11-1092

No. _____

In The

Supreme Court of the United States

MICHAEL McCRARY,

Petitioner,

v.

IVANOF BAY VILLAGE and EDGAR SHANGIN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1993 and 1995, and then in succeeding years, the Secretary of the Interior published in the Federal Register a list of more than 200 "Native Entities Within the State of Alaska Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs." Respondent Ivanof Bay Village, whose members live in Anchorage, Alaska's largest city, and which purports to represent an abandoned Native village site on the Alaska Peninsula, is a listed entity. In 1999 and again in the decision that is the subject of this petition the Alaska Supreme Court held that Congress intended the Federally Recognized Indian Tribe List Act of 1994 to delegate the Secretary authority to – simply by publishing the aforementioned lists – transform the Alaska Native members of the listed entities into "federally recognized tribes," each of which has sovereign immunity. The question presented is:

Whether the Alaska Supreme Court correctly held that Congress intended the Federally Recognized Indian Tribe List Act to delegate the Secretary of the Interior authority to create more than 200 "federally recognized tribes" in Alaska by publishing a list of Native Entities in the Federal Register.

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PETITION FOR A WRIT OF CERTIORARI

Michael McCrary petitions for a writ of certiorari to review the judgment of the Alaska Supreme Court in this case.

OPINIONS BELOW

The opinion of the Alaska Supreme Court is reported at 265 P.3d 337 and reprinted in the Appendix (App.) at 1. That opinion affirmed an order of the Alaska Superior Court, which is unreported and reprinted at App. 14.

JURISDICTION

The judgment of the Alaska Supreme Court was entered on December 9, 2011. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The provisions of the Federally Recognized Indian Tribe List Act are reprinted at App. 16.

INTRODUCTION

This case presents a question of extraordinary importance to the 719,000 residents of the State of Alaska. Because whether they live in Anchorage, Alaska's largest city, or in one of more than 200 small communities that in 1971 Congress designated as "Native villages" for the purposes of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 *et seq.*,[1] every Alaska resident is affected by the opinion of the Alaska Supreme Court that is the subject of this petition.

First, because the opinion calls into question the future of Alaska as a socially cohesive multi-cultural polity. Because if the Alaska Supreme Court is correct, with no public notice, in 1994 Congress intended the Federally Recognized Indian Tribe List Act (FRITLA), 25 U.S.C. §§ 479a – 479a-1, to delegate the Secretary of the Interior authority to transform more than 200 organizations in Alaska into

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[1] A "Native village" is a community in Alaska that on the 1970 census enumeration date was "not of a modern and urban character" and whose population was composed of at least twenty-five Natives who collectively were a majority of the community's residents. 43 U.S.C. §§ 1602(c) and 1610(b)(3). A "Native" is "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community)[,] Eskimo, or Aleut blood, or combination thereof." 43 U.S.C. § 1602(b).

"federally recognized tribes" simply by publishing a list of Native Entities in the Federal Register.

As a consequence of that new legal status the organizations may subject both their members and nonmembers such as the petitioner to injury in purposeful violation of the Bill of Rights and the Fourteenth Amendment, which prohibit the federal government and the State of Alaska from taking governmental action that is arbitrary or capricious or that violates fundamental constitutional safeguards.[2]

Second, because as a consequence of their legal status as "federally recognized tribes" there now are more than 200 organizations in Alaska that – from Barrow on the coast of the Arctic Ocean south to Saxman on the southern border of the southeast Alaska rain forest – possess sovereign immunity.

That immunity allows the organizations to breach their contractual obligations with impunity as respondent Ivanof Bay Village has done in this case. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). And even

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[2] The Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1303, prohibits an Indian tribe "exercising powers of self-government" from denying "to any person within its jurisdiction the equal protection of its laws" or depriving "any person of liberty or property without due process of law." However, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court concluded that Congress did not intend to provide any remedy for a violation of ICRA other than a writ of habeas corpus.

more disturbingly, that immunity allows the organizations to escape liability for their torts. *See, e.g.*, *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2159 (2009) (sovereign immunity invoked by a "federally recognized tribe" to avoid liability when employee of tribal business entity who became inebriated at a business entity-sponsored social event "swerved [her] automobile across the center line" and hit a motorcycle rider who "suffered catastrophic injuries, including the loss of his left leg, resulting in more than $1,000,000 in medical expenses").

