

For Opinion See [118 S.Ct. 948](#), [117 S.Ct. 2478](#)

U.S.Pet.Brief,1997.

STATE of Alaska, Petitioner,
v.
NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, et al., Respondents.
No. 96-1577.
October Term, 1997.
Aug. 21, 1997.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

Of Counsel:[JOHN G. ROBERTS, JR.](#)[GREGORY G. GARRE](#)[HOGAN & HARTSON L.L.P.](#)555 Thirteenth Street, N.W.Washington, D.C. 20004(202) 637-5810[BRUCE M. BOTELHO](#) ^[FN*]Attorney General[BARBARA J. RITCHIE](#)Deputy Attorney General[D. REBECCA SNOWELIZABETH J. BARRY](#)Assistant Attorneys GeneralSTATE OF ALASKADepartment of LawP.O. Box 110300Juneau, Alaska 99811(907) 465-3600Counsel for Petitioner

FN* Counsel of Record
QUESTIONS PRESENTED

Forty-four million acres of Alaska land were conveyed to state-chartered, Native-owned corporations pursuant to the Alaska Native Claims Settlement Act of 1971 ("ANCSA" or "Act"). The respondent Native Village owns a 1.8 million-acre expanse of ANCSA land located in north-central Alaska. The Ninth Circuit held that this land is "Indian country" within the meaning of [18 U.S.C. § 1151\(b\)](#), making respondent sovereign over a piece of Alaska about the size of the State of Delaware, overturning a fundamental jurisdictional premise upon which Alaska has been governed for more than a century, and rendering uncertain the jurisdiction of the State and the more than 225 Native villages occupying ANCSA land to govern vast areas

of Alaska. The questions presented are:

1. Whether the Ninth Circuit correctly held-in conflict with the clear intent of Congress in enacting ANCSA, the decisions of the Alaska Supreme Court, and the interpretation of the federal agency charged with implementing ANCSA-that ANCSA land may constitute Indian country within [Section 1151\(b\)](#).
2. If so, whether the Ninth Circuit correctly held-in conflict with the decisions of this Court and other federal circuits-that the determination whether land is Indian country within [Section 1151\(b\)](#) should depend upon an *ad hoc*, six-part balancing test incapable of producing predictable results.

PARTIES TO THE PROCEEDINGS

Petitioner, plaintiff-appellee below, is the State of Alaska. It brought this action on its own behalf and on behalf of Yukon Flats School District, Unalakleet/Neaser Construction JV, Unalakleet Native Corporation, Neaser Construction Company, and Gerald Neaser. Yukon Flats School District is organized under state law, [Alaska Stat. § 14.08.031](#), and administers public schools in north-central Alaska. The other entities are the joint venture, along with its principals, which contracted with the school district to construct a public school facility in Venetie. Under the contract the State assumed liability for taxes levied in connection with the project by an entity other than the State, federal government, or state municipality. *See* J.A. 11-12, 14.

Respondents, defendants-appellants below, are the Native Village of Venetie Tribal Government, the Venetie Tax Court, the Venetie Tax Commission, Gideon James, Lawrence Roberts, Larry Williams, Ernest Erick, Lincoln Tritt, John Titus, and David Case. The individuals are tribal officers or members of the tax court or tax commission, who claim authority to collect the taxes at issue or to enforce them through judicial proceedings. They are sued in both their individual and official capacities. *See id.*

12-13. We refer to respondents collectively as the “Native Village of Venetie” or “Village.”

West Headnotes

Indians 209 ↪ 210

[209](#) Indians

[209V](#) Government of Indian Country, Reservations, and Tribes in General

[209k210](#) k. In General. [Most Cited Cases](#)

(Formerly 209k32(1))

Did Court of Appeals correctly hold, in conflict with clear intent of Congress in enacting Alaska Native Claims Settlement Act (ANCSA), decisions of Alaska Supreme Court, and interpretation of federal agency charged with implementing ANCSA, that ANCSA land may constitute Indian country within meaning of federal statute? [18 U.S.C.A. § 1151\(b\)](#); Alaska Native Claims Settlement Act, § 2 et seq., as amended, [43 U.S.C.A. § 1601 et seq.](#)

Indians 209 ↪ 210

[209](#) Indians

[209V](#) Government of Indian Country, Reservations, and Tribes in General

[209k210](#) k. In General. [Most Cited Cases](#)

(Formerly 209k32(1))

Did Court of Appeals correctly hold that determination of whether land is Indian country within meaning of federal statute should depend upon ad hoc, six-part balancing test incapable of producing predictable results? [18 U.S.C.A. § 1151\(b\)](#).

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*1 OPINIONS BELOW

The Ninth Circuit opinion is reported at [101 F.3d 1286](#) and reprinted in the petition appendix (“Pet.App.”) at 1a. That opinion reversed the order of the District Court for the District of Alaska on Indian country, which is unreported and reprinted at *id.* 37a. The District Court order on tribal status, which was not appealed, is unreported and reprinted at *id.* 80a. The Ninth Circuit opinion in the prior appeal is reported at [856 F.2d 1384](#) and reprinted at *id.* 127a. That opinion affirmed the District Court ruling granting a preliminary injunction, which is unreported and reprinted at *id.* 141a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1996. Pet. App. 1a. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on January 6, 1997. *Id.* 143a. The petition for certiorari *2 was filed on April 4, 1997, and granted on June 23, 1997. [117 S. Ct. 2478](#). The jurisdiction of this Court is invoked pursuant to [28 U.S.C. § 1254\(1\)](#).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Alaska Native Claims Settlement Act of 1971 (“ANCSA” or “Act”), [43 U.S.C. § 1601 et seq.](#), and [18 U.S.C. § 1151](#), are reprinted at Pet. App. 145a-172a.

INTRODUCTION

This case arises in the shadow of ANCSA, the largest aboriginal claims settlement in United States history. ANCSA authorized the transfer of nearly one billion dollars and 44 million acres of land to state-chartered business corporations established pursuant to the Act, owned and operated by Natives from villages throughout the State, in exchange for the extinguishment of all aboriginal title and any claims based on that title. The Act expressly disavowed any intention to create a reservation or trustee relationship with the land, making the land instead a freely alienable corporate asset. Pursuant to the settlement, a 1.8 million-acre expanse of land located in north-central Alaska was conveyed in fee to two ANCSA corporations, which later conveyed the land to the Native Village of Venetie.

In 1986 the Village sought to assess \$161,000 in taxes upon a contractor hired by the State to construct a public school facility there, claiming that the Venetie tract is “Indian country” within the meaning of [18 U.S.C. § 1151](#), and, more particularly, a “dependent Indian community” within subsection (b) of that provision.^[FN1] Indian country is the touchstone for delineating federal, state, and tribal *3 jurisdiction over Indian-occupied lands. Within it Indian tribes have broad authority not only over their own members but over the land and non-members. States, on the other hand, are precluded from exercising fundamental attributes of their sovereignty within Indian country. Since territorial times, Alaska has been governed on the basic jurisdictional premise-reflecting the unique history of the land and its Natives-that there is no Indian country in Alaska.

FN1. Under [18 U.S.C. § 1151](#), land is Indian country if it is (a) an “Indian reservation,” (b) a “dependent Indian community,” or (c) an “Indian allotment.” *Id.*

This case concerns only the second type of Indian country. *See* Pet. App. 138a.

The Ninth Circuit below held that ANCSA land qualifies for judicial designation as Indian country within [Section 1151\(b\)](#), and that the Venetie tract *is* Indian country. As we explain, to arrive at that far-reaching result, the Ninth Circuit fundamentally misconstrued the nature of the judicial inquiry in determining whether land is Indian country-which is properly directed to the intent of Congress-and dramatically expanded the scope of the “dependent Indian community” category of Indian country, which-until the decision below-had been relatively narrow and unremarkable, accounting for only a small portion of Indian country nationwide. In addition, the Ninth Circuit disregarded the clear intent of Congress that ANCSA land-including the Venetie tract-*not* be Indian country; indeed, the transformation of ANCSA land into Indian Country is antithetical to what the settlement was all about. The Ninth Circuit decision accordingly should be reversed.

STATEMENT OF THE CASE

Historical and Statutory Background

1a. The history of Alaska and its Natives is as unique as the vast Alaskan landscape that has long captured the imagination of the American mind. When Russian explorers “discovered” Alaska in 1741, they came upon a land of abundant natural resources and a diverse Native population, subsisting in small villages or groups along the thousands of miles of coastline and in the mountainous inland regions of the territory that would become the Nation's *4 49th State. In 1867, when the United States purchased Alaska from Czar Alexander II for \$7.2 million, most of these communities remained intact. *See* Robert D. Arnold, *Alaska Native Land Claims* 1-26 (1975). Today, nearly 40 years after Alaska entered the Union, there are more than 225 Native villages in the State now recognized as Indian tribes, dispersed throughout a land mass about the size of Arizona, California, Oregon, Washington, and Montana-combined.

b. By the time the United States had acquired “Russian-America,” as Alaska was then known, most Indians in the contiguous United States had been displaced from their aboriginal lands by war or treaty, and confined to federally established territories or reservations. Although these reservations were created expressly for the use and occupancy of Indians, Indians did not own or control the land. Rather, the land was held in “trust” for them by the federal government, and any action concerning the land was subject to exclusive federal control. At the same time, because their means of subsistence had fallen prey to westward expansion, reservation Indians were almost entirely dependent upon the federal government for food, clothing, and protection, and were often “dead [ly] enemies” of the States. [*United States v. Kagama*, 118 U.S. 375, 383-384 \(1886\)](#). See Arnold, *supra*, at 28-36; Felix S. Cohen, *Handbook of Federal Indian Law* 28-29, 74-92, 121-125 (1982 ed.).

