No. 07-1372

In The Supreme Court of the United States

STATE OF HAWAII, ET AL.,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Hawaii

BRIEF OF *AMICUS CURIAE* ALASKA FEDERATION OF NATIVES, INC. IN SUPPORT OF RESPONDENTS

RIYAZ KANJI
KANJI AND KATZEN PLLC
101 North Main Street
Suite 555
Ann Arbor, MI 48104
(734) 769-5400

DAVID S. CASE, P.C.
Counsel of Record
MATTHEW MEAD
LANDYE BENNETT BLUMSTEIN LLP
701 West 8th Avenue
Suite 1200
Anchorage, AK 99501
(907) 276-5152

CAROL H. DANIEL
ALASKA FEDERATION OF NATIVES, INC.
1577 C Street
Suite 300
Anchorage, AK 99501
(907) 274-3611

Counsel for Amicus

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

FEDERAL REGULATION

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF *AMICUS*

AFN is a statewide, nonprofit organization representing over 120,000 Alaska Natives on a diverse range of issues important to the Alaska Native community. Its membership consists of over 244 Alaska Native Village Corporations and tribes, 13 regional, for-profit Native corporations formed under the 1971 Alaska Native Claims Settlement Act and 12 regional, nonprofit tribal consortia. These consortia contract as "tribal organizations" under the Indian Self Determination and Education Assistance Act (ISDEA) to furnish a range of health and social services to their member tribes. AFN is governed by a 37-member Board of Directors composed of a representative from each of the 13 Native, regional, for-profit corporations, representative from each of the 12 regional, nonprofit tribal consortia, and a tribal representative chosen from among the villages in each of the same ANCSA regions. For over four decades, AFN has been the principal forum and voice of Alaska Natives in dealing with critical public policy issues.[1]

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Hawaii Supreme Court imposed a moratorium on the disposition of certain state lands pending resolution of the Native Hawaiian land claims. A federal, executive branch moratorium also prevented disposition of Alaska's Statehood Act land selections pending resolution of the Alaska Native land claims. Alaska Natives are frequently cited as the indigenous group most analogous to that of Native Hawaiians when analyzing concepts of federal Indian law and Congress' plenary power to regulate Indian affairs.

The issues in this appeal do not challenge the constitutionality of the state or federal programs benefiting the indigenous peoples of the Hawaiian archipelago[2] or call for the resolution of any principles of federal Indian law as applied to Native Hawaiians. Nonetheless, *amicus* briefs filed in support of Appellants, such as those of the Mountain States Legal Foundation and the Pacific Legal Foundation would have this Court use this occasion to revisit and reverse over 200 years of federal legal precedent.[3] This

---

[2] *See* Brief of Appellant ("App.Br.") at (i) and 18-20 discussing the merits of the appeal and at 27, n.16 disclaiming any challenge to the "constitutionality of any governmental program directed to Native Hawaiians."

[3] *See, e.g.*, *Amicus Curiae* Brief of Mountain States Legal Foundation in Support of Petitioners, at 24, concluding that: "Congress's powers to treat American Indians tribes and their members, much less persons of Hawaiian ancestry, in a special fashion is very limited."

precedent defines the scope of the federal government's plenary power to determine the political status of and the scope of the trust responsibility owed the indigenous peoples now within the borders of the United States.

AFN opposes and responds to these needless efforts to expand the narrow issues to be decided in this appeal. As with the Native Hawaiians,[4] it was long contended that the Alaska Natives were not "Indians" subject to the exercise of federal plenary power under principles of federal Indian law. Federal plenary power proved crucial to preserve and protect the political status and land rights of the indigenous peoples of Alaska in 1966 when the Secretary of the Interior imposed a moratorium on the disposition of Alaska lands. *See* discussion of "land freeze" on pp. 29-31. As now partially exercised through the State of Hawaii, the same trust responsibility is also crucial to the preservation and protection of those fundamentally similar rights in Hawaii under state law. But these issues are not drawn into question in this appeal and the Court should stay its hand. The petition for writ of certiorari should be dismissed. In

[4] *Amicus* AFN uses the term "Native Hawaiian" to refer to the descendants of the Native people of Hawaii who inhabited the Hawaiian Islands prior to 1778 and as the term is defined in the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993), reproduced at Pt.App. 103a-111a.

the alternative, the judgment of the Hawaii Supreme Court should be vacated, and the case remanded for further proceedings.

ARGUMENT

I. FEDERAL PLENARY POWER OVER "INDIAN" AFFAIRS IS DERIVED FROM TWO SOURCES – FEDERAL COMMON LAW AND THE UNITED STATES CONSTITUTION.

A. Plenary power is derived in part from the historic, common law relationship of the United States to the indigenous peoples brought within its borders.

From its earliest decisions this Court has held that the status of the indigenous peoples under common law principles of federal Indian law is unique, and "unlike that of any other people in existence."[5] Their governments are "best denominated as domestic dependent nations."[6]

> From their very weakness and helplessness so largely due to the course of dealing of the Federal Government with them . . . there arises the duty of protection, and with it the power. This has always been recognized by

[5] *Cherokee Nation v. Georgia*, 30 U.S. 1 at 12 (1831).

[6] *Id*. at 13.

> the Executive and Congress, and by this Court wherever the question has arisen.[7]

These principles have been specifically applied to the Alaska Natives by the State of Alaska's highest court (relying on this Court's precedents) to confirm the tribal status of the Alaska Native Villages and their inherent jurisdiction to adjudicate child custody and other matters "internal" to the tribe "from a source of sovereignty independent of the land they occupy."[8]

This Court's 21st century decisions further explicate the common law basis of federal plenary power. For example, in *United States v. Lara,* this Court upheld the plenary power of Congress to reestablish inherent tribal jurisdiction to prosecute any Native American for violating tribal laws. Citing to

---

[7] *United States v. Kagama*, 118 U.S. 375, 383, 384 (1886).