In 1999 when the Alaska Supreme Court in *John v. Baker*, 982 P.2d 738 (Alaska 1999), *cert. denied*, 582 U.S. 1182 (2000), first expressed its view of the intent of Congress embodied in FRITLA (a view that the opinion that is the subject of this petition reaffirms) the Honorable Drue Pearce and Brian Porter, the president of the Alaska Senate and speaker of the Alaska House of Representatives, requested the Court to review the *John v. Baker* opinion and correct the Alaska Supreme Court's error. *See* Petition for a Writ of Certiorari No. 99-973, Brief of Amici Curiae. But the Court denied the request. 528 U.S. at 1182 ("Motion of Drue Pearce and Brian Porter to file a brief as *amici curiae* granted. Certiorari denied.").

That was twelve years ago. Since then the Alaska Supreme Court has relied on the interpretation of the intent of Congress embodied in FRITLA that it announced in *John v. Baker* to dramatically alter Alaskan society, particularly – although far from

exclusively – in the more than 200 communities that Congress has designated as Native villages for the purposes of ANCSA. *See, e.g.*, *In re C.R.H.*, 29 P.3d 849 (Alaska 2001) (as a consequence of *John v. Baker* more than 200 Alaska federally recognized tribes not required to comply with petition provision in § 108 of the Indian Child Welfare Act, 25 U.S.C. § 1918, before receiving transfers of child custody proceedings from the Alaska Superior Court); *Evans v. Native Village of Selawik*, 65 P.3d 58 (Alaska 2003) (as a consequence of *John v. Baker* more than 200 Alaska federally recognized tribes may initiate their own adoption proceedings if tribes provide interested parties proper notice); *Runyon v. Association of Village Council Presidents*, 84 P.3d 437 (Alaska 2004) (as a consequence of *John v. Baker* more than 200 Alaska federally recognized tribes "protected by tribal sovereign immunity"); *State of Alaska v. Native Village of Tanana*, 249 P.3d 734 (Alaska 2011) (as a consequence of *John v. Baker* more than 200 Alaska federally recognized tribes may initiate their own child custody proceedings).

The Indian Commerce Clause, U.S. Const. art. II, § 8, cl. 3, grants Congress "plenary and exclusive power over Indian affairs." *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). If, as the Alaska Supreme Court announced in *John v. Baker* and then reaffirmed in the opinion that is the subject of this petition, Congress intended FRITLA to delegate the Secretary of the Interior authority to shatter the

social cohesion of the Alaska polity by unilaterally reversing 110 years of Congress's Alaska Native policy that was Congress's constitutional prerogative.

But as it did with respect to a directly related question in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (holding that Congress did not intend land that the Secretary of the Interior conveyed in fee to ANCSA village corporations to be 18 U.S.C. § 1151 "Indian country"), *cert. granted*, 521 U.S. 1103 (1997), before it accepts the Alaska Supreme Court's view that Congress intended FRITLA to delegate the Secretary of the Interior authority to create more than 200 "federally recognized tribes" in Alaska, this Court should grant the writ and address the question presented.

STATEMENT OF THE CASE

1a. Ivanof Bay is a small bay on the Alaska Peninsula 500 miles southwest of Anchorage.[3] In 1965

[3] The opinion of the Alaska Supreme Court affirmed a decision of the Alaska Superior Court granting the respondents' motion to dismiss. As a consequence, the following factual account is drawn from the allegations in petitioner's complaint – *see Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss . . . both the trial and reviewing courts must accept as true all material allegations of the complaint"), as well as from the uncontroverted exhibits in the record of the Alaska Superior Court. The lack of any factual dispute makes this case an ideal vehicle for addressing the important question presented.

several families that had been living in a nearby community established a new community at Ivanof Bay. In 1971 the Ivanof Bay community had more than twenty-five Alaska Native residents and thereby qualified to be a "Native village" for the purposes of ANCSA. Today, the community of Ivanof Bay is uninhabited. On a date unknown to petitioner, the former Alaska Native residents of the community of Ivanof Bay, their children and other relatives, most, if not all, of whom live in Anchorage, Alaska's largest city, organized respondent Ivanof Bay Village as an unincorporated association whose headquarters are located in an Anchorage office building. The Ivanof Bay Village Council is the governing body of Ivanof Bay Village, and respondent Edgar Shangin, a resident of Anchorage, is president of the Ivanof Bay Village Council.