In Alaska there is no history of Indian wars or treaties, and from purchase to statehood “the federal government was involved only minimally with Alaska Natives.” Cohen, *supra*, at 739. Moreover, as this Court has recognized, “[t]here was never an attempt in Alaska to isolate Indians on reservations,” and “[v]ery few were ever created.” [*Metlakatla Indian Community v. Egan*, 369 U.S. 45, 51 \(1962\)](#).^[FN2] Indeed, “Alaskans, both Native and non-⁵ Native, opposed creation of reservations on the grounds that reservations were socially divisive and tended to perpetuate a wardship rather than equality for the Natives.” [*United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1015 \(D.Alaska 1977\)](#), *aff’d*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980). Accord [*United States v. Libby, McNeil & Libby*, 107 F. Supp. 697, 699 \(D.Alaska 1952\)](#); Ernest Gruening, *The State of Alaska* 365-381 (1954); *Report of the Governor's Task Force on Federal-State-Tribal Relations* (hereinafter “*Task Force Report*”), pp. 118-119 (Feb. 14, 1986).

FN2. The one notable exception is the Annette Island Reserve, or Metlakatla, established by Congress in 1891 in the territ-

ory's south-eastern panhandle. Act of Mar. 3, 1891, ch. 561, § 15, 26 Stat. 1101. Metlakatla is distinct in that its members are not Alaska Natives at all, but rather nineteenth century emigrants from British Columbia. See [*Egan*, 369 U.S. at 48](#).

c. Not only were Alaska Natives not sequestered from non-Native society, they were early on recruited and paid (albeit on meager terms) for their labor by non-Natives engaged in the harvesting of Alaska's natural resources, and even undertook themselves to manufacture and sell goods in the marketplace. See Donald C. Mitchell, *Sold American: The Story of Alaska Natives and Their Land, 1867-1959* 11, 99-133 (1997) (discussing Native involvement in salmon, mineral, whaling, timber, and other industries). As a result of such economic forces, many Alaskan towns-including some Native villages-soon became home to both Natives and non-Natives. Moreover, Alaska Natives who did not participate in Alaska's frontier economy were not dependent upon the federal or territorial government for their existence, but instead largely subsisted off the land, which-unlike the rapidly settled nineteenth century American west-in most areas remained and still remains today capable of supporting a subsistence lifestyle. See Arnold, *supra*, ch. 2.

At the same time, Alaska Natives, from the organization of Alaska's first civil government in 1884 forward, have been subject to the same laws as non-Natives, including the criminal code, taxes, and civil laws governing matters ⁶ such as hunting and fishing, employment, and even domestic issues. See, e.g., [*Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 35 \(Alaska 1988\)](#) (state laws and taxes); [*United States v. Sit-arangok*, 4 Alaska 667 \(D.Alaska 1913\)](#) (territorial public works laws); [*United States v. Doo-Noch-Keen*, 2 Alaska 624 \(D.Alaska 1905\)](#) (territorial fishing laws); *Task Force Report*, *supra*, at 84, 97 (territorial laws and taxes). The same was true even with respect to the few reservations that existed in Alaska, see [*Egan*, 369 U.S. at 51](#), despite the fact that reservation Indians in the lower 48 States were generally not subject to state or territ-

orial laws, but instead a special body of federal and tribal law reserved for such “Indian country.” See Cohen, *supra*, at 27.^[FN3]

FN3. Accordingly, when this Court described as “deeply rooted in the Nation's history” the “policy of leaving Indians free from state jurisdiction and control,” *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) (internal quotation omitted), it expressly distinguished its consideration of the laws governing Alaska Natives in *Egan*. See *id.* at 167-168.

On occasion, Alaska Natives attempted to avoid application of state or territorial law, or to take advantage of federal Indian law, on the ground that a particular offense or activity occurred in Indian country. These efforts, however, were consistently rejected by the courts, which held that, because of “the anomalous condition of Alaska,” Indian country does not exist there. *Kie v. United States*, 27 F. 351, 353 (D.Or.1886). Accord *United States v. Booth*, 161 F. Supp. 269 (D.Alaska 1958); *In re Sah Quah*, 31 F. 327 (D.Alaska 1886); *United States v. Seveloff*, 27 F. Cas. 1021 (D.Or.1872); cf. *Egan*, 369 U.S. at 51-52 (even the Metlakatla reservation is “not ‘Indian country’ ”).^[FN4] Federal officials and others responsible for governing the Alaska Territory early on formed *7 the same view. See, e.g., DOI, *Opinion Regarding Legal Status of Alaska Natives*, 19 Pub. Lands Dec. 323, 325 (1894) (“Alaska is not Indian country”); Pet. 12-13 (citing authorities).^[FN5]

FN4. Prior to this case, only one reported federal decision had recognized Indian country in Alaska—*In re McCord*, 151 F. Supp. 132 (D.Alaska 1957)—involving the Moquawkie Indian Reserve at Tyonek. Although *McCord* was never followed by other courts, it did prompt Congress to include Alaska among the Public Law 280 States (see 18 U.S.C. § 1162(a)) to ensure that state criminal law was not ousted from Tyonek. See Dep't of the Interior (“DOI”), *Governmental Jurisdiction of Alaska Nat-*

ive Villages Over Land and Nonmembers, Sol. Op. M-36975, p. 36 (Jan. 11, 1993) (hereinafter “DOI Op.”). Copies of this DOI Opinion have been lodged with the Court and served on respondents.

FN5. See also Letter from R. Ernst, Asst. Sec'y, DOT, to Hon. E. Celler, (Feb. 25, 1958), reprinted in *S. Rep. No. 85-1872, at 3 (1958)* (“[T]he general understanding had been that the many native villages in Alaska were not Indian country, and it had been the general practice for Territorial officers to apply Territorial law in the native villages.”); Letter from R. Wilbur, Sec'y, DOI, to Hon. E. Howard (Mar. 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., 1st Sess. 15-16 (1932) (“Alaska has never been regarded as Indian country.”); Lyman E. Knapp, *A Study Upon the Legal and Political Status of the Natives of Alaska*, 39 Am. L. Reg. 325, 328, 332 (1891) (“The courts have * * * repeatedly decided that Alaska is not Indian country”).

d. Alaska Natives also have enjoyed a unique tradition of participation in state and local government. As early as 1916, Natives in the southeastern part of Alaska had cast the deciding ballots in territorial elections. See Mitchell, *supra*, at 212-213. Shortly thereafter, the Alaska Territorial Legislature amended its laws to permit Native villages to organize municipal governments, and several did so. See *Task Force Report*, *supra*, at 93.^[FN6] The *8 organization of such local governments accelerated after statehood. *Id.* at 25. Over the years, moreover, numerous Native leaders have gained “prominent public office in the state government,” *Egan*, 369 U.S. at 51, as well as in the prior Territorial Legislature, and, given the State's unique demographics, Alaska Natives to this day wield genuine political influence through the ballot box. See Mitchell, *supra*, at 12, 217.

FN6. Since 1936 Alaska Native villages also have been permitted to form governments pursuant to the Indian Reorganization Act ("IRA"), [25 U.S.C. § 461 et seq.](#) Sixty-nine villages eventually did so. DOI Op., p. 3. Even the application of the IRA, however, has been different in Alaska: in the lower 48 States, an Indian tribe may not organize an IRA government unless it resides on a reservation; however, Native villages in Alaska were permitted to form such governments in the absence of a reservation, which of course most Native villages lacked. See J.A. 151.

2a. Because Alaska Natives were not categorically displaced from their land, there was little need throughout most of Alaska's history to address the status of the title to the vast areas of land they occupied. In the 1960s, however, two events brought this issue to a head. First, the State began selecting the 103 million acres of land to which it was entitled under the Statehood Act, Act of July 7, 1958, Pub. L. No. 85-508, § 6(a) & (b), 72 Stat. 339, 340, prompting Native opposition and eventually leading the Secretary of the Interior in 1966 to impose a freeze on further selections. Second, in the midst of this dispute, oil was discovered on the Arctic Slope, heightening the need to resolve land claims so that this resource could be developed and transported. See DOI Op., pp. 73-76; [Atlantic Richfield Co., 435 F. Supp. at 1016-18.](#)

b. There followed more than four years of intense deliberations in Congress aimed at settling Alaska Native land claims. During this process, Alaska Natives-represented *en masse* by the Alaska Federation of Natives ("AFN")-made clear that they "very vehemently" opposed any settlement based on the reservation concept. *Alaska Native Land Claims: Hearings on S. 2906 Before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 89 (1968) (hereinafter "*Hearings on S. 2906*"). They also opposed the concept advanced by the Secretary of the Interior-that the federal government would hold the land in trust. *Id.* at 576. See DOI Op., p. 89. Instead, rather than "some modified

form *9 of reservation or paternalism," Alaska Natives urged Congress to adopt "a bold and imaginative approach which fully and finally resolves all claims, * * * and permits the Natives to improve themselves and their land and determine their own destiny." *Alaska Native Land Claims: Hearings on H.R. 13142 and H.R. 10193 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 181 (1969) (hereinafter "*Hearings on H.R. 13142*"). In ANCSA, Congress did just that.

