 94a. As support for that finding, the district court found that "residents of the ancestral villages seldom if ever visited" "huge portions of the OCS." *Ibid.* In other portions of the OCS (namely, the "periphery"), other groups "met up" with members of the ancestral villages to "fish[] and hunt[] on a seasonal basis." *Ibid.* The "residents of the ancestral villages" likely did use portions of the OCS "nearest" to their "respective villages" or "when traveling to the outlying islands," but the district court found that "none * * * was in a position to control or dominate access to *any* part of the OCS." *Ibid.* (emphasis added). As the district court found, the area (*i.e.*, the ocean waters beyond the three-mile limit of Alaska's jurisdiction) was simply "too large" and the population (*i.e.*, between 400 and 1500 total) "too few" for them to do so. *Id.* at 10a, 94a. And there was no other "evidence that the tribes exercised full dominion and control of the claimed area." *Id.* at 11a. None of those factual findings were contested (*id.* at 5a, 13a) and, on that factual record, the court of appeals correctly concluded that petitioners failed to demonstrate ex-

clusive use and occupancy of the claimed area. *Id.* at 13a.

2. Petitioners contend (Pet. 13-23) that the court of appeals' decision is flawed in a number of respects. But petitioners' arguments rest on a fundamentally flawed premise: that there was "no evidence that any other Native group similarly used and occupied the claimed area." Pet. 3.

The district court did not *find* that no other Native group used and occupied the claimed area. To the contrary, it expressly found that other groups used and occupied at least part of the claimed area—namely, the "periphery." Pet. App. 94a. The court also found that the ancestral villages did not use or occupy "huge portions of the OCS"—let alone *exclusively* use and occupy such areas. *Ibid.* And although the court did find it "more likely true than not true that residents of the ancestral villages made some use (probably seasonal) of the portions of the OCS nearest their respective villages and when traveling to the outlying islands," *ibid.*, it did *not* find that no other Native groups used and occupied the same portions of the OCS in the same manner.

All of the evidence relating to the use and occupancy of ocean areas in this case, including the evidence of use by members of the ancestral villages, was necessarily inferential. As the district court explained, "there is simply no way of knowing exactly where in the OCS residents of any particular village fished or took game, or the frequency of those efforts, or the size of the take." Pet. App. 93a. "[T]here is a dearth of information" from the relevant time period "as to what resource was actually targeted, who was doing the fishing and hunting, and what the results of the efforts were." *Ibid.* The district court nevertheless inferred that "[m]ore proba-

bly than not, a limited amount of fishing took place" when villagers traveled to the outlying islands, such as "an easy take that would not long delay the travelers[,]" and that village members made "some use" of portions of the OCS "nearest their respective villages." *Id.* at 93a-94a. The district court could reasonably infer that other groups made similar use of the claimed areas. That inference finds support in the district court's finding that the ancestral villages lacked the power to exclude other groups from the claimed areas given the sheer size of the ocean waters relative to the comparatively small number of villagers. *Id.* at 94a.

3. Petitioners contend (Pet. 13-23) that the court of appeals' decision conflicts with several decisions of the Federal Circuit, the Court of Claims, and the Indian Claims Commission on several different issues. Petitioners misstate the holdings in the purportedly conflicting cases and disregard the distinct facts of each case. There is no conflict.

In *United States* v. *Seminole Indians*, 180 Ct. Cl. 375, 385, 387 (1967), the court applied a deferential standard of review and determined that the evidence in the record was sufficient to support the Indian Claims Commission finding that the tribe's use and occupancy sustained "a claim of original title to the Florida peninsula." In that case, there was evidence that "the Seminoles held a virtual 'monopoly'" and an "unrivaled position" over the area in question; that they maintained encampments throughout the area; and that they absorbed any "'foreign' elements into their own ranks." *Id.* at 383. Even though the Seminoles unquestionably "were the exclusive occupants of the land," the court still found it necessary to decide whether "they availed themselves of their exclusive position." *Ibid.*