[8] *John v. Baker I*, 982 P.2d 738, 754 (Alaska 1999); *cert. denied*, 528 U.S. 1182 (2000); *see also United States v. Kagama*, 118 U.S. 375, 379-80 (1886) (enactment of Major Crimes Act); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-65 (1903) (termination of treaty rights); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (Indian tribes are separate sovereigns for purposes of double jeopardy); *United States v. Antelope*, 430 U.S. 641, 645 (1977) (federal government addressing political entities, not members of particular race); *Morton v. Mancari*, 417 U.S. 535, 551 (1994) (Indian preference in employment); *United States v. Lara*, 541 U.S. 193, 207 (2004) (acknowledging the federal common law component of Indian rights, which common law federal courts develop as a necessary expedient when Congress has not spoken to a particular issue) (citations, quotations and emphasis omitted).

the military and foreign policy origins of federal Indian common law, the court concluded that:

> Congress' legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of pre-Constitutional powers necessarily inherent in any Federal Government, namely, powers of that this Court has described as 'necessary concomitants of nationality.'[9]

B. Plenary power is also derived from the Commerce and Treaty Clauses of the United States Constitution.

These provisions, together with the Supremacy Clause, comprise all that is necessary to afford Congress complete power to enact legislation related to Native Americans.[10] When Congress so acts in the field of Indian affairs it preempts contrary state legislation that might infringe upon the rights of reservation Indians to govern themselves.[11] Similarly, when Congress or the Executive branch recognizes a "distinctly Indian community" as an "Indian Tribe," it is a "political question" solely determined by the

---

[9] *United States v. Lara*, 541 U.S. 193, 201 (2004) (citation omitted).

[10] *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

[11] *Id.*; *accord Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).

"political branches of government" and not reviewable by this Court.[12]

Plenary power is complete but not absolute. It cannot be exercised arbitrarily to bring a non-indigenous people within the scope of its Congressional power.[13] Nor can it be exercised to deprive a tribe or its members protection under the Fifth Amendment or other Constitutional rights.[14]

The Court emphasized the scope of Congress' plenary power in *United States v. Lara*,[15] as granting Congress the power to both restrict and relax restrictions on tribal sovereign authority. There, the Court noted the need for such comprehensive legislative power "would have seemed obvious" because the government's Indian policies were:

> Applicable to numerous tribes as diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically and if the needs of the Nation and those of the tribes changed over time.[16]

Federal policy has indeed fluctuated over time from the early treaty era through 1871, interspersed with removal, then followed by the General Allotment

---

[12] *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

[13] *Sandoval*, 231 U.S. *supra* at 46-47.

[14] *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-85 (1977).

[15] 541 U.S. *supra* at 202.

[16] *Id*.

Act of 1887 and "assimilation" designed to breakup tribal lands. Following the loss of some 90 million acres under the General Allotment Act, Congress adopted the Indian Reorganization Act in 1934 to prevent further loss of land, which, in turn, was followed by the "termination" policy of the 1950's and 1960's. Indian policy now seeks greater tribal autonomy within the framework of a "government-to-government relationship" between the tribes and the federal government.[17]

II. THE FEDERAL GOVERNMENT DID NOT INITIALLY TREAT THE ALASKA NATIVES AS INDIGENOUS PEOPLE, BUT THAT POLICY WAS REVERSED BY THE EARLY TWENTIETH CENTURY.

Alaska is often a mystery for those who do not live there. Nowhere is this truer than in the application of federal Indian law to the Alaska Natives. Federal officials, often drawing from their experience of the "Indians" on reservations in the lower 48 states, sometimes assumed the same legal principles applicable there did not apply in Alaska. This was perhaps due to the perception that Alaska's history is somehow "different" and that, like the Native Hawaiians, the Alaska Natives were not initially considered to have the same relation to the federal government

[17] *Id*.

as did the "Indians."[18] It was initially also a common assumption that the 1971 Alaska Native Claims Settlement Act (ANCSA)[19] untethered the Alaska Natives and the federal government from the normal legal principles applicable to their relationship. Neither perception is accurate.

The fundamental "difference" in Alaska's American history is that it began in 1867 with the Russian Treaty of Cession[20] rather than with the adoption of the United States Constitution in 1789. This meant that the Alaska Natives were not part of the first nearly 80-year history of federal Indian policy under the common law and Commerce Clause of the United States Constitution.[21] Article III of the 1867 Treaty of Cession divided all the inhabitants of Alaska into two broad categories: (1) the "uncivilized native tribes" and (2) all the other "inhabitants." The inhabitants "with the exception of the uncivilized native tribes" were to be admitted as citizens of the United States. As for the tribes, the last sentence of Article III provides that:

---

[18] Cohen, Felix, *Handbook of Federal Indian Law* (U.S. Government Printing Office, 1942; reprinted University of New Mexico Press, 1986) at 404, quoting "Leasing of Lands within Reservations in Alaska," 49 L.D. 592, 594-595 (May 19, 1923), reprinted in Vol. II Opinions of the Solicitor, 1917-1974, 2075 at 2076 (U.S. Department of the Interior).

[19] 43 U.S.C. § 1601 et seq.

[20] Treaty Considering the Cession of Russian Possessions in North America, U.S.-Rus., 15 Stat. 539, TS No. 301 (1867).

[21] U.S. Const., Art. I, § 8, cl. 3.

> The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time, adopt with regard to the aboriginal tribes of that country.