Passed in December 1971, ANCSA authorized the transfer of \$962.5 million and 44 million acres of land in exchange for the extinguishment of aboriginal title and any claims based on that title. [43 U.S.C. §§ 1603\(c\), 1605, 1611.](#) Congress sought to effect this settlement by "maximiz[ing] participation by Natives in decisions affecting their rights and property * * * without creating a reservation system or lengthy wardship or trusteeship." *Id.* [§ 1601\(b\).](#) Thus, it expressly revoked the few reservations that had been created in Alaska (save Metlakatla), *id.* [§ 1618\(a\)](#), and provided for the creation of more than 200 state-chartered village and regional corporations, owned and operated by Natives as for-profit businesses subject to state law. *Id.* [§§ 1606, 1607.](#) It then conveyed the land to these business corporations in fee, leaving it a freely alienable corporate asset. *Id.* [§§ 1611, 1613.](#) To encourage Native villages to adopt municipal governments under state law, Congress required the new ANCSA corporations to reconvey a portion of their land to the existing municipal government or, if none existed, to the State in trust until one was established. *Id.* [§ 1613\(c\)\(3\).](#)

c. Fittingly, in light of the unique history of Alaska and its Natives, ANCSA marked a dramatic break with prior federal Indian legislation, which had been enacted with the Indians of the lower 48 States in mind. See Pet. 5 & n. 5 (citing authorities). Consistent with Congress' intent, thousands of acres of ANCSA land have *10 been reconveyed since the statute was enacted-including to non-Natives "in the ordinary course of business and at a profitable return," Thomas R. Berger, *Village Journey: The*

Report of the Alaska Native Review Commission 99 (1995 ed.)-and ANCSA land has been subject to lucrative land swaps. At the same time, nearly 50 Native villages have formed municipal governments after ANCSA-bringing the total to 125-entitling such villages to share in a state-wide municipal assistance fund, and further integrating Natives into Alaska's body politic. *See Task Force Report, supra*, at 24.

In the wake of ANCSA those responsible for governing Alaska have reaffirmed the historical understanding that Indian country does not exist in that State. *See* Alaska Admin. Order No. 125 (Aug. 16, 1991). In 1988-more than 15 years after ANCSA was passed-the Alaska Supreme Court reiterated that "[t]here is not now and never has been an area of Alaska recognized as Indian country." *Native Village of Stevens*, 757 P.2d at 35 (internal quotation marks omitted).^[FN7] In 1993 the Solicitor of the Department of the Interior ("DOI"), the federal agency charged with implementing ANCSA, 43 U.S.C. § 1624, and with overseeing Indian affairs in general, 25 U.S.C. § 2, issued a 133-page opinion-concurred in by the Acting Secretary-which thoroughly canvassed ANCSA and its historical backdrop, and concluded in unambiguous terms that "ANCSA precludes the treatment of lands received under that Act as Indian country." DOI Op., pp. 131, 133.

FN7. The *Stevens* court recognized as a possible exception the Moquawkie reserve considered in *McCord*, 757 P.2d at 35 & n. 4, but that reserve was revoked by ANCSA. 43 U.S.C. § 1618(a).

Factual and Procedural Background

1a. This case arises due to the efforts of the Native Village of Venetie to chart an altogether different course. The members of this Village-descendants of the Neets'aii *11 Gwich'in-reside in the communities of Arctic Village and the Village of Venetie in north-central Alaska, at the southern foot of the Brooks Mountain Range. Pet. App. 83a. In 1943 the Secretary of the Interior designated 1.8 million acres of land around these villages as one of the

few reserves created in Alaska. *Id.* 2a. When Congress debated ANCSA, the Village proposed an amendment that would have allowed it to elect to retain the land's reservation status. *Id.* 116a; J.A. 146. But Congress rejected that amendment and, instead, expressly revoked the former Venetie reserve. 43 U.S.C. § 1618(a).

b. Following the passage of ANCSA, Arctic Village and the Village of Venetie each established ANCSA corporations under state law, as they were required to do under the Act to receive land as part of the settlement. *Id.* § 1607(a); Pet. App. 4a. In 1973 these corporations selected the option under the settlement of taking fee title to the 1.8 million-acre Venetie tract, *see* 43 U.S.C. § 1618(b), rather than receiving other available land and monetary benefits. Six years later, the ANCSA corporations unilaterally deeded this land to the Native Village of Venetie Tribal Government, then were dissolved. Pet. App. 4a.

In 1978 the Village-returning to its strategy of seeking to restore its former reserve-asked the federal government to take the land into trust. But the government refused to do so. *See id.* 78a n. 40; DOI Op., p. 112 n. 276. As the Solicitor of DOI explained to the Village at the time, "the Secretary simply does not have the authority to ignore the policy and statutory provisions of [ANCSA] and restore the former Venetie Reserve to trust status." J.A. 143. In 1980 the Village sought federal approval of an oil and gas exploration agreement between it and a private company, but DOI rejected that request as well. again reiterating that under ANCSA it has no supervisory role over Venetie. *See* J.A. 155. Accordingly, as even the Ninth Circuit acknowledged, "[t]oday, Venetie *12 owns its land in fee simple, and the federal government exercises few controls (if any) over Venetie's territory." Pet. App. 29a.

2a. This litigation stems from the Village's effort to tax non-members for commercial activity in Venetie. In 1986 the State, acting through the Yukon Flats School District, entered into a contract with a joint venture for the construction of a public school

facility in the Village of Venetie financed with state funds. In December 1986 the Village notified the contractor that it owed \$161,000 pursuant to a five percent business activity tax the Village had recently enacted on “source gains” derived from commercial activity on the land. When neither the contractor nor the State—“the party responsible for paying the tax” under the contract, *id.* 4a—paid the tax, the Village sought to collect it in tribal court from the State, the school district, and the contractor. *Id.*

The State thereupon brought this federal action for declaratory and injunctive relief in the Alaska District Court, challenging the Village’s jurisdiction to impose the tax. The Village moved to dismiss, arguing, *inter alia*, that, as an Indian tribe, it is entitled to tax non-Natives who engage in commercial activities in Venetie because the land is “Indian country” within [18 U.S.C. § 1151\(b\)](#). The District Court rejected that motion and preliminarily enjoined the Village from attempting to collect the tax. Pet. App. 4a, 141a. The Ninth Circuit affirmed the injunction and remanded for further proceedings. *Id.* 140a.

b. On remand, the District Court ruled in December 1994 that “the Neets’aiti Gwich’in are a sovereign tribe as a matter of common-law,” and thus are entitled to govern *their own members* for internal purposes. *Id.* 126a.^[FN8] *13 That ruling was not appealed and is not at issue here. In August 1995, however, the District Court ruled that the 1.8 million-acre Venetie tract is *not* Indian country within [Section 1151\(b\)](#), and that, accordingly, the Village is not sovereign over the *land* and lacks authority to tax non-members doing business upon it. Pet. App. 79a.

FN8. Generally speaking, Indian tribes may govern their own internal affairs, and thus may “punish tribal offenders,” “determine tribal membership,” “regulate domestic relations,” and “prescribe rules for inheritance for members.” [Montana v. United States](#), 450 U.S. 544, 564 (1981). Tribal jurisdiction to regulate land and the activities of non-members, however, turns

on whether the tribes occupy Indian country. That is the nub of the dispute here.

The District Court focused on “the question of whether land has been validly set apart for the use of Indians as such, under superintendence of the government.” *Id.* 49a. It found federal superintendence absent, because under ANCSA “[t]he federal government no longer has any right or responsibility for the active supervision of Alaska Natives with respect to the lands which they occupied after extinguishment of aboriginal title.” *Id.* 70a. The requisite set aside was also missing, because ANCSA land was not conveyed to Indians as such, but rather to state-chartered business corporations to do with as they see fit. *Id.* 77a-79a. The subsequent conveyance from the ANCSA corporations to the Village was the product of a “unilateral decision” of those private entities, *id.* 79a, “not joined in nor approved by the federal government.” *Id.* 75a.

3a. A divided panel of the Ninth Circuit reversed. It rejected the District Court’s test for determining whether land constitutes Indian country, concluding instead that a “factually dependent,” “more textured six-factor inquiry” was required. *Id.* 12a (internal quotation marks omitted). Applying that test, the panel held that “[ANCSA] did not extinguish Indian country in Alaska as a general matter, and that the land Venetie occupies is Indian country.” *Id.* 2a.

Even though it candidly acknowledged that “the federal government exercises few controls (if any) over Venetie’s territory,” the panel found superintendence based on the fact that the Native inhabitants of Venetie participate in a *14 “patchwork of [federal] benefit programs.” *Id.* 22a, 29a. The court then concluded that a set aside had occurred because the ANCSA corporations that received the land—while plainly not Indian tribes—nevertheless had a “Native identity.” *Id.* 15a, 30a. Having swept ANCSA to one side, the panel then proceeded—within the loosely worded contours of its multi-factor balancing test—to conclude that Venetie is Indian country within [Section 1151\(b\)](#). Pet. App. 31a.

b. Judge Fernandez wrote separately. He explained

that “[i]f ANCSA meant anything at all, it meant that the tribes, as such, would no longer have control or sovereign power over the land. They would only have sovereignty over their members.” *Id.* 35a. The panel’s ruling not only contravened Congress’ intent, but invited “a blizzard of litigation throughout the State of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country,” a process that would create a “crazy quilt” of state and tribal jurisdictional enclaves in Alaska. *Id.* 35a-36a. Judge Fernandez nevertheless joined the panel opinion in light of circuit precedent he found binding on the Indian country issue. *Id.*

This Court granted certiorari. [117 S. Ct. 2478](#).