Contrary to petitioners' contention (Pet. 15), the *Seminole Indians* court did not engage in that additional inquiry *because* there were "scattered groupings of other Indians in the claimed area." The court simply noted that fact in explaining why the Seminoles were nevertheless "exclusive occupants of the land"—the threshold question. 180 Ct. Cl. at 383. The court did not hold that such an inquiry would be unnecessary if (on different facts) no other tribe or group used or occupied the claimed area. *Seminole Indians*, moreover, does not suggest that population density is irrelevant in determining whether exclusive occupancy has been established. Pet. 17-18. The court held only that, given other evidence that the tribe had "[p]hysical control or dominion" over the claimed area, "population thinness" did not defeat exclusivity. *Seminole Indians*, 180 Ct. Cl. at 385-386; see Pet. App. 10a-11a (distinguishing *Seminole Indians*).[5]

Petitioners also rely on *Wichita Indian Tribe* v. *United States*, 696 F.2d 1378 (Fed. Cir. 1983) (*Wichita*). In that case, however, there was no dispute that the Wichitas "had held aboriginal title to various tracts of the claimed lands." *Ibid.* The only issue was whether they had since abandoned such title. *Ibid.* Making clear

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[5] Petitioners also contend (Pet. 18) that, in *Seminole Indians*, the court held that "for purposes of demonstrating exclusive use, the relevant unit is not a village or even necessarily one tribe" but, rather, "a socio-cultural group that uses and occupies a generally definable territory." But the court said nothing about that issue. At most, in discussing "[c]ultural assimilation[,]" the court explained that "whatever land rights were possessed by those absorbed may be recognized as inhering in the culture that emerges." *Seminole Indians*, 180 Ct. Cl. at 386. Here, petitioners do not claim that one of the ancestral villages "absorbed" the others, permitting imputation of the absorbed cultures' land rights.

that its analysis was specific to the issue of "abandonment," the court concluded that the record evidence demonstrated the Wichitas retained aboriginal title to at least some parts of the claimed area. *Id.* at 1380-1384.

Here, the court of appeals held that petitioners failed to demonstrate aboriginal title to *any* part of the ocean waters three miles beyond Alaska's jurisdiction. That does not create a conflict. It simply reflects the different factual records and legal issues in the two cases. Contrary to petitioners' contention (Pet. 20), the court of appeals here did not rest solely on the district court's finding that "neighboring tribes also fished and hunted in waters 'on the periphery.'" The court of appeals also relied on the district court's factual findings that, *inter alia*, "huge portions" of the claimed territory had seldom (if ever) been used by the ancestral villages and that the villages lacked the manpower to exclude others from the vast expanse of the claimed ocean waters. See Pet. App. 10a-12a. To the extent petitioners now suggest that the district court should have subdivided the "inner portion" of the claimed ocean waters (Pet. 22), they did not make any such claim below.[6]

Petitioners' reliance on *Zuni Tribe* v. *United States*, 12 Cl. Ct. 607 (1987) (*Zuni*), is similarly misplaced. In that case, the court found that the Zuni exclusively used and occupied the claimed area even though other tribes also used certain portions of the claimed area. *Id.* at 608. But, as the court explained, the other tribes' uses

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[6] Petitioners also note (Pet. 15-16) that the court in *Wichita* held that "the presence of other Indians in a region as 'guests' of a possessing tribe is not sufficient to defeat the aboriginal rights of the tribe." The court of appeals here, however, did not hold otherwise. If other Indians are merely "guests" of the possessing tribe, the possessing tribe necessarily *has* "the power to exclude" (Pet. 16).

were "either temporary and under agreement with the Zuni or w[ere] of specific short duration and the result of raid or other hostile intrusion." *Ibid.* Because of the "limited extent" of such use, the court concluded that it did not "vitiate or detract" from the court's finding of exclusivity. *Ibid.*

Zuni therefore does not stand for the broad proposition that "aboriginal rights survive[] if neighboring Native groups only used the 'periphery'" of the claimed territory. Pet. 21. Nor did the court of appeals here hold the opposite. As explained above, the court did not rely solely on the district court's finding with respect to the periphery. *Zuni* also does not suggest (Pet. 17-18) that population density is never relevant to an exclusivity determination. In a footnote, the court did reject the government's reliance on the size of the Zuni population, 12 Cl. Ct. at 608 n.2, but, unlike here, "there was other evidence that the tribes involved had dominion and control of their claimed lands," Pet. App. 10a.[7]

4. Contrary to petitioners' contention (Pet. 23-25), the federal paramountcy doctrine is another reason to deny further review, not grant it. Although that issue was not decided by the court of appeals, it would be an alternative ground for affirmance.[8] For the reasons explained by the district court (Pet. App. 57a-67a), peti-

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[7] The other cited cases (Pet. 18, 20-23) fare no better. Each consists of case- and fact-specific rulings by trial tribunals, and none establishes the broad legal principles ascribed to them by petitioners.