b. In September 2005 petitioner entered into a written contract with respondent Ivanof Bay Village in which, in exchange for the payment of $1,500 per month, petitioner agreed to move to Ivanof Bay to "oversee all of the Ivanof Bay Village Council's interests in Ivanof Bay."

c. In June 2006 petitioner and respondent Ivanof Bay Village entered into a second written contract entitled "Memorandum of Agreement." Between June 2006 and September 2006 petitioner tried repeatedly to discharge his duties as described in the Memorandum of Agreement. But respondent Edgar Shangin, acting in bad faith, prevented petitioner from discharging those duties and then, on behalf of

respondent Ivanof Bay Village, terminated petitioner's contracts.

2a. In 2008 petitioner filed a civil action against respondents in the Alaska Superior Court in which petitioner requested the court to award petitioner a money judgment in the amount of $135,000 for respondents' breaches of the aforementioned contracts.

b. Respondents moved the Alaska Superior Court to dismiss petitioner's civil action on the ground that the court lacked subject matter jurisdiction because respondents "have sovereign immunity." In the memorandum they filed in support of their motion, respondents argued:

> Since Ivanof Bay is a federally recognized Tribe protected by sovereign immunity, the action against it must be dismissed.
>
> The United States Supreme Court has long held that Indian Tribes are sovereigns and possess common law immunity from suit traditionally enjoyed by sovereign governments. The Alaska Supreme Court held in *John v. Baker* that Alaska Native Villages on the Department of the Interior's lists of federally [sic] tribes are sovereign entities. Thus, Native Villages that appear on the Department of Interior's list are entitled to be treated as sovereign governments. Ivanof Bay is a sovereign Tribe based on its inclusion on the Department of Interior's list.

c. In a cursory order the Alaska Superior Court granted respondents' motion to dismiss on the ground

that "Ivanof Bay Village (ne Ivanoff Bay Village) and Edgar Shangin are protected by sovereign immunity; therefore, this court lacks subject matter jurisdiction." App. 14.

3a. Petitioner appealed the Alaska Superior Court's order to the Alaska Supreme Court.

b. Eleven years earlier in *John v. Baker*, *supra* at 749-50, the Alaska Supreme Court had announced:

> Prior to 1993, no such recognition of Alaska villages [as federally recognized tribes] had occurred.
>
> * * *
>
> In 1993, however, the Department of the Interior issued a list of federally recognized tribes that included Northway Village[4] and most of the other Native villages in Alaska. In the list's preamble, the Department of Interior explained that it was issuing the list in order to clarify confusion over the tribal status of various Alaska Native entities . . . It sought to rectify this misunderstanding and to reaffirm the sovereign status of the recognized tribes.

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[4] The question *John v. Baker* presented was whether a "tribal court" that had been created in Northway, a community near the Alaska Highway 223 miles east of Fairbanks, had jurisdiction to involve itself in matters relating to child custody. Because in 1970 a majority of the residents of Northway were of Athabascan Indian descent, in 1971 Congress listed Northway in ANCSA as a "Native village." *See* 43 U.S.C. § 1610(b)(1).

* * *

> And for those who may have doubted the power of the Department of the Interior to recognize sovereign political bodies, a 1994 act of Congress appears to lay such doubts to rest. In the Federally Recognized Tribe List Act of 1994 [sic], Congress specifically directed the Department to publish annually "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The Department published tribal lists for 1995 through 1998, all of which include Alaska Native villages such as Northway, based on this specifically delegated authority.
>
> The text and legislative history of the Tribe List Act [sic] demonstrate that Congress also views the recognized tribes as sovereign bodies.
>
> * * *
>
> Through the 1993 tribal list and the 1994 Tribe List Act [sic], the federal government has recognized the historical tribal status of Alaska Native villages. . . .