SUMMARY OF ARGUMENT

I. The authority of the Native Village of Venetie to tax non-members doing business in Venetie turns on whether the land is “Indian country.” Congress has defined Indian country to include (a) “Indian reservation[s],” (b) “dependent Indian communities,” and (c) “Indian allotment[s].” [18 U.S.C. § 1151](#). The vast bulk of Indian country nationwide has been clearly designated by Congress as an Indian reservation or an allotment. The other type of Indian country—the dependent Indian community—has existed thus far as a relatively narrow adjunct to the categories that surround it in the statutory listing. The Ninth Circuit decision below changes all that, transforming the heretofore discrete “dependent Indian community” category of Indian country into a *major* form of Indian country nationwide. That result not only expands [Section 1151\(b\)](#) far beyond its congressionally intended scope, but transfers from Congress to the courts the authority to make vast areas of Alaska—and, indeed, of the United States—Indian country.

[Section 1151\(b\)](#) was enacted to codify the definition drawn by [United States v. Sandoval](#), 231 U.S. 28 (1913), and [United States v. McGowan](#), 302 U.S. 535 (1938). Those cases establish that congressional intent is the touchstone of the Indian country inquiry, and that a “dependent Indian community” is

land that Congress has clearly set aside for Indians as the equivalent of an Indian reservation. This construction comports with the general rule stated by this Court for determining whether land is Indian country, which looks to whether Congress has “validly set apart [the land] for the use of the Indians as such, under the superintendence of the Government.” [Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe](#), 498 U.S. 505, 511 (1991) (internal quotation marks omitted). The Ninth Circuit’s indeterminate, six-factor “dependent Indian community” test bears little resemblance to the inquiry codified in [Section 1151\(b\)](#), and is singularly ill-suited for a threshold jurisdictional determination such as whether Indian country exists.

II. The land conveyed under ANCSA—including the Venetie tract—is not Indian country within [Section 1151\(b\)](#) because Congress did not set that land aside as the equivalent of an Indian reservation, or anything like one. Indeed, that was the one thing above all that Congress—at the urging of Alaska Natives, the State, and others—made clear it did not want to accomplish via the settlement. Thus, Congress in ANCSA expressly revoked the few reserves that had existed in Alaska (including the former Venetie reserve) and disavowed any reservation or trustee relationship with the land. [43 U.S.C. §§ 1601\(b\) & 1618\(a\)](#). That express congressional intent—codified in the statute itself and resounding throughout the entire legislative record—alone precludes judicial designation of ANCSA land as Indian country within [Section 1151\(b\)](#).

Nor does ANCSA land qualify as Indian country under the general rule formulated by this Court. In ANCSA, Congress did not set aside the land for the use of tribes or Natives *as such*, but instead conveyed it to private business corporations, formed under and subject to state law. *Id.* [§§ 1606\(d\) & 1607\(a\)](#). That distinction was key to Congress’ goal of achieving a settlement “without establishing any permanent racially defined institutions.” *Id.* [§ 1601\(b\)](#). Thus, ANCSA land is a freely alienable corporate asset, which may be—and has been—conveyed to Natives *or* non-Natives. In this respect, the later conveyance of the Venetie tract from the

ANCSA corporations to the Village was not by any stretch of the imagination a *federal* set aside; it was the voluntary act of *private* companies. Because the decision to create Indian country is emphatically one for Congress to make, neither Indians nor such private companies may create Indian country of their own volition.

ANCSA also precludes any finding of federal superintendence. Indeed, the Act is antithetical to the out-dated notions of dependence and superintendence that gave rise to the “dependent Indian community” category of Indian country in the first place. ANCSA sought to “maximiz[e] participation by Natives in decisions affecting their rights and property,” *id.* § 1601(b), not to subordinate such decisions to federal agents. Moreover, far from establishing federal jurisdiction and control over the land, Congress sought to enhance state and local control by subjecting ANCSA corporations to state law and even taxation, *id.* §§ 1607(a) & 1620(d)-which itself belies any notion that Congress intended to make the land sovereign Indian country. The eligibility of Alaska Natives to participate in general federal assistance programs certainly does not establish the requisite federal superintendence over the land; and, in any event, as even the Ninth Circuit acknowledged, the federal government has been replaced in the wake of ANCSA by the State or Natives themselves as the direct provider of such assistance, including in Venetie.

III. The jurisdictional and practical consequences of designating ANCSA land as Indian country also counsel against any conclusion that Congress intended to permit the courts to do so. The Ninth Circuit Indian country regime will create enormous uncertainty and confusion over the boundaries and extent of state, federal, and tribal sovereignty within vast areas of Alaska. This will result in protracted litigation, which Congress expressly sought to avoid through ANCSA. *Id.* § 1601(b). In addition, transforming ANCSA land into Indian country will impede implementation of numerous important state regulatory programs, empower Native villages to tax ANCSA corporations out of existence, and leave the State with full jurisdictional authority

over less than 3% of all privately held land in Alaska. The absence of *any* discussion in ANCSA's voluminous legislative record of such obvious and far-reaching implications of designating settlement land as Indian country provides still more confirmation that Congress intended nothing of the sort.

So, too, does the most astonishing result of the Ninth Circuit Indian country regime: the establishment of a gigantic reservation system in Alaska, nearly doubling the total area of Indian country nationwide. Because of its unique history and geography, Alaska and its Natives were spared the reservation policy adopted by the federal government in its relations with Indians in the lower 48 States. That policy has left in its wake a decidedly mixed legal legacy, including the notion of a “dependent Indian community” itself. As the ANCSA Congress recognized, Alaska-the Nation's last frontier-provided an opportunity for a new approach, one freed from outworn entanglements with an Indian policy formed for a different time and place. In seizing that opportunity, Congress made clear its intent that ANCSA land not be Indian country or, indeed, anything like it. This Court should give effect to that intent.

ARGUMENT

I. THE NINTH CIRCUIT FUNDAMENTALLY MISTOOK THE JUDICIAL INQUIRY INTO WHETHER LAND IS INDIAN COUNTRY AND MISCONSTRUED THE “DEPENDENT INDIAN COMMUNITY” CATEGORY OF [SECTION 1151](#).

1. The authority of the Native Village of Venetie to levy the tax at issue in this case turns on whether the Venetie tract is “Indian country.” [FN9] Indian country is the jurisdictional touchstone for delineating federal, state, and tribal authority over Indian-occupied lands. See [Oklahoma Tax Comm'n v. Sac & Fox Nation](#), 508 U.S. 114, 125 (1993); [Naragansett Indian Tribe v. Narragansett Elec. Co.](#), 89 F.3d 908, 915 (1st Cir.1996); Cohen, *supra*, at 27, 256 & n. 115. Within it tribes possess broad authority-subject to federal limitations-to govern not only their own members, but also the land and non-

members. States, on the other hand, are precluded from exercising fundamental attributes of their sovereignty within Indian country. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983); Bryan v. Itasca County, 426 U.S. 373, 376 (1976); DeCoteau v. District County Court, 420 U.S. 425, 427 & n. 2 (1975); Pet. 12.

FN9. That much is undisputed. See Br. for Native Village of Venetie, *et al.*, p. 13 (9th Cir.) (“The presence of ‘Indian country’ is both critical and fundamental since the power to tax must be exercised within a Tribe’s territorial jurisdiction, *i.e.*, Indian country.”); accord Pet. App. 6a (Ninth Circuit), 39a (District Court).

2a. Congress—which has plenary control over Indian affairs, see U.S. Const. art. I, § 8; Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)—alone has the authority to create (or sanction the creation of) Indian country. Accordingly, the determination whether land is Indian country is ultimately a matter of ascertaining Congress’¹⁹ intent. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977) (“The underlying premise [in this area] is that congressional intent will control”); United States v. Soldana, 246 U.S. 530, 531 (1918) (“Whether or not [land] is Indian country depends upon the construction to be given the act of Congress”). See also Cohen, *supra*, at 41 (“Recognition or establishment of lands as * * * a dependent Indian community * * * is essentially a matter of the purpose of Congress and of the Executive Department”).

b. Congress has delineated the extent of Indian country in 18 U.S.C. § 1151. That provision—enacted in 1948 as part of a general revision of Title 18—states that “Indian country” is:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, * * * (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indi-

an titles to which have not been extinguished * * *. [18 U.S.C. § 1151.^{FN10}]

FN10. While this definition is found in the criminal code, this Court has made clear that it governs for purposes of establishing civil as well as criminal jurisdiction over Indian matters. See Oklahoma Tax Comm’n v. Chickasaw Nation, 115 S. Ct. 2214, 2217 n. 2 (1995); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n. 5 (1987); DeCoteau v. District County Court, 420 U.S. at 427 n. 2.