As early as 1904 the federal courts held that this sentence applied the whole body of federal Indian law to the tribes of Alaska.[22] Nonetheless, until near the end of the 20th century, there was general judicial and policy confusion about the status of the Alaska Natives and their relationship to the federal government. It was often assumed that they did not have the same "trust" relationship with the United States and that, notwithstanding the 1867 Treaty, federal Indian law did not apply in Alaska.[23] Beginning with the enactments of ANCSA in 1971 and the Indian Self-Determination and Education Assistance Act in 1975 (ISDEA), and continuing with a host of statutes enacted to the end of the 20th century, it is now well established that:

> Alaska natives, including Indians, Eskimos and Aleuts, have the same legal status as members of Indian tribes singled out as

---

[22] *In re Minook*, 2 Alaska Fed. 200, 220-21 (D. Alaska 1904) (so holding in determining a question of Alaska Native citizenship). *See generally* David S. Case and David A. Voluck, *Alaska Natives and American Laws* (2d ed., Univ. Alaska Press 2002) at 44-46 (discussing the application of the 1867 treaty to Alaska Natives).

[23] Case and Voluck, *supra* at 6-8; *accord* Cohen (1942), *supra* at 402 (discussing the treaty).

> political entities in the commerce clause of the United States Constitution.[24]

The great confusion about the history of the relationship between the Alaska Natives and the federal government is that it is often characterized as being "unique." In truth it is no more unique than the history of any other Native American community within the United States. Like all Native American communities, that history begins with a treaty between the United States and a foreign power ceding the foreign power's authority over Native American territory to the United States. These cessions are understood to convey to the United States the exclusive right to acquire the aboriginal title of the Native Americans.[25] As in the contiguous United States, Native people living primarily in village communities historically denominated as "tribes" also populate Alaska.[26]

As noted earlier, what *was* different about Alaska was that the year was 1867, not 1789. By that time, following the end of the Civil War, America was on its march west and the Indians were in the way. In the

---

[24] Cohen, Felix, *Handbook of Federal Indian Law* (2005 ed. LexisNexis Mathew Bender) at 336, n.1068. *See* authorities cited there.

[25] *Fletcher v. Peck*, 10 U.S. 87, 142-43 (1810) ("[T]he Indian title . . . to be respected by all courts, until it be legitimately extinguished," continues with the land when it is acquired by a new sovereign).

[26] Cohen (2005) at 336, n.1068.

latter half of the 19th century the United States adopted policies calculated to assimilate Native Americans, break up their tribal governments and divide their tribal lands. These policies found their expression in late 19th century Alaska judicial decisions and federal policies. Until 1884 Alaska was governed as a military district, but when the army attempted to use the federal Trade and Intercourse Act to stop the introduction of liquor, the courts held that Alaska was not "Indian country" subject to the Act.[27] The next year, Congress applied the liquor control sections of the Intercourse Act to Alaska, after which the courts upheld prosecutions for supplying liquor to the Indians.[28]

Similarly, the comptroller of the Treasury decided in 1873 that the Bureau of Indian Affairs (BIA) had no authority to implement programs or spend money in Alaska.[29] Much as was then the policy in the lower 48 states, these cases, statutes, and policies in Alaska were designed to assimilate the Natives into American society and generally avoided treating Alaska Natives as being subject to federal Indian law. At the end of the 19th century, the Department of the Interior Solicitor held that Alaska Natives did not have

---

[27] *See United States v. Seveloff*, 1 Alaska Fed. 64 (D. Alaska 1872).

[28] *In re Carr*, 1 Alaska Fed. 75 (D. Alaska 1875).

[29] Case and Voluck, *supra* at 187, n.2.

the same relationship to the federal government as other Native Americans.[30]

In this same period of time, this Court reached a similar conclusion as to the Pueblo tribal communities of Southwest America.[31] Similarly, early decisions of the Alaska federal courts held that the Alaska Natives did not have a "tribal" form of government[32] and that their aboriginal claims to land had been extinguished by the 1867 Treaty or subsequent congressional legislation.[33] Section 8 of the 1884 Organic Act ambiguously protected the Alaska Natives' rights to land "actually in their use or occupation or now claimed by them" from encroachment by others, and Section 13 of the same statute required the Alaska Natives to be educated in schools "without regard to race."[34]

In spite of these policies, other forces were at work to protect Alaska Native lands under the federal "trust" responsibility and the doctrine of aboriginal title and to deal with the Alaska Native villages as tribal governments. Two cases, in 1904 and 1914, upheld the authority of the United States to prevent

---

[30] *Alaska Legal Status of Natives*, 19 L.D. 323 (1894).

[31] *United States v. Joseph*, 94 U.S. 614 (1877).

[32] *In re Sah Quah*, 31 F. 327 (D. Alaska 1898).

[33] *Miller v. United States*, 159 F.2d 1005 (9th Cir. 1947).

[34] Compare §§ 8 and 13, Organic Act of May 17, 1884, 23 Stat. 24.

trespass to aboriginal lands in Alaska.[35] Additionally, although education was to be "without regard to race," in fact the federal education program in Alaska was implemented consistent with what would later be determined to be the unique political status of the Alaska Natives – comparable to that of the "Indians" in the contiguous states.

A noted missionary, Dr. Sheldon Jackson, was appointed General Agent for Education in Alaska to implement the non-racial educational policies of the 1884 Organic Act. In that capacity he established numerous schools in remote Native villages, which became the focus of health care, reindeer herding, and other programs administered by the Interior's Bureau of Education exclusively for Natives. In 1905 the Nelson Act specifically required the separation of white and Native children in the schools and increased the appropriations for Native services in Alaska.[36]

The Secretary of the Interior transferred responsibility for Alaska Native programs to the BIA in 1931.[37] Shortly thereafter the Interior Department

---

[35] *United States v. Berrigan*, 2 Alaska Fed. 442 (D. Alaska 1904) and *United States v. Cadzow*, 5 Alaska Fed. 125 (D. Alaska 1914).