c. In his appeal of the Alaska Superior Court's order petitioner requested the Alaska Supreme Court to revisit its pronouncements regarding FRITLA and Alaska Native tribal status in *John v. Baker* because

throughout that appeal appellee Baker's attorney had conceded that the Athabascan Indian residents of Northway were a "federally recognized tribe." As a consequence, the Alaska Supreme Court had reasoned to its pronouncements regarding Alaska Native tribal status without the adversarial briefing and argument that, as this Court instructed in *Baker v. Carr*, 369 U.S. 186, 204 (1962), are necessary in order "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." Petitioner pointed out that, because there had not been adversarial briefing and argument, the court had misconstrued the intent of Congress embodied in FRITLA. Petitioner also pointed out that the evidence in the record of the Alaska Superior Court demonstrated that the 1993 decision of the Secretary of the Interior to create more than 200 "federally recognized tribes" in Alaska simply by publishing a list of Native Entities in the Federal Register – an action that in *John v. Baker* the Alaska Supreme Court had found determinative, *see* 982 P.2d at 749-50 – had been the consequence of behind-closed-doors lobbying inside the Department of the Interior by attorneys employed by the Native American Rights Fund, rather than a consequence of reasoned agency legal analysis.

4a. In the opinion that is the subject of this petition the Alaska Supreme Court either rejected or dismissed with its silence each of petitioner's arguments. With respect to not having had the benefit of

adversarial briefing and argument, the court responded that

> McCrary argues that *John v. Baker* should not be considered binding precedent because no party in that appeal argued against recognition of the sovereign status of Alaska Natives tribes. He contends this legal issue was not tested by the adversarial process. But our conclusion regarding the Executive Branch's tribal recognition and Congress's approval through the Tribe List Act was carefully considered and adopted by the entire court.

App. 8-9.

The court then

> concludeld that] McCrary has not sustained his heavy burden to demonstrate our precedent in *John v. Baker* should be overturned. Because Ivanof Bay is a federally recognized tribe, it is entitled to sovereign immunity. Ivanof Bay and Shangin, as its president, are immune from suit in state court.

App. 12.

In so holding, the Alaska Supreme Court made no mention of uncontroverted evidence in its record that respondent Shangin and the other members of respondent Ivanof Bay Village live in Anchorage and purport to represent a "federally recognized tribe" located at a Native village site long abandoned.

Nor did the court acknowledge the uncontroverted evidence in its record which demonstrated that the 1993 agency action which the court found determinative was not a product of reasoned agency legal analysis, but rather had been instigated by attorneys employed by the Native American Rights Fund.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF THE STATE OF ALASKA HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Whether they reside in Anchorage or in a Native village, for all citizens of the State of Alaska, the reaffirmation by the Alaska Supreme Court in the opinion that is the subject of this petition of its pronouncements regarding the important question of federal law it decided in *John v. Baker*, *supra*, calls into question the future of Alaska as a socially cohesive multi-cultural polity.

For the first century of the nation's existence Congress exercised the plenary power over Indian affairs that the Indian Commerce Clause confers to achieve an opprobrious objective: the clearing of the public domain of the Native Americans who occupied

it.[5] But in 1884 when Congress turned its attention to Alaska by enacting the Alaska Organic Act, 23 Stat. 24, to give the District of Alaska a civil government, Congress decided that, rather than being economically and politically isolated on reservations as Native Americans in the western coterminous states had been, Alaska Natives should be afforded the same economic opportunities and civil rights, and as soon as possible the same political rights, as all other Alaska residents. As a consequence, as Secretary of the Interior Ray Lyman Wilbur in 1932 explained Congress's Alaska Native policy to that date,

> In the United States statutes Alaska has never been regarded as Indian country. The United States has had no treaty relations with any of the aborigines of Alaska nor have they been recognized as the independent tribes with a government of their own. The individual native has always and everywhere in Alaska been subject to the white man's law, both Federal and territorial, civil and criminal.

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[5] The Senate pursued that objective by ratifying treaties in which Native Americans ceded land. In 1830 Congress authorized the President to relocate Native Americans who resided east of the Mississippi River to locations west of the river. 4 Stat. 411. West of the river, "[v]irtually every major war of the two decades after Appomattox was fought to force Indians on to newly created reservations or to make them go back to reservations from which they had fled." ROBERT M. UTLEY, THE INDIAN FRONTIER OF THE AMERICAN WEST 164 (1984).

Letter from Ray Lyman Wilbur to the Hon. Edgar Howard, March 14, 1932, *reprinted in Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 before the Senate Comm. on Indian Affairs*, 72d Cong. 15-16 (1932).