The vast bulk of the reported 56 million acres of Indian country nationwide, see DOI, *American Indian Today* 9 (3d ed. 1991), was clearly designated by Congress as either a reservation (§ 1151(a)) or an allotment (§ 1151(c)), “explicitly invoking the statutory terms.” Cohen, *supra*, at 28. The other category of Indian country under Section 1151—the dependent Indian community—represents only a tiny portion of Indian country nationwide²⁰ and has received comparatively scant attention. As the Ninth Circuit observed below, this Court “has never resolved * * * the test for determining whether a tribe constitutes a dependent Indian community within the meaning of § 1151(b).” Pet. App. 6a. Accord Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F.3d at 917; Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1545 (10th Cir.1995).

The limited scope of the “dependent Indian community” category of Indian country is nevertheless quite clear. The Reviser’s Notes to Section 1151 confirm that this provision was intended to codify the definition established by this Court’s decisions in United States v. Sandoval and United States v. McGowan. See United States v. John, 437 U.S. 634, 648 (1978); United States v. Levesque, 681 F.2d 75, 77 (1st Cir.), *cert. denied*, 459 U.S. 1089 (1982); DOI Op., p. 115; Cohen, *supra*, at 38. Those cases establish that the dependent Indian community category of Indian country is—as historical experience suggests—a narrow one, grounded like the other two

categories of Indian country that surround it in the statutory listing in a clear congressional purpose to create Indian country.^[FN11]

FN11. This construction comports with the maxim *noscitur a sociis*-that “a word is known by the company it keeps”-which this Court applies in order “to avoid the giving of unintended breadth to the Acts of Congress.” *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). See *Beecham v. United States*, 511 U.S. 368, 371 (1994); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990).

c. The phrase “dependent Indian communities” comes from *Sandoval*, 231 U.S. at 46. That case involved the authority of the federal government to enforce its laws governing the introduction of liquor into “Indian country” on the Pueblo lands in New Mexico. Significantly, it was undisputed in *Sandoval* that Congress itself had specified that the Pueblo lands were “Indian country.” See *id.* at 37 n. 1 (“ ‘Indian country * * * shall * * * include all *21 lands now owned or occupied by the Pueblo Indians of New Mexico’ ”) (quoting statute); *id.* (“ ‘the terms “Indian” and “Indian country” shall include the Pueblo Indians of New Mexico and the lands now occupied by them.’ ”) (quoting statute). The only question was whether that express congressional designation could be given effect.

The Court answered in the affirmative, emphasizing that “the questions whether, to what extent, and for what time [Indians] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.” *Id.* at 46 (emphasis added). Underlying that determination was the Court’s finding that the Pueblo Indians “are dependent upon the fostering care and protection of the [federal] Government, like reservation Indians in general.” *Id.* at 41. Because there was no question that Congress-having expressly said so-intended that “the lands then owned or occupied by the Pueblo Indians should be deemed and treated as Indian country,” the Court held that the federal In-

dian laws applied there. *Id.* at 37-38, 49. The lesson of *Sandoval*, accordingly, is that-even when it comes to the “dependent Indian community” category of Indian country-the designation of lands as Indian country is one for Congress, not the courts.^[FN12]

FN12. The Ninth Circuit below repeatedly adverted to the fact that the Pueblo lands at issue in *Sandoval* were owned in fee by the Indians, not the federal government. See Pet. App. 11a, 18a, 29a. In fact, however, the Pueblos’ “fee” ownership was dramatically circumscribed by the statute designating those lands as Indian country, which placed the lands “ ‘under the absolute jurisdiction and control of the Congress of the United States.’ ” *Sandoval*, 231 U.S. at 37 n. 1 (quoting statute). More to the point, Congress had expressly designated those lands as “ ‘Indian country.’ ” *Id.* (same). That express designation was determinative, regardless of the status of the title to the land.

McGowan is of like tenor. It concerned land purchased and set apart by Congress as a permanent settlement for *22 “needy Indians scattered over the State of Nevada,” which Congress had designated as an “Indian Colony.” 302 U.S. at 537. See Act of May 10, 1926, ch. 278, 44 Stat. 496. The United States argued that the Indian Colony was “Indian country” on the ground that “it was in effect an Indian reservation,” Br. for United States 19, a view shared by the Secretary of the Interior. See Memorandum of C. Westwood, Asst. Solicitor, DOI (Apr. 7, 1958) (“[T]he Department knows no reason why the colony was termed a colony instead of a reservation and * * * in the opinion of the Department there is no practical distinction between an Indian reservation and an Indian colony.”) (Pl.Ex. 8). This Court agreed, finding that “Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as ‘reservations.’ ” 302 U.S. at 538.

The *McGowan* Court explained that “it is immateri-

al whether Congress designates a settlement as a 'reservation' or 'colony,' " since the settlement in question shared the same attributes as a reservation: it was "validly set apart for the use of the Indians"; "[i]t is under the superintendence of the Government"; and "[t]he Government retains title to the lands which it permits the Indians to occupy." *Id.* at 538-539. Citing *Sandoval*, the Court also reiterated that "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out." *Id.* at 538 & n. 11. *McGowan* therefore reaffirms that congressional intent is the touchstone, and that the "dependent Indian community" category of Indian country consists of Indian land that is like a reservation in everything but the name Congress gives it.

[Section 1151\(b\)](#) was intended to do no more than codify the definition carved by *Sandoval* and *McGowan*. See [John](#), 437 U.S. at 648.^[FN13] When a concept-such as *23 the dependent Indian community-"is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). Here that "soil "-*Sandoval* and *McGowan*-supplies a distinctly circumscribed meaning to [Section 1151\(b\)](#): a "dependent Indian community" is land that Congress has set aside for Indians as the equivalent of an Indian reservation. See, e.g., Cohen, *supra*, at 45 n. 154 ("a dependent Indian community is equivalent to an Indian reservation"); *id.* at 38-39 (same); Heather Noble, *Tribal Powers to Regulate Hunting in Alaska*, 4 Alaska L. Rev. 223, 248 (1987) ("the term dependent Indian community includes lands occupied by Indians that are functionally equivalent to reservations"); DOI Op., pp. 114-115 (same).^[FN14]

FN13. The Reviser's Notes expressly state as much and, as this Court has recognized, the 1948 recodification was as a general matter not intended to effect any change in the existing law-represented in this instance by *Sandoval* and *McGowan*-that Congress sought to codify. See [Tidewater](#)

[Oil Co. v. United States](#), 409 U.S. 151, 162 (1972); [Fourco Glass Co. v. Transmirra Prods. Corp.](#), 353 U.S. 222, 228 (1957).

FN14. Both *Sandoval* and *McGowan* dwell on the dependent nature of the Indian communities and people at issue. In *Sandoval* the Court termed the Pueblos "essentially a simple, uninformed and inferior people," [231 U.S. at 39](#); in *McGowan* it characterized the Reno Indians as "needy" and noted that Congress had appropriated funds for their "civilization." [302 U.S. at 537 & n. 4](#). The fact that such outdated notions of cultural superiority lie at the core of the dependent Indian community category of Indian country provides another reason to construe it narrowly. See James E. Lobsenz, "Dependent Indian Communities": A Search for a Twentieth Century Definition, 24 Ariz. L. Rev. 1, 2 (1982) ("The 'quasi-sovereign' or 'dependent' status of the Indian tribe is inextricably linked to past concepts of the Indian as an uncivilized savage who was to be gradually elevated to the level of a civilized human being.").

Certainly a court should be reluctant to assume today that Congress operated on the basis of such notions, and-as even decisions from an era willing to reach judgments on such matters recognized-these matters "are to be determined by Congress, and not by the courts." [Sandoval](#), [231 U.S. at 46](#) (emphasis added). In any event, insofar as dependence is concerned, the lesson of these cases is that the Indian communities did not simply receive federal assistance; the federal government had explicitly undertaken to enter their everyday lives, to protect them, and to provide for their very means of existence. See [id. at 41](#); [McGowan](#), [302 U.S. at 537 & n. 5](#).

*24 d. This construction comports with the Court's general approach in Indian country cases. This Court has said that "the test for determining wheth-

er land is Indian country [under [Section 1151](#)]” is “whether the area has been ‘validly set apart for the use of the Indians as such, under the superintendence of the Government.’ ” [Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe](#), 498 U.S. at 511 (quoting [John](#), 437 U.S. at 648-649; [McGowan](#), 302 U.S. at 539). Nothing in this general rule supports an expansion of the “dependent Indian community” category of Indian country beyond the bounds delineated by this Court in [McGowan](#) and [Sandoval](#), and codified by Congress in [Section 1151\(b\)](#).

The phrase “validly set apart for the use of the Indians as such, under the superintendence of the Government” comes from [United States v. Pelican](#), 232 U.S. 442, 449 (1914). See [John](#), 437 U.S. at 648-649. The Court in [Pelican](#) used the phrase to describe a clearly designated Indian reservation. 232 U.S. at 449 (“the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the Government”).^[FN15] See also [Donnelly v. United States](#), 228 U.S. 243, 269 (1913) (Indian country is land “lawfully set apart as an Indian reservation”). In [McGowan](#) the phrase was used to refer to a congressionally designated “Indian Colony,” which, the *25 Court found, was indistinguishable from a reservation. 302 U.S. at 537. And in [John](#) the phrase was again used to refer to a clearly designated reservation. See 437 U.S. at 649. Thus, in every case cited for the general “Indian country” rule the land was either specifically designated by Congress as a “reservation,” its equivalent, or an “allotment,” or was held by the United States in trust.