[36] "Nelson" Act of January 27, 1905, 33 Stat. 616, 619. *See also* Case and Voluck, *supra* at 8.

[37] Secretarial Order 494, March 14, 1931. *See also* Donald C. Mitchell, *Sold American: The Story of Alaska Natives and Their Land, 1867-1959 – The Army to Statehood, 253-55* (1997).

Solicitor issued a new opinion, concluding after an exhaustive analysis of applicable cases, statutes and policies:

> From the foregoing it is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos or other natives are natives or of Indian origin or not as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska referred to in the [1867 Treaty of Cession], are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States.[38]

Four years later Congress amended the Indian Reorganization Act to specifically include Alaska Natives.[39] Nonetheless, the confusion about the status of the Alaska Natives continued to the end of the 20th century.[40]

---

[38] *Status of Alaska Natives*, 53 I. D. 593, I Ops. Sol. 303, 310 (1932).

[39] Act of May 1, 1936, § 1, 41 Stat. 1250 (25 U.S.C. § 473a).

[40] *See generally* Case and Voluck, *supra* at 11-12 (describing the implementation of the IRA and at 1-33 describing the evolution of federal Indian law and policy in Alaska).

III. ENACTMENT OF ANCSA IN 1971 AND THE ISDEA IN 1975 LED TO FORMAL RECOGNITION OF THE ALASKA NATIVES IN 1993 AND 1994.

The only mention of "tribes" in ANCSA is in the definition of "Native village," which includes "any tribe, band, clan, group, village, community, or association in Alaska" that qualified for ANCSA benefits.[41] The residents of each Native village were authorized to organize a "Village Corporation"[42] which is defined in ANCSA as:

> an Alaska Native Village Corporation organized under the law of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of [ANCSA].[43]

The Village Corporations were to receive the surface lands under ANCSA and the Regional Corporations were to receive the subsurface of those lands as well as, in some cases, additional surface and subsurface lands.[44] Although the "Native villages" clearly

---

[41] Alaska Native Claims Settlement Act of December 18, 1971, § 3(c), 85 Stat. 689 (43 U.S.C. § 1602(c)).

[42] 43 U.S.C. § 1607(a).

[43] 43 U.S.C. § 1602(j).

[44] Regional Corporations were organized within each of the 12 ethnic regions of Alaska under 43 U.S.C. § 1606 and a "thirteenth" Regional Corporation for Alaska Natives living outside Alaska.

included "tribes," the corporations were not initially considered to be tribes. That soon changed.

In 1975 Congress enacted the Indian Self-Determination and Education Assistance Act. The ISDEA expressed a firm congressional commitment to:

> the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful self-determination policy which will permit an orderly transition from the Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.[45]

The ISDEA required the contracting of federal programs to an "Indian tribe" or the tribe's designated "tribal organization." The definition of these terms was crucial. "Indian tribe" under the ISDEA means:

> Any Indian tribe, band, nation, or other organized group or community including any Alaska Native *village or regional or village corporation* as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services

[45] Act of January 4, 1975, § 3(b), 88 Stat. 2203 (25 U.S.C. § 450a(b)).

> provided by the United States to Indians because of the their status as Indians. (Emphasis added.)[46]

A "tribal organization" is defined in important part as "any legally established organization of Indians which is controlled, sanctioned, or charted by [the governing body of an Indian tribe]."[47]

Thus, four years following the enactment of ANCSA, Congress identified three separate Alaska Native institutions as "tribes." At that time, and up to the present, most Alaskan Native villages are also organized as consortia of regional, nonprofit corporations, each of which were ideally suited to act as a "tribal organization" for purposes of ISDEA contracting.[48] This resulted in the rapid contracting of BIA and Indian Health Service services to those organizations, as well as in many cases, to individual villages.[49] Moreover, the inclusion of the Village and Regional Corporations as "tribes" enabled the corporations to obtain contracts under the ISDEA when Native villages were not available for contracting.[50]

---

[46] 25 U.S.C. § 450b(e).

[47] *Id*. at 25 U.S.C. § 450b(*l*).

[48] Twelve of these tribal organizations are the nonprofit consortia that sit on AFN's Board.

[49] *See* Case and Voluck at 221-24 describing the effect of the ISDEA in Alaska.

[50] *Cook Inlet Native Assn. v. Bowen*, 810 F.2d 1471-76 (9th Cir. 1987) (ANCSA Regional Corporation held to be a tribe for

(Continued on following page)

Beyond the congressional treatment of the Alaska Native corporations as tribes for certain purposes, it is also now well established in the general sense that the Alaska Native villages are federally recognized tribal governments. Owing perhaps to ANCSA's omission of tribes in the settlement, it took more than twenty years of litigation to confirm their status. At the end of the first Bush administration, Thomas L. Sansonetti, the Solicitor for the Department of Interior, issued a comprehensive 133-page opinion examining the historical status of the Alaska Natives and their continued entitlement to federal services and programs. Although the opinion stopped short of deciding that all the Alaska villages were federally recognized tribes, it noted in conclusion that:

> In our view, Congress and the Executive Branch have been clear and consistent in the inclusion of Alaska Natives as eligible for benefits provided under a number of statutes passed to benefit Indian tribes and their members. Thus we have stated that it would be improper to conclude that no Native village in Alaska could qualify as a federally recognized tribe.[51]

---

purposes of ISDEA contracting for health and other federal services).