[8] The Secretary raised a number of additional arguments that the court of appeals did not address, but that would bar relief even if petitioners possessed aboriginal title to some portion of the claimed area. See, *e.g.*, Resp. C.A. Br. 48-49 (freedom of the seas doctrine); *id.* at 53-56 (IFQ regulations are, in any event, reasonable and nondiscriminatory).

tioners' assertion of aboriginal rights conflicts with the paramount authority of the federal government over the resources in the EEZ.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2013

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No. 12-668

In the Supreme Court of the United States

NATIVE VILLAGE OF EYAK, ET AL., PETITIONERS

v.

PENNY PRITZKER, 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

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QUESTION PRESENTED

Whether the court of appeals correctly held, based on the district court's uncontested factual findings, that petitioners failed to demonstrate the historic exclusive use and occupancy of ocean waters beyond the three-mile limit of Alaska's jurisdiction necessary to establish aboriginal title.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Treaty, statutes and regulations: Page

Miscellaneous:

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-37a) is reported at 688 F.3d 619. A prior order of the en banc court of appeals (Pet. App. 72a-73a) is reported at 375 F.3d 1218. The district court's findings of fact and conclusions of law (Pet. App. 76a-101a) are unreported. Prior orders of the district court (Pet. App. 38a-71a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2012. On October 23, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 28, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before 1993, there was no limitation on the number of vessels that could engage in the commercial harvest of halibut or black cod (sablefish) in the waters beyond the three-mile limit of state jurisdiction in the Gulf of Alaska, known as the "exclusive economic zone" (EEZ) and at times referred to as the Outer Continental Shelf (OCS).[1] The result was a rapid rise in the number of vessels engaged in those commercial fisheries and increasingly short seasons, leading to serious safety and allocation concerns. See 57 Fed. Reg. 57,130-57,132 (Dec. 3, 1992). The "race for fish" prompted the Department of Commerce to adopt a fishery management plan. *Alliance Against IFQs* v. *Brown*, 84 F.3d 343, 346 (9th Cir. 1996), cert. denied, 520 U.S. 1185 (1997).

In 1993, the Secretary of Commerce (Secretary) promulgated regulations establishing individual fishing quotas for halibut and sablefish in the EEZ. See 58 Fed. Reg. 59,375 (Nov. 9, 1993).[2] Under the regulations,

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[1] When speaking of fishery resources, however, it is appropriate to refer to the area beyond state jurisdiction as the 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 (Magnuson-Stevens Act), 16 U.S.C. 1811(a). The courts below often referred to the two interchangeably, and the difference in nomenclature makes no substantive difference for the purposes of this case.

[2] The regulations at issue were promulgated pursuant to the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.*, and the Northern Pacific Halibut Act of 1982, 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, U.S.-Can., Mar. 2, 1953, 5 U.S.T. 5. In the Magnuson-Stevens Act, the United States claims "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the [EEZ]." 16 U.S.C. 1811(a).

any boat fishing commercially for halibut or sablefish must have an Individual Fishing Quota (IFQ) permit that limits the amount of fish the vessel may take. See 50 C.F.R. 679.4(d)(1). The Secretary originally allocated IFQs to persons or entities that owned or leased vessels used to catch halibut or sablefish, respectively, and who actually caught such fish, at any time during 1988, 1989, or 1990. See 50 C.F.R. 679.40(a)(2)(i)(A)-(B) and (3)(i). Persons or entities who did not qualify for an IFQ permit may still obtain one from an original participant. See 50 C.F.R. 679.41. And, even without an IFQ permit, the current regulations permit members of recognized "Alaska Native tribe[s]" to engage in "subsistence" fishing, which allows them to catch up to 20 halibut per person per day. See 50 C.F.R. 300.65(g) and (h).[3] Because of the depth at which sablefish are found, the regulations assume there is no subsistence harvest. See Pet. App. 49a-50a.