FN15. The [Pelican](#) Court went on to hold that allotments from the reservation continued to constitute Indian country when distributed to Indians, “the Government retaining control.” 232 U.S. at 449. See 18 U.S.C. § 1151(c). Congress had specified that the allotments were to be held in trust by the United States and be inalienable during the pertinent period. 232 U.S. at 447.

3a. The Ninth Circuit decision below transforms the heretofore discrete “dependent Indian community” category of Indian country into a *major* form of Indian country nationwide. In one fell swoop, that decision makes the 44 million acres of land conveyed under ANCSA eligible for judicial designation as Indian country. In doing so, moreover, it makes the courts rather than Congress the principal arbiter of Indian country in Alaska, transferring from Congress to the courts the power to allocate the sovereign authority of the State of Alaska, federal government, and hundreds of Indian tribes over vast areas of Alaska and, indeed, of the United States.

b. This result is largely the product of the dependent Indian community test adopted and applied by the Ninth Circuit below. That test departs dramatically from this Court's precedents, discussed above, and thus from [Section 1151\(b\)](#). While this Court has focused on evidence that Congress intended to set aside the land in question as Indian country-and has insisted on the most unambiguous evidence of that intent when Congress has not actually proclaimed the land as “Indian country,” a “reservation,” or an “allotment”-the Ninth Circuit looked to a six-factor, fact-intensive “functional” balancing test that by its terms seems not to concern itself with congressional intent at all. See Pet. App. 8a, 13a.

While this Court has looked to Congress' intent to set the land apart for Indians under federal ownership and control, the Ninth Circuit simply considered “the *degree* of *26 federal ownership of and control over the area” and “the *extent* to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples,” to ensure “*some* federal connection to the land at issue.” *Id.* 7a-9a & n. 1, 13a (emphases added). And while this Court has found the requisite dependency and superintendence when the government relocated Indians with “no protection whatever” to “a permanent settlement” which it “supervised and equipped,” [McGowan](#), 302 U.S. at 537 & n. 5 (internal quotation marks omitted), or when federal “superintendents” determined that the Indians were “dependent on the fostering care and protection of

the Government,” [Sandoval](#), 231 U.S. at 41, the Ninth Circuit found those criteria met by a mere “patchwork of benefit programs.” Pet. App. 22a.

The test Congress distilled from this Court’s cases and codified in [Section 1151\(b\)](#) is circumscribed and reasonably precise-as befits a test serving the threshold function of delineating the respective parameters of federal, state, and tribal jurisdiction-and calls upon the courts to undertake a task to which they are both suited and accustomed: ascertaining Congress’ intent. In contrast, the Ninth Circuit’s test-like all amorphous, multi-factor tests-is “hard to apply,” “jettison[s] relative predictability for the open-ended rough-and-tumble of factors,” and “invit[es] complex argument in a trial court and a virtually inevitable appeal,” all of which is especially unacceptable for threshold *jurisdictional* determinations. [Grubart v. Great Lakes Dredge & Dock Co.](#), 513 U.S. 527, 547 (1995); see Pet. 28-30.

c. This Court should reject the ill-conceived and far-reaching Ninth Circuit test, and instead construe the “dependent Indian community” category of [Section 1151](#) according to its congressionally intended scope. Construing [Section 1151\(b\)](#) based on its actual meaning, the only plausible conclusion in this case is that ANCSA land does not fall within, or even anywhere near, the dependent Indian*27 community category of Indian country. For, based on what Congress said about the land conveyed under ANCSA, it is clear that Congress neither designated that land as Indian country nor set it aside for the benefit of Indians as the equivalent of a federally supervised reservation. Indeed, Congress-at the behest of Alaska Natives-was explicit that this was the one thing above all it did *not* intend.

II. THE CLEAR INTENT OF CONGRESS IN ENACTING ANCSA FORECLOSES ANY JUDICIAL DETERMINATION THAT LAND CONVEYED UNDER THAT ACT IS INDIAN COUNTRY.

A. Congress’ Express Revocation Of Existing Reserves And Repudiation Of Any Reservation Or

Trustee Arrangement Precludes Any Determination That ANCSA Land Is Indian Country.

1a. The clear intent of Congress in enacting ANCSA forecloses any judicial determination that land conveyed under that Act-including the Venetie tract-is Indian country. That conclusion is buttressed by numerous indicia of Congress’ intent, but to reach it, this Court need look no further than ANCSA’s express revocation of the few reserves that existed in Alaska and disavowal of the entire reservation and trustee concept. Those acts alone clearly and unmistakably establish the intent of Congress that settlement lands *not* be Indian country under [Section 1151\(b\)](#), because, as discussed, the “dependent Indian community” category of Indian country is limited to land that is equivalent to the very model of Indian occupation-the reservation-repudiated by ANCSA.^[FN16]

FN16. In construing ANCSA, the Ninth Circuit below placed great weight on the general canon of construction that any ambiguity in statutes affecting Indians should be resolved in favor of the Indians. See Pet. App. 14a-15a. As Judge Fernandez observed, however, “the provenance of ANCSA” is so “unique” that this “rule of construction * * * ‘operates with less force.’ ” Pet. App. 34a (citing [United States v. Atlantic Richfield Co.](#), 612 F.2d at 1139). In this case, moreover, it is debatable which construction “favors” Alaska Natives. As explained by amicus Shee Atika, Inc. and by Judge Fernandez, the Ninth Circuit construction harms ANCSA corporations and their Native shareholders. See Br. of Amicus Curiae Shee Atika, Inc. (“Shee Atika Br.”) 25-28; Pet. App. 35a. In any event, there is no basis for invoking this canon one way or the other, since its trigger-ambiguity-is absent. See [South Carolina v. Catawba Indian Tribe, Inc.](#), 476 U.S. 498, 506 (1986) (“The canon of construction regarding the resolution of ambiguities in favor of Indians * * * does not permit reliance on ambiguities that do not

exist, nor does it permit disregard of the clearly expressed intent of Congress”); *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) (same). As we explain, ANCSA clearly and unmistakably precludes any determination that ANCSA land is Indian country.

*28 b. The reservation system is itself foreign to Alaska, due to the unique history of that land and its Natives. Very few reserves were ever created, and those that were established were subject to the same local laws and taxes applicable to non-Natives and their lands, making them wholly unlike the Indian reservations of the lower 48 States. See *Metlakatla Indian Community v. Egan*, 369 U.S. at 51-52. In ANCSA, Congress expressly revoked the few reserves-including the former Venetie reserve-that existed, except for Metlakatla, which was exempted from the settlement altogether because its inhabitants are not Alaska Natives at all, but instead British Columbian emigrants. See 43 U.S.C. § 1618(a); note 2, *supra*. Respondents have characterized this revocation as a mere “technical[ity],” Opp. 11 n. 8, but it was central to what ANCSA was all about.

The emphatic purpose of ANCSA was to “maximiz[e] participation by Natives in decisions affecting their rights and property * * * without creating a reservation system or lengthy wardship or trusteeship.” 43 U.S.C. § 1601(b) (emphasis added). Alaska Natives as a group not only embraced but promoted that mission.^[FN17]

At the same time, *29 they opposed the Secretary of the Interior’s proposal that would have placed ANCSA lands in trust, and instead urged Congress to move in the opposite direction.^[FN18] Alaska Natives even pointed to the Pueblos of New Mexico-whose communities were at issue in *Sandoval*-as the paradigm of what they wanted to avoid. See *Hearings on S. 2906, supra*, at 90 (“the Pueblos of New Mexico are frozen in history * * * and this is something we want to avoid”) (Barry W. Jackson, AFN counsel). The State of Alaska shared these sentiments.^[FN19]

The repudiation*30 of the Indian reservation and the trustee concept of federal Indian policy-rooted

in another place and time-was central to ANCSA.

FN17. See, e.g., *Hearings on H.R. 13142, supra*, at 181 (“a solution which will work * * * cannot be achieved by trinkets or doles * * * or by imposing some modified form of reservation or paternalism upon the Alaskan Natives”) (AFN memorandum); *Hearings on S. 2906, supra*, at 89 (“Alaska is a little unusual because if anything the natives in Alaska are *very vehemently antireservation* and they have never been in favor of reservations and are not today and would like to participate as fully as possible in the life of the State and the society”) (Barry W. Jackson, AFN counsel) (emphasis added); DOI Op., at 89 (“[T]he choice to do away with the reservation system was one proposed and endorsed by the Native leadership relatively early on. * * * The reservation model was viewed by the Native leadership as incompatible with maximum economic self-determination.”).

FN18. See, e.g., *Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049, and H.R. 17129 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 76 (1968) (hereinafter “*Hearing on H.R. 11213*”) (DOI proposal); *Hearings on S. 2906, supra*, at 90 (“[W]e also are trying to get away from [the federal Bureau of Indian Affairs (“BIA”)], frankly, and from the Secretary of the Interior and accomplish a transition into American society to preserve for Indians as well as for the whites the mobility which exists in American society today. We are trying to build in provisions which will prevent us from having, if you will pardon the expression, our villages frozen in history.”) (Barry W. Jackson, AFN counsel) *Hearing on H.R. 11213, supra*, at 144 (“The AFN does not desire the Secretary to act as a trustee.”) (AFN commentary).

to DOI proposal); *Hearings on S. 2906, supra*, at 576 (AFN “object[s]” to the “propos[al] that the lands go initially in trust to the Secretary”) (Barry W. Jackson).