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

Nine months later, and consistent with the Sansonetti opinion, the new Clinton administration published a comprehensive "Notice" in the Federal Register listing more than 200 of the Alaska Native villages and two regional tribes as federally recognized Indian tribes. The Notice states specifically that:

> This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.[52]

The very next year, Congress passed the federally Recognized Indian Tribe List Act that required the annual publication of a list of all federally recognized Indian tribes.[53] In 1998, after many years of litigation, this Court denied territorial jurisdiction to Alaska Native tribes to impose a tax on non-Natives on ANCSA land now held by the tribe.[54] In reaching its decision, the Court noted that the effect of ANCSA was to leave the Alaska Native villages as "sovereigns, without territorial reach."[55] The next year the

---

[52] 58 Fed. Reg. 54365, 54366 (October 21, 1993).

[53] *See* 25 U.S.C. § 479a note, and 479a-1. The Alaska Native Native Tribes have included in every subsequent publication of the "List."

[54] *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

[55] *Id*. at 526.

Alaska Supreme Court concluded, in a groundbreaking decision, that even without territory, Alaska Native villages as federally recognized tribal governments, retained inherent common law jurisdiction over their members even outside of Indian country, sufficient to determine child custody and probably other "internal" matters significant to the exercise of inherent tribal sovereignty.[56]

IV. THE FEDERAL GOVERNMENT FACILITATED THE SETTLEMENT OF THE ALASKA NATIVE LAND CLAIMS BY PROHIBITING STATE LAND DISTRIBUTIONS AS AN EXERCISE OF PLENARY POWER AND THE TRUST RESPONSIBILITY.

A. The federal trust responsibility is founded on the common law decisions of the United States Supreme Court that acknowledge the unequal relationship arising out of the federal government's subjugation of the indigenous people within the borders of the United States.

The federal trust responsibility is founded on the inherently unequal relationship between the Native Americans and the federal government – an inequality largely of the government's own making.[57] The

---

[56] *John v. Baker I*, 982 P.2d 738 (Alaska 1999).

[57] *E.g.*, *United States v. Kagama*, 118 U.S. 375, 384 (1886).

nature of that relationship was defined in the early years of the republic by congressional enactments and the common law decisions of the United States Supreme Court – the so-called Marshall Trilogy. The Trade and Intercourse Act of 1790 imposed a statutory restraint on the alienation on all tribal lands, preventing their disposition by the tribes except by a federal treaty.[58] The statute ensured a federal monopoly over the disposition of Indian lands, but it was the Supreme Court that defined the common law nature of Indian title.

In *Johnson v. M'Intosh*, John Marshall employed the "rule of discovery" to find that the United States held a superior title to the lands (variously characterized as "fee," "absolute title" or "absolute ultimate title").[59] The Indians, on the other hand, were considered to have an exclusive right of use and occupancy (which later came to be described as "aboriginal title" or "Indian title") that can only be defeated by the exercise of congressional authority. Because the United States gained the preemptive right to purchase the title, the result was that the Indian title was significantly diminished at common law in a way that paralleled the Trade and Intercourse Act's restraint on alienation.[60]

---

[58] Act of July 22, 1790, 1 Stat. 137 (25 U.S.C. § 177).

[59] *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823).

[60] *See generally* Cohen (2005), *supra* section 5.04[4][a], describing the development of the trust responsibility.

In the Cherokee cases (*Cherokee Nation v. Georgia* and *Worcester v. Georgia*), Marshall extended the analysis of the federal-tribal relationship to describe the political status of the Indian tribes as "domestic dependant nations" whose relationship to the federal government was something like that of a "ward to his guardian."[61] As a result of the Marshall decisions, and as a matter of federal common law, the Indians lost control of the disposition of their lands, and their governments were deemed placed under the protection of the federal government, subject to further limitations of their powers by Congress.[62] The weakened position thus thrust upon the Native Americans carried with it a common law "trust" responsibility for the federal government to protect aboriginal title from encroachment.[63] Early Alaska cases suggested for various reasons that the doctrine did not apply to Alaska, a conclusion this Court finally rejected in 1955.[64]

Supreme Court decisions in the late 19th to early 20th centuries expanded upon the Marshall Trilogy,

---

[61] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

[62] Cohen (2005), *supra* at 420. *See also United States v. Lara,* 541 U.S. *supra* at 205 (inherent tribal power subject to divestiture by Congress).

[63] *Johnson v. M'Intosh*, 21 U.S. *supra* at 588.

[64] *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 283, n.17 (1955) (holding that Native land claims in Alaska are on the same footing as in the lower 48 states and congressional extinguishment of aboriginal title is not compensable under the Fifth Amendment).

to evolve a virtually unchallengeable interpretation of the scope of congressional authority to legislate in the field of Indian affairs.[65] Similarly:

> [I]n respect distinctly Indian communities the question is whether, to what extent to and for what time they shall be recognized and dealt with as dependant tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.[66]

The trust responsibility, as exercised by Congress and delegated to the Executive branch, is almost unfettered. As explained by this Court in *United States v. Lara*,[67] Congress can enact laws both restricting and relaxing restrictions on the sovereignty and autonomy of Native groups. However, once Congress delegates the power to manage tribal assets to the Executive branch and prescribes the standards

---

[65] *See, e.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (tribal status determined exclusively by the political branches of government) and *United States v. Kagama*, 118 U.S. 375 *supra* at 384 (although not within the scope of the Commerce Clause, Congress held to have the common law power to regulate and prescribe penalties for crimes by Indians in Indian country because from the federal relationship to the tribes "there arises the duty of protection, and with it the power").

[66] *United States v. Sandoval*, 231 U.S. *supra* at 46 (1913).

[67] 541 U.S. *supra* at 202.

for doing so, the Executive branch can be held to principles applicable to a private trustee.[68]

B. Both Alaska and Hawaii were admitted to the United States in 1959. Alaska disclaimed all interest in Alaska Native lands, reserving to Congress the exclusive power to resolve Native land claims in Section 4 of the Alaska Statehood Act and Article XII, Section 12 of the Alaska Constitution.