2. Petitioners, five Native Villages on the southern coast of Alaska, challenged the Secretary's 1993 halibut and sablefish IFQ regulations. In an earlier action filed in 1995, petitioners claimed aboriginal title to the ocean waters beyond the three-mile limit of Alaska's jurisdiction and alleged, among other things, that the regulations violated their exclusive hunting and fishing rights. See Pet. App. 43a-44a, 77a. The Ninth Circuit held that petitioners' claim of exclusive rights conflicts with the

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[3] Before 2003, the regulations did not separately define subsistence fishing for halibut in Alaska but, rather covered such activities under the definition of "sport" fishing. See 50 C.F.R. 300.61 (2002). The 2003 amendments created a new regime for Alaska Natives and other subsistence fishermen and increased the bag limit, as well as the number of hooks allowed and the duration of the season. See 68 Fed. Reg. 18,145 (Apr. 15, 2003).

paramount authority of the federal government over the resources in that area. See *Native Vill. of Eyak* v. *Trawler Diane Marie, Inc.*, 154 F.3d 1090, 1092-1097 (1998) (*Eyak I*). This Court denied a petition for a writ of certiorari. See 527 U.S. 1003 (No. 98-1437).

3. In 1998, petitioners filed a second action, again challenging the 1993 halibut and sablefish regulations. Pet. App. 44a-45a, 78a. This time petitioners asserted *non*-exclusive aboriginal hunting and fishing rights in the EEZ and argued that the Secretary's regulations effectively prohibit their tribal members from exercising such rights. *Id.* at 78a. The Secretary filed a motion for summary judgment arguing, *inter alia*, that petitioners' claim of non-exclusive rights conflicts with the paramount authority of the federal government over the resources in the EEZ and that, in any event, petitioners do not have non-exclusive aboriginal rights to fish or hunt in those waters. *Id.* at 45a, 79a.

a. The district court granted the Secretary's motion. Pet. App. 38a-71a. The court did not decide whether petitioners had non-exclusive aboriginal rights to fish or hunt in the EEZ waters. *Id.* at 71a. Instead, finding "no legal difference between an exclusive claim to hunt and fish in the OCS and a non-exclusive claim when it comes to the doctrine of federal paramountcy," it held that petitioners' assertion of non-exclusive aboriginal rights was precluded by the same federal paramountcy doctrine that disposed of petitioners' initial suit. *Id.* at 61a.

b. The court of appeals decided to hear the case en banc to resolve any conflict between *Eyak I* and *Village of Gambell* v. *Hodel*, 869 F.2d 1273 (9th Cir. 1989) (*Gambell III*), on the issue of federal paramountcy.[4]

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[4] In *Gambell III*, the court of appeals held that Section 4(b) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, which

The court, however, ultimately declined to decide that question. Instead, it vacated and remanded "with instructions that the district court decide what aboriginal rights to fish beyond the three-mile limit, if any, [petitioners] have." Pet. App. 73a. The court of appeals instructed the district court to "assume," contrary to its initial determination, "that the villages' aboriginal rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law." *Ibid.*

c. On remand, the district court explained that "[a]boriginal hunting and fishing rights flow from aboriginal title," and that "[t]o establish aboriginal title, there must be a showing of actual, exclusive and continuous use and occupancy for a long time prior to the loss of the land." C.A. Supp. E.R. 8-9 (quoting *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975)) (internal quotation marks omitted). After a seven-day trial including testimony from experts in anthropology, fisheries biology, and native languages, as well as from tribal elders, the district court found that petitioners failed to establish aboriginal hunting and fishing rights in the claimed area. Pet. App. 76a-101a.

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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. 869 F.2d at 1278-1280. The court further observed, however, that such claims are limited by federal paramountcy principles. See *id.* at 1276 & n.3. The court ultimately held that the paramountcy doctrine did not control that case 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. The court then remanded with instructions that the district court determine "whether the drilling and other activities by the oil companies will interfere significantly with the [plaintiffs'] exercise" of their asserted subsistence rights. *Id.* at 1280.