In 1971 Congress enacted ANCSA to settle Alaska Native land claims based on aboriginal title. In ANCSA Congress reaffirmed the Alaska Native policy it first codified in the Alaska Organic Act by directing that the ANCSA settlement to be implemented "without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] without creating a reservation system or lengthy wardship or trusteeship. . . ." 43 U.S.C. § 1601(b). Consistent with that directive, ANCSA required Alaska Natives to implement the settlement by organizing a business corporation in each Native village "under the laws of the State [of Alaska]." 43 U.S.C. § 1607. And ANCSA directed the Secretary of the Interior to convey the village corporations title to the surface estate of land in fee. 43 U.S.C. § 1613. *Accord Alaska v. Native Village of Venetie Tribal Government*, *supra* (holding that Congress did not intend land that the Secretary of the Interior conveyed to ANCSA village corporations in fee to be 18 U.S.C. § 1151 "Indian country").

As a consequence of Alaska Native participation in the implementation of Congress's unique Alaska Native policy, in 1924 Alaska Native voters elected the first Alaska Native to the Alaska Territorial

Legislature. DONALD CRAIG MITCHELL, SOLD AMERICAN: THE STORY OF ALASKA NATIVES AND THEIR LAND 246-248 (2d ed. 2003). By 1951 seven Alaska Natives were serving in the Territorial Legislature. ERNEST GRUENING, THE STATE OF ALASKA 376-377 (1954). And in 1958 ten Alaska Natives were elected to the First Alaska State Legislature. DONALD CRAIG MITCHELL, TAKE MY LAND TAKE MY LIFE: THE STORY OF CONGRESS'S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS 12 (2001).

By contrast, in New Mexico the right of Native American members of "federally recognized tribes" who reside on reservations to vote in state elections was not settled until 1962. *Montoya v. Bolack*, 372 P.2d 387 (N.M. 1962). And the first Native American was not elected to the New Mexico State Legislature until 1964. STAN STEINER, THE NEW INDIANS 231-233 (1968).

This Court should be hesitant to assume, as the Alaska Supreme Court did so blithely, that in 1994 Congress, with no discussion, debate, or public notice, intended FRITLA to delegate the Secretary of the Interior authority to shatter the social cohesion of the Alaska polity by unilaterally reversing 110 years of congressional Alaska Native policy by creating more than 200 "federally recognized tribes" in Alaska that prior to that delegation of authority did not exist.

If Congress intended that result, for Alaska the social consequences are portentous.[6] For that reason, this Court should decide for itself the important federal question the Alaska Supreme Court decided without the benefit of adversarial briefing and argument.

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[6] That expression of concern is not hyperbole. In 1989 when Alaska State Troopers attempted to arrest two residents of Tununak, a Native village on the coast of the Bering Sea, for violating state commercial fishing regulations, they were confronted by village residents because, according to a village official, "Tununak elders fel[t] the troopers infringed on village sovereignty," and according to a newspaper account, "the head of the village elders council said that Tununak has a new tribal government that requires troopers to ask permission to enter the village." *Village Defies Troopers: State's Authority Challenged Again*, Anchorage Daily News, April 16, 1989, at A1. More recently, in October 2011 the Chickaloon Village Traditional Council, which purports to represent a "federally recognized tribe" whose members live in Chickaloon, a Native village near Anchorage, sent a local land owner a property tax bill for $500,000. *See Cook Inlet Region, Inc. v. Chickaloon Native Village*, U.S. District Court for the District of Alaska No. 3:11-cv-228 SLG. Finally, the Klawock Cooperative Association (KCA) asserts that, because they are members of a "federally recognized tribe," the Tlingit Indian residents of Klawock, a Native village in southeast Alaska, are members of an "Indian tribe" for the purposes of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq*. As a consequence, KCA is engaging in class II gaming in Klawock in violation of the State of Alaska's charitable gambling statute. *See* National Indian Gaming Commission, Gaming Tribe Report, February 9, 2012, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/listandlocationoftribalgamigops/state1.pdf.

Of equal importance, the power the Indian Commerce Clause grants to Congress to decide the nation's Native American policies is plenary and *exclusive*. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, *supra* at 470. Nevertheless, as Justice Kennedy noted in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, *supra* at 756, the now blackletter rule that a "federally recognized tribe" has sovereign immunity was "developed almost by accident," not by Congress, but by this Court.