1. State Lands

Alaska was admitted as a state on January 3, 1959. Section 6 of the Alaska Statehood Act initially allowed the new state 25 years to select approximately 103 million acres from "vacant, unappropriated, and unreserved" federal lands.[69] As was typical of most western states, a provision in the Alaska

---

[68] Compare *United States v. Mitchell I,* 445 U.S. 535 (1980) (remanded to determine if federal government had defined statutory responsibilities in the management of allotment timber) with *United States v. Mitchell II*, 463 U.S. 206 (1983) (upholding a statutory responsibility to manage Indian timber). *See also Seminole Nation v. United States*, 316 U.S. 286, 297, n.12 (1942) (holding the United States to "the most exacting judiciary standards" when it erroneously paid money to the agents of the Indian tribe knowing them to be dishonest).

[69] Act of July 7, 1958, § 6(a) and (b), 72 Stat. 339. The Act was amended in 1980 to allow the state 35 years to make the selections.

Statehood Act and an identical provision in the Alaska Constitution also disclaimed:

> all right or title . . . to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts (hereinafter called natives) [and retained these lands] 'under the absolute jurisdiction and control of the United States until disposed of under its authority.'[70]

Six months later, in a long pending case, the United States Court of Claims affirmed the aboriginal title of the Tlingit and Haida Indians to virtually all of southeast Alaska.[71] This decision set the stage for the settlement of the broader Alaska Native claims to aboriginal title throughout the new state and implicitly rejected the notion that the Alaska Natives were "unique" and not entitled to such claims.

In the ensuing years, as the state began to select its lands under the Statehood Act, the Alaska Natives became aware that the state's land selections conflicted with their traditional use and occupancy, i.e., aboriginal title. The Association on American Indian Affairs (AAIA) convened a 1961 conference on Native Rights in Point Barrow, Alaska. The conference

---

[70] *Id.*, § 4, 72 Stat. 339. *See also* Art. XII, § 12 of the Alaska Constitution (containing parallel language).

[71] *Tlingit and Haida v. United States*, 147 Ct. Cls. 315, 177 F.Supp. 452 (1959).

issued a set of recommendations that described the problem and a way to solve it:

> The Alaska Statehood Act . . . says that the state may take over 100,000,000 acres from the public domain in 25 years. . . . If Congress does not define our [Native] rights soon, the 25 years will be up and our [rights] will be gone. Congress should act now to settle our Alaska Native land claims. . . . The interior department [sic] should immediately withdraw from the public domain in Alaska tracts of land around all Native villages, pending the establishment of reservations or other settlement of Alaska Native land claims.[72]

A series of events galvanized the Native land claims movement in the early-to-mid 1960s. In 1961 the Atomic Energy Commission proposed "Project Chariot" to create a harbor on the North Slope by detonating an underground nuclear device near the Village of Point Hope.[73] Five years later the Bureau of Land Management proposed a massive oil lease near the same village.[74] In 1963 several villages in Interior Alaska filed claims to millions of acres of land amid the threat of a proposed giant dam to be constructed

---

[72] "Barrow Conference Statement and Recommendations," quoted from: Donald C. Mitchell, *Take My Land Take My Life* (University of Alaska Press, 2001) at 84.

[73] Robert D. Arnold, *Alaska Native Land Claims* (2d ed. Alaska Native Foundation, Anchorage 1978) at 94-95.

[74] Mitchell, *supra* at 124-28.

near the village of Rampart on the Yukon River that would have flooded many villages and vast areas used by the Athabascan Indians for hunting.[75]

Nascent Native leaders like Charlie Edwardsen, Jr. on the North Slope, Willie Hensley in the Northwest Arctic and Al Ketzler in the Interior of Alaska alerted villages in these regions to the impending loss of Native lands that could result from these proposals and the state's land selections under the Statehood Act.[76] The Native villages filed claims with the Interior challenging the state selections. Seventy-year-old Andrew Issac, then Chief of the Village of Tanacross, told the Senate Interior and Inuslar Affairs Committee at a 1968 hearing in Anchorage:

> We made our claim in 1963 because the state came in and selected our land – everything, even our village and graveyard. This is not fair. We own our land – the white man does not.[77]

On October 18, 1966 (the 99th anniversary of the 1867 Treaty of Cession) Emil Notti, the 34-year-old president of the Anchorage based Cook Inlet Native Association, convened a statewide meeting to organize the Alaska Federation of Natives to pursue the Native land claims. He was elected AFN's first

---

[75] Arnold, *supra* at 102-03.

[76] Mitchell, *supra* at 129-32 (Edwardsen); 118-22 (Hensley); 88-93 (Ketzler).

[77] Quoted in Arnold, *supra* at 122-23.

president.[78] AFN's land claims committee, chaired by Willie Hensley, recommended a "land freeze" on all federal lands until Congress enacted legislation to settle the Native claims.[79]

2. "Land Freeze"

Before the end of the year, then Secretary of the Interior Stewart Udall, adopted AFN's recommendation. Newly elected Alaska Governor, Walter Hickel, wrote Udall a letter complaining that his action denied the state the right to its land selections under the Statehood Act. To which Udall replied:

> In the face of Federal guarantee that the Alaska Natives shall not be disturbed in the use and occupation of lands, I could not in good conscience allow title to pass into others' hands. . . .[80]

Following Udall's action, Native villages filed additional protests to state selections until by 1967 the protests covered about 380 million acres, which was more than the entire land area of the state.[81]

The state challenged the Secretary's action in the Alaska Federal District Court, which ruled against

---

[78] *Id*. at 112-13. Emil Notti now serves as Alaska's Commissioner of Economic Development.

[79] *Id*. at 114.

[80] *Id*. at 118, quoting Udall letter.