The district court issued detailed findings of fact and conclusions of law. The court found that petitioners' "predecessor villages were independent, non-political entities" that were "independent of one another" and that sustained themselves by their "own efforts." Pet. App. 91a-92a. The court found no evidence that the villages shared fish camps or that they "joined together to fish" on a "regular basis." *Id.* at 92a. To the contrary, the court found that, during the relevant time period, the predecessor villages "were free-standing, self-supporting, independent entities" that likely kept the other villages "at arm's length," as other "villagers could be expected to poach or steal or raid as often as they sought to visit in a friendly fashion or trade." *Ibid.*; see *id.* at 90a.

The district court also found that "the residents of [petitioners'] ancestral villages made irregular use of the OCS," but that there was "no way of knowing exactly where in the OCS residents of any particular village fished or took game, or the frequency of those efforts, or the size of the take." Pet. App. 92a-93a. The court found that while it was "[m]ore probabl[e] than not" that "a limited amount of fishing took place" during trips across the OCS to outlying islands, "any fishing that was done would have been purely opportunistic—an easy take that would not long delay the travelers—rather than a combined hunting/fishing/trading trip." *Id.* at 93a.

The district court further found that while residents of the ancestral villages likely "made some use (probably seasonal) of the portions of the OCS nearest their respective villages and when traveling to the outlying islands, none of the ancestral villages was in a position to control or dominate access to any part of the OCS."

Pet. App. 94a. The court explained that "there were huge portions of the OCS being claimed by [petitioners] which residents of the ancestral villages seldom if ever visited." *Id.* at 93a-94a. And although the court deemed it "likely that some hunting and fishing took place in the near parts of the OCS," the court found "a dearth of information from pre-contact times as to what resource was actually targeted, who was doing the fishing and hunting, and what the results of the efforts were." *Id.* at 93a. The court additionally found that "[t]he area was too large" and "the number of men of an age who would have been able to defend or control high seas marine areas were too few." *Id.* at 94a. Moreover, the court continued, some of the areas in question were "on the periphery of the Chugach territory[,]" "where the Chugach villagers met up with" other groups who likewise "fished and hunted on a seasonal basis." *Ibid.* Accordingly, the court found that "[n]one of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis." *Ibid.*

4. In a per curiam decision, the same en banc panel of the court of appeals affirmed. Pet. App. 1a-37a.

a. Noting that petitioners did not "challenge the district court's factual findings," the court of appeals first considered "whether the facts found by the district court support [petitioners'] claim to aboriginal rights." Pet. App. 5a. To answer that question, the court assessed whether petitioners had proven "actual, exclusive, and continuous use and occupancy 'for a long time' of the claimed area." *Ibid.* (quoting *Sac & Fox Tribe of Indians* v. *United States*, 383 F.2d 991, 998 (Ct. Cl.), cert denied, 389 U.S. 900 (1967) (Table)). Applying a "liberal approach[,]" the court held that petitioners established

"continuous" use and occupancy of the claimed area, but failed to establish "exclusive" use and occupancy of that area. *Id.* at 6a (citation omitted); see *id.* at 7a-13a.

Relying on the district court's uncontested factual findings, the court of appeals noted that "huge portions of the OCS being claimed were 'seldom if ever visited.'" Pet. App. 11a (quoting *id.* at 93a-94a). As for the remaining portions of the OCS, the court of appeals explained that the district court had found that the "periphery" was used by other groups to hunt and fish, and that the reference to the "periphery" "*include*[*d*] the outer boundary of the claimed area." *Id.* at 9a. But even if the district court meant the word "periphery" to refer to areas outside the claimed territory, the court of appeals continued, the district court also "found that [petitioners'] claimed area was too large and there were too few people who could control it." *Id.* at 10a. The court noted the district court's finding that the villages were independent entities that rarely acted in concert. *Id.* at 12a. The court further explained, however, that even viewed collectively, there were simply too few Natives (between 400 and 1500 total) to control the large areas of ocean claimed. *Id.* at 10a. And, the court continued, there was no other evidence of "full dominion and control of the claimed area." *Id.* at 10a-11a. The court thus concluded that the district court's finding that "none of the ancestral villages was in a position to control or dominate access to any part of the OCS" was supported by the record. *Id.* at 11a (quoting *id.* at 94a).