In *Kiowa Tribe* three members of the Court expressed the view that since "no federal statute or treaty provides [a federally recognized tribe] any immunity from the application of [state] law to its off-reservation commercial activities," the Court should not "extend the judge-made doctrine of sovereign immunity to pre-empt the authority of the state courts to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity." *Id.* at 760. However, while the six other justices agreed with the three-member minority that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine [of tribal sovereign immunity]," *id.* at 758, they "decline[d] to revisit [the Court's] case law" and chose "to defer to Congress" to reform the judge-made doctrine. *Id.* at 760.

That was fourteen years ago.

Since *Kiowa Tribe* Congress has not acted to effectuate the reform that the Court invited. Pursuant to the Indian Commerce Clause, that is Congress's

constitutional prerogative. However, the Court should be hesitant to allow more than 200 new "federally recognized tribes" to be created in Alaska each of which, as a consequence of that legal status, has sovereign immunity unless, after reviewing the intent of Congress embodied in FRITLA, the Court is confident that that is the result Congress has intended.

II. THE SUPREME COURT OF THE STATE OF ALASKA HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN DISREGARD OF AGENCY ACTION THAT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF AGENCY PROCEEDINGS.

Each term the Court receives more than 8,000 petitions for a writ of certiorari. Each petitioner is certain that the opinion that is the subject of his petition was wrongly decided. For that reason, whether an opinion was wrongly decided is not a criterion the Court considers when it decides whether to grant a petition. *See* SUP. CT. R. 10. However, the Alaska Supreme Court's reaffirmance in the opinion that is the subject of this petition of the court's prior reliance in *John v. Baker*, *supra*, on the publication in 1993 by the Secretary of the Interior of a list of Native Entities in the Federal Register as evidence that respondent Ivanof Bay Village and more than 200 other listed entities are "federally recognized tribes" merits the attention of the Court.

After surveying the history of Congress's Alaska Native-related enactments, in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 41 (1988), the Alaska Supreme Court concluded that

> In a series of enactments following the Treaty of Cession and extending into the first third of this century, Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status. The historical accuracy of this conclusion was expressly recognized in the proviso to the Alaska Indian Reorganization Act . . . No enactment subsequent to the Alaska Indian Reorganization Act granted or recognized tribal sovereign authority in Alaska.

For that reason, the Alaska Supreme Court held that Stevens Village was "not entitled to utilize the defense of tribal sovereign immunity." *Id.* at 41. And eleven years later in *John v. Baker*, *supra* at 749, the Alaska Supreme Court cited *Native Village of Stevens* as authority for the legal conclusion that "[p]rior to 1993, no . . . recognition of Alaska Native villages [as sovereign tribes] had occurred."

What event occurred in 1993?

In the early 1980s a political movement began inside the Alaska Native community whose organizing tenets were 1) that the Native residents of every Native village were, and always had been, members of a "federally recognized tribe," and 2) that land within and surrounding each Native village was

18 U.S.C. § 1151 "Indian country." *See* Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 Alaska Law Review 353, 391-94 (1997) (birth of the Native sovereignty movement documented).

When in *Native Village of Stevens* the Alaska Supreme Court rejected the contention that Congress had created "federally recognized tribes" in Alaska, a group of attorneys led by attorneys in the Anchorage office of the Native American Rights Fund (NARF)[7] began privately lobbying officials in the Department of the Interior to reverse *Native Village of Stevens* by agency fiat. To that end, the NARF attorneys urged those officials to publish in the Federal Register a list of Native Entities whose preamble would announce that the act of publication conferred sovereign status on the listed entities. *See* App. 19 (Letter from NARF attorneys Lawrence Aschenbrenner and Bart Garber and sixteen attorney co-signers to Eddie Brown, Assistant Secretary of the Interior for Indian Affairs, and William Lavell, Associate Solicitor, Division of Indian Affairs, February 27, 1990).

[7] NARF, which is headquartered in Boulder, Colorado, and has offices in Anchorage and Washington, D.C., is "the oldest and largest nonprofit law firm dedicated to asserting and defending the rights of Indian tribes, organizations, and individuals nationwide." *See* http://www.narf.org.