[81] *Id*. at 119. *See also Edwardsen v. Morton*, 369 F.Supp. 1359, 1364 (D.C. Alaska 1973) (describing the land freeze).

the Secretary on summary judgment. The Ninth Circuit Court of Appeals reversed, holding that the Native claim to exclusive use and occupancy precluded summary judgment and was sufficient to prevent state land selections until the claims were resolved.[82] Richard Nixon was elected President while the case was pending, and he appointed Walter Hickel to succeed Udall as Secretary of the Interior. Three days before leaving office, Secretary Udall signed Public Land Order 4582, which expanded the moratorium to cover any disposition of some 262 million acres of federal lands, including state selections, and made it permanent pending settlement of the claims.[83] In order to secure confirmation as Secretary of the Interior, Walter Hickel had to agree that he would not revoke PLO 4582.[84]

Two years later, Congress, exercising its plenary power, enacted ANCSA, extinguishing aboriginal title throughout Alaska and confirming what would amount to 45 million acres of surface and subsurface estate to 12 Regional and more than 200 Village Corporations. Of the land freeze, Udall said:

> Frankly, I do not believe we would have made any significant progress on the Native claims issue if we had not held everyone's

---

[82] *Alaska v. Udall*, 420 F.2d 938, 940 (9th Cir. 1969); *cert. denied*, *sub nom Alaska v. Hickel*, 397 U.S. 1076 (1970).

[83] Mitchell, *supra* at 189 and Arnold, *supra* at 125.

[84] Arnold, *supra* at 125-26.

> feet to the fire (or perhaps I should say to the ice) without the freeze.[85]

Udall's land freeze was critical to bringing the state and industry to the table, and directly resulted in the enactment of ANCSA.

It is now beyond doubt that Alaska Native Villages, as well as ANCSA Regional and Village Corporations, are federally recognized "tribes." The "Native Villages" defined in ANCSA, the ISDEA and other statutes listed under the requirements of the federally Recognized Tribe List Act are tribal governments with political jurisdiction at least over their members. Alaska Native regional and village corporations, as defined in or established under ANCSA, are also tribes for purposes of certain Native American programs and services. As the United States Supreme Court decided nearly a century ago in the case of "distinctly Indian communities . . . whether to what extent and for what time they shall be recognized . . . is to be determined by Congress."[86]

V. CONGRESS HAS EXERCISED ITS PLENARY POWER TO RECOGNIZE NATIVE HAWAIIANS IN THE SAME CAPACITY AS OTHER INDIGENOUS PEOPLES OF THE UNITED STATES.

The federal government acknowledges that it has a "special responsibility for the welfare of the Native

---

[85] *Id*. at 124.

[86] *United States v. Sandoval*, 23 U.S. *supra* at 46.

peoples of the United States, including Native Hawaiians."[87] The United States' policy towards indigenous inhabitants of Hawaii is unique based on Hawaii's distinct history and geographical location. Similar factors, as with the American Indians, Alaskan Natives, and Pueblo Indians, bring them within the federal government's traditional trust responsibility owed to indigenous inhabitants. All indigenous tribes, groups, clans, pueblos, bands and villages have unique histories, cultures and historic relationships with the federal government. As this Court has repeatedly held, Congress' authority to extend the special relationship to indigenous peoples within the borders of the United States operates "whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state."[88]

The history of the United States' interaction with the indigenous inhabitants occupying the lands now considered the "United States" and brought within its borders is one of subjugation.[89] The continental

---

[87] Brief for *Amicus Curiae* the United States at 1, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818).

[88] *United States v. Sandoval*, 231 U.S. *supra* at 46 (1913) (Pueblo Indian lands subject to Congress' exercise of guardianship over Indians); *see also United States v. Kagama*, 118 U.S. 375, 384 ("the theater of its exercise [Congress' plenary power of Indians] is within the geographical limits of the U.S.").

[89] *See Rice v. Cayetano*, 528 U.S. 495, 534 (2000) (Stevens, J., dissenting): "The descendants of native Hawaiians share with the descendants of the Native Americans on the mainland or in the Aleutian Islands not only a history of subjugation at the

(Continued on following page)

United States, Alaska and Hawaii all share this history. The unequal relationship and often disastrous effect of the United States' expansion created the guardian-ward relationship and the concomitant trust responsibility first recognized in *Cherokee Nation v. Georgia, supra*.

Similar to Alaska Natives, Native Hawaiians were not initially treated as indigenous people. But the federal government soon acknowledged their condition, and realizing the need for rehabilitation, included them in the same general regard as Native Americans and Alaska Natives.[90] In 1921, when the United States realized that Native Hawaiians were struggling for continued existence, it extended its trust responsibility to Native Hawaiians by passing the Hawaiian Homes Commission Act (HHCA). The Act set aside approximately 200,000 acres of ceded public lands for the benefit of Native Hawaiians.[91]

---

hands of colonial forces, but also a purposefully created and specialized 'guardian-ward' relationship with the Government of the United States."

[90] H.R. Rep. No. 839, 66th Cong., 2d Sess. at 4 (1920). Recognizing the dire living conditions of Native Hawaiians and stating that Native Hawaiians are "our wards."

[91] Act of July 9, 1921, ch. 42, 42 Stat. 108. The Hawaiian Homes Commission Act defines Native Hawaiians as those of "not less than one-half part of the blood of the races inhabiting the Hawaiian Islands prior to 1778." *Id.* at § 201(7). However, *see* n.98 (Congress has consistently used broader classification without regard to blood quantum).