"Based on the uncontested factual findings of the district court," the court of appeals held that petitioners "failed to establish an entitlement to non-exclusive aboriginal rights on the OCS." Pet. App. 13a. The court therefore found it unnecessary to decide whether peti-

tioners' assertion of rights conflicts "with the federal paramountcy doctrine." *Ibid.*

b. Judge William Fletcher, joined by four other judges, dissented. Pet. App. 14a-37a. Although agreeing that the majority applied the correct "test" and that petitioners satisfied the "continuous" use and occupancy requirement, the dissent would have found that petitioners also satisfied the requirement that the use and occupancy be "exclusive." *Id.* at 15a-33a. The dissent argued that a claimant need not show "that it had the power to exclude other groups" in the absence of "evidence of use or occupancy by another group," *id.* at 24a, and that the district court found "evidence of use or occupancy by another tribe or group" only on the "periphery," which it took to mean an area outside the claimed territory. *Ibid*; see *id.* at 27a-30a. The dissent also faulted the district court for analyzing "the aboriginal rights" of individual villages rather than "the Chugach as a whole." *Id.* at 36a. The dissent ultimately concluded that petitioners had "established aboriginal hunting and fishing rights in at least part of the claimed area of the OCS" and that the case should be remanded for a determination of precisely which areas such rights had been established. *Id.* at 14a.

In a portion of the dissent joined by only three other judges, Judge Fletcher also concluded that petitioners' assertion of aboriginal rights is consistent with federal paramountcy and that the court of appeals should overrule its earlier decision in *Eyak I*. Pet. App. 30a-35a.

ARGUMENT

Petitioners contend that the court of appeals erred in holding that the district court's uncontested factual findings failed to establish that petitioners had "exclusive" use and occupancy of the claimed areas of the

EEZ. The court of appeals' decision is correct, and it does not conflict with any decision of this Court or of another court of appeals. Petitioners' claims, moreover, fail in any event because the sort of aboriginal rights asserted by petitioners cannot exist in ocean areas beyond the limits of state jurisdiction under the federal paramountcy doctrine. That alternative ground for affirmance, which was not passed on by the court of appeals, makes this case a particularly poor vehicle for the Court's review. Further review is not warranted.

1. The court of appeals held that petitioners failed to establish aboriginal hunting and fishing rights in the ocean waters beyond the three-mile limit of Alaska's jurisdiction. See Pet. App. 1a-13a. It is undisputed that the court applied the correct legal test when it required petitioners to establish "actual, exclusive, and continuous use and occupancy" of the claimed area "for a long time." *Id.* at 5a (citation omitted); see Pet. 3. Petitioners nevertheless contend (Pet. 13-23) that the court of appeals erred in concluding, based on the district court's uncontested factual findings, that petitioners failed to satisfy the requirement of "exclusive" use and occupancy of the claimed area. The court of appeals' decision is correct.

"Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *United States* v. *Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941). To decide whether a tribe had established its aboriginal occupation of an area, a court must determine whether "definable territory" was "occupied exclusively by them or whether they were lands wandered over by many tribes." *Ibid.*; see *id.* at 359. "Implicit in the concept of ownership of property is the right to exclude others"; and "[g]enerally speaking,

a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders." *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975). Accordingly, "[i]n order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and occupied the land to the exclusion of other Indian groups." *Ibid.*

As the court of appeals held (Pet. App. 5a-13a), petitioners failed to satisfy that test. The district court expressly found that "[n]one of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis." *Id.* at 94a. As support for that finding, the district court found that "residents of the ancestral villages seldom if ever visited" "huge portions of the OCS." *Ibid.* In other portions of the OCS (namely, the "periphery"), other groups "met up" with members of the ancestral villages to "fish[] and hunt[] on a seasonal basis." *Ibid.* The "residents of the ancestral villages" likely did use portions of the OCS "nearest" to their "respective villages" or "when traveling to the outlying islands," but the district court found that "none * * * was in a position to control or dominate access to *any* part of the OCS." *Ibid.* (emphasis added). As the district court found, the area (*i.e.*, the ocean waters beyond the three-mile limit of Alaska's jurisdiction) was simply "too large" and the population (*i.e.*, between 400 and 1500 total) "too few" for them to do so. *Id.* at 10a, 94a. And there was no other "evidence that the tribes exercised full dominion and control of the claimed area." *Id.* at 11a. None of those factual findings were contested (*id.* at 5a, 13a) and, on that factual record, the court of appeals correctly concluded that petitioners failed to demonstrate ex-

clusive use and occupancy of the claimed area. *Id.* at 13a.