During the President George H.W. Bush administration, the NARF attorneys' lobbying was unavailing. However, in January 1993 when Bill Clinton became President and appointed Bruce Babbitt as Secretary of the Interior, the effort began anew. As NARF attorneys Lawrence Aschenbrenner and Robert Anderson described their scheme in March 1993 in a memorandum titled "New List of Federally Recognized Tribes" that they sent to the attorneys who were participating with NARF in the effort:

> We plan to have John Ecohawk [the executive director of NARF] ask Bruce Babbitt to *direct* [Assistant Secretary of the Interior for Indian Affairs] Eddie Brown to take this action [i.e., "direct the Bureau [of Indian Affairs] to review the proposed new Federal Register list and come up with its own draft list, and to give this matter priority starting *now*!"], if necessary. And speaking of that sort of thing, you'll be happy to learn that on March 17th the Justice Department filed its application to participate as Amicus in the *Tyonek* case. So *now* is the time to strike! (emphases in original).

App. 24-25.

Several weeks later President Clinton nominated Ada Deer to succeed Eddie Brown as Assistant Secretary of the Interior for Indian Affairs. Prior to her nomination Ms. Deer had been chair of the NARF

board of directors.[8] On July 16, 1993 the Senate confirmed Ms. Deer as Assistant Secretary. 139 Cong. Rec. 15,961 (1993). On October 21, 1993 Assistant Secretary Deer published in the Federal Register the list of Native Entities whose publication the NARF attorneys had long advocated. 58 Fed. Reg. 54,364 (1993). In the preamble that she attached to her list, Assistant Secretary Deer announced:

> 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; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the same right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other

[8] *Nomination of Ada Deer: Hearing on the Nomination of Ada Deer to be Assistant Secretary of Indian Affairs before the Senate Comm. on Indian Affairs*, 103d Cong. 9 (1993) (statement of Ms. Deer that "I was a client, a staff member, a board member, a board chair, and finally, chair of the National Support Committee of the Native American Rights Fund.").

> tribes; and are subject to the same limitations imposed by law on other tribes.
>
> (emphasis added).

Id. at 54,366.[9]

What statute delegated Assistant Secretary Deer authority to create more than 200 "federally recognized tribes" in Alaska in purposeful contravention of Congress's Alaska Native policy simply by publishing a list of Native Entities in the Federal Register? Assistant Secretary Deer cited two statutes: 25 U.S.C. §§ 2 and 9. *Id.* at 54,364. But neither statute delegated the authority that Assistant Secretary Deer purported to exercise.[10]

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[9] The year after Congress enacted FRITLA, in 1995 the Bureau of Indian Affairs republished Assistant Secretary Deer's list. 70 Fed. Reg. 71,197 (1995). And see most recently, 75 Fed. Reg. 60,813 (2010). FRITLA requires the Secretary of the Interior to publish annually in the Federal Register "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1. Despite that statutory command, in 2011 the Secretary did not publish a list.

[10] Congress enacted 25 U.S.C. § 2 thirty-five years before the United States purchased Alaska. Ch. 174, § 1, 4 Stat. 564 (1832). The statute states: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." Congress enacted 25 U.S.C. § 9 thirty-three years before the United States purchased Alaska. Ch. 162, § 17, 4 Stat. 738 (1834). The statute states: "The

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Because the Alaska Native tribal status issue was not the subject of adversarial briefing and argument during the appeal that resulted in *John v. Baker*, *supra*, the Alaska Supreme Court had no knowledge of the events inside the Department of the Interior that had produced the administrative action which the court characterized as the Department's clarification of a "misunderstanding" regarding Alaska Native tribal status. *Id.* at 749. However, petitioner submitted the letter and memorandum above-cited, as well as other documents obtained from the Department of the Interior that describe those events, to the Alaska Supreme Court in the appeal that resulted in the opinion that is the subject of this petition. But in that opinion, when it reaffirmed the pronouncements regarding Alaska Native tribal status that it had announced in *John v. Baker*, the Alaska Supreme Court made no mention of the events inside the Department of the Interior that the record before it documented.

That was the Alaska Supreme Court's prerogative. But this Court should not permit the Alaska Supreme Court's reaffirmation of its pronouncements in *John v. Baker* regarding Alaska Native tribal status to allow the doctrine of tribal sovereign immunity to be invoked to deny petitioner and similarly

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President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs."

situated Alaskans a judicial remedy for breaches of contract and tortious injury until the Court reviews the post-1993 legal history of Alaska Native tribal status.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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