The HHCA made clear that the federal government and Native Hawaiians had a "special relationship" by promoting their self-determination and establishing a permanent land base for the benefit of Native Hawaiians.[92] Indeed, the Congressional hearings that preceded the enactment of the HHCA noted the similarity between the federal government's relationship with Native Hawaiians and its existing relationship with American Indians.[93]

The trust responsibility enumerated in the HHCA was delegated to the State of Hawaii upon admission to the Union[94] and a portion subsequently transferred to the Office of Hawaiian Affairs, which was established by the people of Hawaii through constitutional amendment, in part to ensure that the state's trust responsibility to Native Hawaiians is

---

[92] *See also Keaukaha-Panaewa Community Ass'n, v. Hawaiian Homes Commission ("Keaukaha II")*, 739 F.2d 1467, 1472 (9th Cir. 1984) (Hawaiian trust obligation is rooted in federal law).

[93] *See* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95, 105 (1998); citing *Hearings Before House Comm. on Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii*, 66th Cong. 129-30 (1920).

[94] *See* Hawaii Admission Act, Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, § 5; *see also Ahuna v. Dep't of Hawaiian Home Lands*, 640 P.2d 1161 (Haw. 1982) (defining scope of Hawaii's trust responsibility to Native Hawaiians by comparing the federal government's trust responsibility to Native Americans).

fulfilled.[95] As this Court has noted, "the federal power to pass laws fulfilling the federal trust relationship with the Indians may be delegated to the states."[96] In defining the scope of this trust responsibility and special relationship, the Hawaii Supreme Court realized: "Essentially, we are dealing with relationships between government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans."[97]

After delegating a portion of the trust responsibility first established in the HHCA to the State of Hawaii, Congress has nonetheless repeatedly reaffirmed the special relationship with Native Hawaiians.[98] It has made clear that Native Hawaiians are owed a special duty of care by including them in the programs and laws benefitting indigenous people

---

[95] Haw. Const., Art. XII, § 5.

[96] *Rice v. Cayetano*, 528 U.S. 495, 536-37 (2000) (Stevens, J., dissenting), citing *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 500-01 (1979).

[97] *Ahuna*, 640 P.2d *supra* at 1169.

[98] In doing so, Congress has consistently included the broader class of Native Hawaiians without regard to blood quantum in such legislation. *See, e.g.*, the 1994 Native Hawaiian Education Act establishing programs and funding for Native Hawaiian educational initiatives. Pub. L. No. 103-382, 108 Stat. 3794 (1994). The Native Hawaiian Education Act was re-enacted as part of the No Child Left Behind Act of 2001, as part B of title VII of Pub. L. No. 107-110 (2002), and is currently codified at 20 U.S.C. § 7512 et seq.

defined in the broader class as "Native American."[99] In one of many examples, Congress expressly found:

> The authority of Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii.[100]

When Congress passed the earlier 1988 version of the Native Hawaiian Health Care Act (quoted above), Congress explicitly noted the trust relationship and analogized it to that with Alaska Natives.[101] The Senate Report explained:

> While most commentators agree that a trust relationship exists, there is little agreement as to the exact nature of the obligations implicit in the relationship. It is probable that until Native Hawaiian issues are addressed on a comprehensive basis, such as they have been to some extent for many Indians and Alaska Natives, the extent of the trust relationship for Native Hawaiians will remain unsettled. What is clear, however, is that Congress does possess the authority, pursuant to the Federal-Native Hawaiian relationship to

---

[99] *See Rice v. Cayetano*, 528 U.S. 495, 533 (2000) (Stevens, J., dissenting).

[100] 42 U.S.C. § 11701(17).

[101] 100th Cong., 2d Sess., Pub. L. No. 100-579, S.Rep. No. 100-580 at 26, *Analysis of Legal Relationship Between the Federal Government and Native Hawaiians*.

> enact legislation that is rationally related to the purposes of the trust relationship – to legislate for the benefit of Native Hawaiians.[102]

In fact, over 160 Congressional laws expressly include Native Hawaiians in the class of Native Americans receiving special treatment.[103]

CONCLUSION

The proper fulfillment of Hawaii's trust responsibility lies in the existing moratorium issued to protect Native Hawaiians' unrelinquished and unresolved claims to ceded lands. Similar to the "land freeze" in Alaska (*supra* at pp. 29-31), a moratorium is necessary to protect unsettled Native Hawaiian land claims and unresolved Native Hawaiian interests in the reconciliation process. As the Hawaii Supreme Court noted, the moratorium "serves as the *foundation* (or starting point) for reconciliation, including the future settlement of the plaintiffs' [Native Hawaiians'] unrelinquished claims."[104] Much as Secretary Udall exercised the federal trust responsibility to preserve the Alaska Native claims, so has the Supreme Court of Hawaii enforced the similar trust

---

[102] S.Rep. No. 100-580 at 26, *Analysis of Legal Relationship Between the Federal Government and Native Hawaiians*.

[103] Brief for *Amicus Curiae* Hawai'i Congressional Delegation at 30, Rice v. Cayetano, *supra*.

[104] *OHA v. HCDCH*, 117 P.3d 884, 902 (2008) (emphasis provided).

Congress has delegated to the State of Hawaii as a matter of state law. But these issues are not drawn into question in this appeal and the Court should stay its hand. The petition for writ of certiorari should be dismissed. In the alternative, the judgment of the Hawaii Supreme Court should be vacated, and the case remanded for further proceedings.

Respectfully submitted,

RIYAZ KANJI
KANJI AND KATZEN PLLC
101 North Main Street
Suite 555
Ann Arbor, MI 48104
(734) 769-5400

DAVID S. CASE, P.C.
Counsel of Record
MATTHEW MEAD
LANDYE BENNETT
BLUMSTEIN LLP
701 West 8th Avenue
Suite 1200
Anchorage, AK 99501
(907) 276-5152

CAROL H. DANIEL
ALASKA FEDERATION OF
NATIVES, INC.
1577 C Street
Suite 300
Anchorage, AK 99501
(907) 274-3611

Counsel for Amicus