2. Petitioners contend (Pet. 13-23) that the court of appeals' decision is flawed in a number of respects. But petitioners' arguments rest on a fundamentally flawed premise: that there was "no evidence that any other Native group similarly used and occupied the claimed area." Pet. 3.

The district court did not *find* that no other Native group used and occupied the claimed area. To the contrary, it expressly found that other groups used and occupied at least part of the claimed area—namely, the "periphery." Pet. App. 94a. The court also found that the ancestral villages did not use or occupy "huge portions of the OCS"—let alone *exclusively* use and occupy such areas. *Ibid.* And although the court did find it "more likely true than not true that residents of the ancestral villages made some use (probably seasonal) of the portions of the OCS nearest their respective villages and when traveling to the outlying islands," *ibid.*, it did *not* find that no other Native groups used and occupied the same portions of the OCS in the same manner.

All of the evidence relating to the use and occupancy of ocean areas in this case, including the evidence of use by members of the ancestral villages, was necessarily inferential. As the district court explained, "there is simply no way of knowing exactly where in the OCS residents of any particular village fished or took game, or the frequency of those efforts, or the size of the take." Pet. App. 93a. "[T]here is a dearth of information" from the relevant time period "as to what resource was actually targeted, who was doing the fishing and hunting, and what the results of the efforts were." *Ibid.* The district court nevertheless inferred that "[m]ore proba-

bly than not, a limited amount of fishing took place" when villagers traveled to the outlying islands, such as "an easy take that would not long delay the travelers[,]" and that village members made "some use" of portions of the OCS "nearest their respective villages." *Id.* at 93a-94a. The district court could reasonably infer that other groups made similar use of the claimed areas. That inference finds support in the district court's finding that the ancestral villages lacked the power to exclude other groups from the claimed areas given the sheer size of the ocean waters relative to the comparatively small number of villagers. *Id.* at 94a.

3. Petitioners contend (Pet. 13-23) that the court of appeals' decision conflicts with several decisions of the Federal Circuit, the Court of Claims, and the Indian Claims Commission on several different issues. Petitioners misstate the holdings in the purportedly conflicting cases and disregard the distinct facts of each case. There is no conflict.

In *United States* v. *Seminole Indians*, 180 Ct. Cl. 375, 385, 387 (1967), the court applied a deferential standard of review and determined that the evidence in the record was sufficient to support the Indian Claims Commission finding that the tribe's use and occupancy sustained "a claim of original title to the Florida peninsula." In that case, there was evidence that "the Seminoles held a virtual 'monopoly'" and an "unrivaled position" over the area in question; that they maintained encampments throughout the area; and that they absorbed any "'foreign' elements into their own ranks." *Id.* at 383. Even though the Seminoles unquestionably "were the exclusive occupants of the land," the court still found it necessary to decide whether "they availed themselves of their exclusive position." *Ibid.*

Contrary to petitioners' contention (Pet. 15), the *Seminole Indians* court did not engage in that additional inquiry *because* there were "scattered groupings of other Indians in the claimed area." The court simply noted that fact in explaining why the Seminoles were nevertheless "exclusive occupants of the land"—the threshold question. 180 Ct. Cl. at 383. The court did not hold that such an inquiry would be unnecessary if (on different facts) no other tribe or group used or occupied the claimed area. *Seminole Indians*, moreover, does not suggest that population density is irrelevant in determining whether exclusive occupancy has been established. Pet. 17-18. The court held only that, given other evidence that the tribe had "[p]hysical control or dominion" over the claimed area, "population thinness" did not defeat exclusivity. *Seminole Indians*, 180 Ct. Cl. at 385-386; see Pet. App. 10a-11a (distinguishing *Seminole Indians*).[5]

Petitioners also rely on *Wichita Indian Tribe* v. *United States*, 696 F.2d 1378 (Fed. Cir. 1983) (*Wichita*). In that case, however, there was no dispute that the Wichitas "had held aboriginal title to various tracts of the claimed lands." *Ibid.* The only issue was whether they had since abandoned such title. *Ibid.* Making clear