FN19. *See, e.g., Hearings on H.R. 13142, supra*, at 134 (“The result [of ANCSA] should not be Indian reservations because this is contrary to the traditions of Alaska. The ownership of land held by Alaska natives should be no different from that of other Alaskans.”) (statement of Hon. Keith H. Miller, Governor).

Congress made its intent surpassingly clear in this regard, not only in the text of ANCSA, [43 U.S.C. §§ 1601\(b\) & 1618\(a\)](#), but throughout its deliberations. *See, e.g., S. Rep. No. 92-405*, at 108 (1971) (“A major purpose of this committee and the Congress is to avoid perpetuating in Alaska the reservation and trustee system which has characterized the relationship of the Federal government to the Indian peoples in the contiguous 48 states.”); *S. Rep. No. 91-925*, at 112 (1970) (same); [H.R. Conf. Rep. No. 92-746, at 40 \(1971\)](#) (“[T]he conference committee does not intend that lands granted to Natives under this Act be considered ‘Indian reservation’ lands,” and “[t]he lands granted by this Act are not ‘in trust’ and the Native villages are not Indian ‘reservations.’ ”); *S. Conf. Rep. No. 92-581*, at 40 (1971) (same).^[FN20]

FN20. *See also H.R. Rep. No. 92-523, at 9 (1971)* (“[ANCSA] does not establish any trust relationship between the Federal government and the Natives. The regional corporations and the village corporations will be organized under State law, and will not be subject to Federal supervision except to the limited extent specifically provided in the bill. All conveyances will be in fee-not in trust.”); 117 Cong. Rec. 36865 (Oct. 19, 1971) (“Every one of the bills in our committee and the bills in the other body, all of them, eschew the reservation or trust concept. For too long we in America have

been making the Natives' mistakes for them.”) (Rep.Meeds); DOI Op., p. 89 (discussing same).

c. The express intent of Congress to avoid creating anything resembling a reservation or trustee arrangement itself commands the conclusion that ANCSA land is not Indian country. Indeed, as DOI observed in its 1993 opinion on the precise question presented by this case, “[i]t would be anomalous to conclude that *31 [ANCSA] lands are the jurisdictional equivalent of reservations, when Congress specifically abolished reservations and designed a comprehensive system of land holdings purposely intended not to be the functional equivalent of reservations.” DOI Op., p. 121. This conclusion is bolstered by numerous other provisions of the Act, discussed in more detail below, including those (1) extinguishing any claims based on aboriginal use or occupation of the land, [43 U.S.C. § 1603\(b\), \(c\)](#); (2) stripping the land of virtually any residue of its prior federal ownership, *id.* [§§ 1603\(b\), \(c\), 1606, 1607\(a\), 1613\(g\), 1617, 1618\(a\)](#); (3) conveying the land in fee simple to private business corporations rather than to tribes or Natives as such, *id.* [§§ 1606\(d\), 1607](#); (4) subjecting those corporations and the land to state rather than federal or tribal law, *id.* [§§ 1606\(d\), 1607\(a\), 1620\(d\)](#); and (5) encouraging the corporations to establish municipal governments organized under state law to govern the land, *id.* [§ 1613\(c\)](#).

2a. This is not news to the Native Village of Venetie. Recognizing the significance of the revocation of its former reserve, the Village first sought to avoid, then to circumvent this express congressional act altogether. Thus, during the legislative deliberations on ANCSA, the Village proposed an amendment that would have allowed it to elect to retain the land's reservation status. but Congress rejected that amendment. *See supra* at 11; J.A. 146. Then, after Congress had revoked the former Venetie reserve and conveyed the land under the settlement, the Village sought to have the government take the land back into trust. But DOI rejected that effort as well, explaining that, because “[t]he intent of Congress to permanently remove all Native lands

in Alaska from trust status is unmistakable,” J.A. 144, the Secretary had no authority to take the land into trust.^[FN21] Having failed *32 before Congress and the Executive, the Village now asks this Court to resurrect the reservation Congress revoked.

FN21. In its final rule concerning the acquisition of Indian land by the United States in trust, DOI reaffirmed this view, stating that “[ANCSA] does not contemplate the further acquisition of land in trust status, or the holding of land in such status, in the State of Alaska.” 45 Fed. Reg. 62034 (Sept. 18, 1980). ANCSA lands are accordingly expressly excluded from the Secretary’s rules authorizing the acquisition of Indian lands by the federal government in trust. [25 C.F.R. § 151.1 \(1997\)](#).

b. The Village argues that through [Section 1618\(b\)](#) of ANCSA it “opted out” of the settlement to be “‘reunifi[ed] * * * with its former reservation.’ ” Opp. 11 (quoting Pet. App. 31a).^[FN22] But nothing of the sort was permitted by ANCSA. When Congress revoked the former Venetie reserve, [43 U.S.C. § 1618\(a\)](#), it stripped the land of any vestiges of Indian country status. See, e.g., [Hagen v. Utah](#), 510 U.S. 399, 401 (1994) (“If the reservation has been diminished, then [the land] within the historical boundaries of the reservation, is not in ‘Indian country.’ ”); [Solem v. Bartlett](#), 465 U.S. 463, 467 (1984) (same); [DeCoteau v. District Court](#), 420 U.S. at 427 & n. 2 (same). As DOI correctly concluded at the time, the Village’s acquisition of fee title to the land under ANCSA did not in any way restore the land’s reservation status, or permit DOI to hold it in trust. See *supra* at 11.

FN22. Under [Section 1618\(b\)](#), village corporations established pursuant to ANCSA whose stockholders had resided on former reserve lands were permitted to elect to receive title to that land in lieu of the other benefits under the Act. [43 U.S.C. § 1618\(b\)](#).

Moreover, respondents did not “opt out” of ANCSA, but rather simply selected a particular benefits option available *under* ANCSA. As DOI concluded when the Village of Venetie put the same argument to it in 1980, any suggestion that [Section 1618\(b\)](#) permitted occupants of a former reserve to “disassociate [] themselves from the settlement” fundamentally misconstrues the purpose and effect of that provision:

*33 The option contained in [Section \[1618\(b\)\]](#) was * * * designed to avoid the hardship which would result if [the reservation] Natives were forced to select land elsewhere, or a lesser total acreage. * * * The structure and legislative history of Section [1618] itself precludes the restoration of former reservations to trust status. Section [1618] * * * does not allow Natives to vote for continued trust status. It merely allows them to choose between two forms of compensation in settlement of their claims. [J.A. 145-146.]

c. Accordingly, neither [Section 1618\(b\)](#) nor Venetie’s former reserve status provides any basis for treating the land at issue in this case any differently from the tens of millions of acres of other Alaska land conveyed as part of the settlement. Except, that is, in this important respect: of all the land conveyed under ANCSA, former reserve land is the *least* likely candidate for Indian country status, since by virtue of Congress’ express revocation of the land’s reservation status, there can be no question whatsoever that Congress did not intend for that land to be a reservation or-as the other provisions discussed above underscore anything like one. Rather, Congress had something altogether different in mind. The Native Village of Venetie disagrees with that approach-and has tried repeatedly to circumvent it-but neither the Village nor the courts are free to disregard the clear intent of Congress that land conveyed under the settlement not be Indian country.^[FN23]

FN23. [Section 1603\(c\)](#) of ANCSA sweeps even broader than the Act’s explicit revocation of existing reserves, expressly “extinguish[ing]” “[all] claims * * * that are based on claims of aboriginal right,

title, use, or occupancy of land * * *, or that are based on any statute or treaty of the United States relating to Native use and occupancy * * *.” [43 U.S.C. § 1603\(c\). Section 1151](#)-the federal Indian country statute-plainly “relat [es] to Native use and occupancy.” *Id.* Therefore, as Judge Fernandez concluded, [Section 1603\(c\)](#) “disassociated the land from all other claims, including Indian country claims” based on [Section 1151](#). Pet. App. 34a.

***34 B.** ANCSA Does Not Set Apart Land For The Use Of Indians As Such, Under The Superintendence Of The Federal Government.

1a. The same conclusion follows under this Court's general “Indian country” rule, which asks whether the land is “validly set apart for the use of the Indians as such, under the superintendence of the Government.” [Oklahoma Tax Comm'n v. Potawatomi Tribe](#), 498 U.S. at 511 (internal quotation marks omitted). In every one of this Court's cases in which the requisite “set aside” has been found, Congress had specifically designated the land as “Indian country,” [Sandoval](#), 231 U.S. at 37, a “reservation,” [John](#), 437 U.S. at 648; [Pelican](#), 232 U.S. at 449; [Donnelly](#), 228 U.S. at 269, its equivalent, [McGowan](#), 302 U.S. at 537 & n. 4, or “trust land,” [Potawatomi Tribe](#), 498 U.S. at 511. In ANCSA, Congress did nothing of the sort. Indeed, rather than “set[ting] apart [the land] for the use of the [Indians as such](#),” 498 U.S. at 511 (emphasis added), it expressly revoked any existing reserves or trusteeship, and provided for the conveyance of the land to state-chartered business corporations to do with as they see fit. See [43 U.S.C. §§ 1606\(d\), 1607\(a\)](#).