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[5] Petitioners also contend (Pet. 18) that, in *Seminole Indians*, the court held that "for purposes of demonstrating exclusive use, the relevant unit is not a village or even necessarily one tribe" but, rather, "a socio-cultural group that uses and occupies a generally definable territory." But the court said nothing about that issue. At most, in discussing "[c]ultural assimilation[,]" the court explained that "whatever land rights were possessed by those absorbed may be recognized as inhering in the culture that emerges." *Seminole Indians*, 180 Ct. Cl. at 386. Here, petitioners do not claim that one of the ancestral villages "absorbed" the others, permitting imputation of the absorbed cultures' land rights.

that its analysis was specific to the issue of "abandonment," the court concluded that the record evidence demonstrated the Wichitas retained aboriginal title to at least some parts of the claimed area. *Id.* at 1380-1384.

Here, the court of appeals held that petitioners failed to demonstrate aboriginal title to *any* part of the ocean waters three miles beyond Alaska's jurisdiction. That does not create a conflict. It simply reflects the different factual records and legal issues in the two cases. Contrary to petitioners' contention (Pet. 20), the court of appeals here did not rest solely on the district court's finding that "neighboring tribes also fished and hunted in waters 'on the periphery.'" The court of appeals also relied on the district court's factual findings that, *inter alia*, "huge portions" of the claimed territory had seldom (if ever) been used by the ancestral villages and that the villages lacked the manpower to exclude others from the vast expanse of the claimed ocean waters. See Pet. App. 10a-12a. To the extent petitioners now suggest that the district court should have subdivided the "inner portion" of the claimed ocean waters (Pet. 22), they did not make any such claim below.[6]

Petitioners' reliance on *Zuni Tribe* v. *United States*, 12 Cl. Ct. 607 (1987) (*Zuni*), is similarly misplaced. In that case, the court found that the Zuni exclusively used and occupied the claimed area even though other tribes also used certain portions of the claimed area. *Id.* at 608. But, as the court explained, the other tribes' uses

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[6] Petitioners also note (Pet. 15-16) that the court in *Wichita* held that "the presence of other Indians in a region as 'guests' of a possessing tribe is not sufficient to defeat the aboriginal rights of the tribe." The court of appeals here, however, did not hold otherwise. If other Indians are merely "guests" of the possessing tribe, the possessing tribe necessarily *has* "the power to exclude" (Pet. 16).

were "either temporary and under agreement with the Zuni or w[ere] of specific short duration and the result of raid or other hostile intrusion." *Ibid.* Because of the "limited extent" of such use, the court concluded that it did not "vitiate or detract" from the court's finding of exclusivity. *Ibid.*

Zuni therefore does not stand for the broad proposition that "aboriginal rights survive[] if neighboring Native groups only used the 'periphery'" of the claimed territory. Pet. 21. Nor did the court of appeals here hold the opposite. As explained above, the court did not rely solely on the district court's finding with respect to the periphery. *Zuni* also does not suggest (Pet. 17-18) that population density is never relevant to an exclusivity determination. In a footnote, the court did reject the government's reliance on the size of the Zuni population, 12 Cl. Ct. at 608 n.2, but, unlike here, "there was other evidence that the tribes involved had dominion and control of their claimed lands," Pet. App. 10a.[7]

4. Contrary to petitioners' contention (Pet. 23-25), the federal paramountcy doctrine is another reason to deny further review, not grant it. Although that issue was not decided by the court of appeals, it would be an alternative ground for affirmance.[8] For the reasons explained by the district court (Pet. App. 57a-67a), peti-

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[7] The other cited cases (Pet. 18, 20-23) fare no better. Each consists of case- and fact-specific rulings by trial tribunals, and none establishes the broad legal principles ascribed to them by petitioners.

[8] The Secretary raised a number of additional arguments that the court of appeals did not address, but that would bar relief even if petitioners possessed aboriginal title to some portion of the claimed area. See, *e.g.*, Resp. C.A. Br. 48-49 (freedom of the seas doctrine); *id.* at 53-56 (IFQ regulations are, in any event, reasonable and nondiscriminatory).

tioners' assertion of aboriginal rights conflicts with the paramount authority of the federal government over the resources in the EEZ.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2013

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