The conveyance of the land to private business corporations-rather than to tribes or individual Natives-was key to ANCSA's express goals of achieving a settlement “in conformity with the real economic and social needs of Natives,” “with maximum participation by Natives in decisions affecting their rights and property,” and “without establishing any permanent racially defined institutions.” *Id.* [§ 1601\(b\)](#). And-along with the Act's express revocation of existing reserves and rejection of any trust

arrangement-it was one of the principal means through which Congress sought to promote the economic participation of Alaska Natives in American society. See DOI Op., p. 82 (“One of ANCSA's most significant departures from the government's past practice in resolving Indian or Native land claims was the choice made to deliver compensation and land title to corporate entities organized *35 under state law, rather than directly to, or in trust for the benefit of, traditional tribal groups.”).

The important distinction between conveying the land to tribes or Natives as such, on the one hand, and to private corporations, on the other, was not lost on Alaska Natives. As AFN's chief counsel testified during the hearings:

I think some members of the committee may be interested in the unusual features that we have adopted in handling the land and the money. The land and the money * * * will not be given to the villages as tribal entities. Instead, business corporations will be formed by the village members and the land and money will go to these business corporations. *This is very important because it separates the municipal corporation or the native group as a municipal corporation from the native group as a tribal entity.* Otherwise, there is a very real danger that it will freeze the natives to the land and to the villages and make it difficult or impossible for them to be mobile in American society today. [*Hearings on S. 2906, supra*, at 575 (Barry W. Jackson) (emphasis added).]

And, as amicus Shee Atika, Inc. has explained, there are numerous ways in which the ANCSA corporations that own the land are distinct from the tribal entities eligible to participate in the settlement. See *Shee Atika Br.* 6-16.

Significantly, Congress specified that the corporate recipients of the land would be organized under and subject to state rather than federal law, including in the area of taxation. See, e.g., [43 U.S.C. §§ 1606\(d\), 1606\(h\)\(2\), 1607\(a\), 1613\(h\)\(2\), 1620\(d\)](#). This is telling because-as Congress is presumed to have been aware, see [Goodyear Atomic Corp. v. Miller](#), 486 U.S. 174, 184-185 (1988)-state laws

and taxes are generally *inapplicable* within Indian country. *See supra* at 18.^[FN24] Indeed, the *36 available evidence confirms that Congress made ANCSA corporations subject to state law precisely to preclude any possibility that the settlement lands would be considered reservations.^[FN25]

FN24. ANCSA's treatment of taxes is especially revealing. Congress expressed its intent in the statute itself to achieve a land settlement "without adding to the categories of property and institutions enjoying special tax privileges." [43 U.S.C. § 1601\(b\)](#). Recognizing ANCSA lands as Indian country would of course starkly contravene that intent, because Indian country enjoys a broad exemption from state taxes. *See Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. at 128 ("we presume against a State's having jurisdiction to tax within Indian country"). In addition, ANCSA exempted undeveloped ANCSA land from state and local property taxes for 20 years, [43 U.S.C. § 1620\(d\)\(1\)](#)-an action that would have been wholly superfluous if Congress had intended the lands to be sovereign Indian country.

FN25. The Chairman of the pertinent House committee, responding to a colleague's request for a "guarantee" that there be "no possibility" that the lands would "be considered at any time in the future as Native reservations or Indian reservations, knowing the tremendous problems that we have because of the Indian reservations in the forty-eight adjacent states," stated that he shared that concern and that the "way that we can do this is to find that these villages, wherever they may be, before they can take, must be incorporated under the laws of the State of Alaska." *Executive Session, Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. (June 21, 1971) (Ch. Aspinall and Rep. Kyl). In [Section 1607\(a\)](#), Congress did just that.

b. Despite all of this, the Ninth Circuit concluded that ANCSA land was set apart for the use of Indians "as such," because ANCSA corporations are owned by Natives and thus, as the Ninth Circuit put it, have a "Native identity." Pet. App. 15a. There are several problems with this conclusion, among which is that it conflicts with the express intent of Congress to *avoid* creation of "any permanent racially defined institutions." [43 U.S.C. § 1601\(b\)](#). Indeed, through ANCSA, Congress thought that it had "put an end forever to racial or ethnic distinctions in land tenure * * * or provision of government services in Alaska." S. Rep. No. 91-925, *supra*, at 62. Moreover, if all that were required to meet the set aside requirement were the conveyance of land to an individual *37 or entity with a "Native identity," then Congress could never convey land to a Native-affiliated entity or individual without creating Indian country, even when, as here, the creation of sovereign Indian enclaves is precisely the opposite of what it is attempting to accomplish.

In reaching its "set aside" conclusion, the Ninth Circuit also emphasized that ANCSA restricts the alienability of stock in ANCSA corporations. Pet. App. 17a. But the pertinent question is whether the *land*-not the stock in its corporate owner-has been set aside for the use of Indians as such. And while the alienability of stock in ANCSA corporations may-at least as a temporary matter-be restricted,^[FN26] the alienability of ANCSA land-as even the Ninth Circuit felt obliged to concede, Pet. App. 17a-is *not*. *See Capener v. Tanadgusix Corp.*, 884 P.2d 1060, 1074 (Alaska 1994); Cohen, *supra*, at 747 ("An important feature of ANCSA is that all lands selected by Native corporations are patented in fee simple with few restrictions on alienation"); Shee Atika Br. 18 n. 49 ("ANCSA corporations are as free as any other private owners to dispose of their lands").^[FN27] The free *38 alienability of ANCSA land-to Natives *or* non-natives-alone compels the conclusion that Congress did not set aside the land for the use of Indians as such.^[FN28]

FN26. ANCSA barred the sale of members' stock in ANCSA corporations for a period

of 20 years from the date of the Act. [43 U.S.C. §§ 1606\(h\), 1607\(c\)](#). (That period was later changed to 20 years from the date of conveyance of land to the ANCSA corporations, after which corporations may elect to provide for the alienability of their stock. *See id.* [§ 1629c](#).) ANCSA did not, however, prevent non-Natives from owning stock in ANCSA corporations. Non-Natives could become non-voting stockholders through inheritance or by acquiring stock through court orders in divorce or child support proceedings. *See id.* [§ 1606\(h\)](#).

FN27. Since ANCSA's enactment numerous ANCSA corporations-including, of course, the Venetie and Arctic Village corporations-have sold, swapped, or conveyed valuable ANCSA lands to others, including to non-Native individuals and entities. *See, e.g., Village Journey, supra*, at 99; *Spill Trustees OK \$89 Million Kodiak Deals*, Anchorage Daily News, Nov. 4, 1994, at E1 (ANCSA corporations received \$60.5 million for sale of 237,000 acres of land and related property rights); *Land Baron Publicity-Shy Mississippian Has Lock on Anchorage Lots*, Anchorage Daily News, June 30, 1991, at C3 (ANCSA corporation sold 270 acres of land to Sunrise Development Corp.).

FN28. Indeed, as even the Ninth Circuit acknowledged (*see* Pet. App. 8a-9a), the fact that the Village-and not the federal government-owns fee title to the land at issue calls for the conclusion that the land is not Indian country under the “dependent Indian community” test applied in the other circuits. *See, e.g., Penobscot Indian Nation v. Key Bank of Maine*, [112 F.3d 538, 547 n. 12 \(1st Cir.1997\)](#) (existing authorities “indicate that ‘Indian Country’ * * * encompass[es] Indian trust lands but not Indian fee lands”), *pet. for cert. filed*, No. 97-219 (Aug. 4, 1997); [United States v.](#)

[Adair](#), [111 F.3d 770, 776 \(10th Cir.1997\)](#) (no dependent Indian community where “the federal government has not retained title to the land * * * nor has it retained regulatory or protective legal authority over the area”); [United States v. Stands](#), [105 F.3d 1565, 1572 \(8th Cir.1997\)](#) (“fee land beyond the boundaries of a reservation is not Indian country”), *pet. for cert. filed*, No. 96-9316 (June 5, 1997); [Naragansett Indian Tribe](#), [89 F.3d at 920-921](#) (“in most of the cases we found where land was privately held, even if by a tribe, the courts found there was not a dependent Indian community”) (citing Eighth and Tenth Circuit cases).

c. There is no reason to treat the Venetie tract any differently. As DOI itself found with respect to Venetie, “[t]he Government's conveyance of former Venetie Reserve lands to the ANCSA entities in fee was a conveyance to Village corporations, *not* to tribes.” J.A. 152 (Letter from S. Keep, Acting Assoc. Solicitor, DOI, to P. Williams, First Chief, Native Village of Venetie, *et al.* (Dec. 23, 1980) (emphasis added)). The corporate entities subsequently conveyed the land to the Village, but, as the District Court found, that act was not a *federal* set aside; it was the “voluntary act” of state-chartered corporations, “not joined in nor approved by the federal government.” Pet. App. 75a. *See id.* 77a-79a.

The decision to create Indian country is emphatically one for Congress to make. *See McGowan*, [302 U.S. at 538](#); [Sandoval](#), [231 U.S. at 46](#); *supra* at 18-19, 21-22. Thus, as the Tenth Circuit recently explained, Indian tribes do not have the authority to *39 remove land from state jurisdiction and force the federal government to exert jurisdiction over that land without either sovereign having any voice in the matter. Nothing in *McGowan* or the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have such unilateral power to create Indian country. [[Buzzard v. Oklahoma Tax Comm'n](#), [992 F.2d 1073, 1077 \(10th Cir.\)](#), *cert. denied*, [510 U.S. 994 \(1993\)](#).]

Accord [Naragansett Indian Tribe](#), 89 F.3d at 922. The rule is no different under ANCSA. See DOI Op., p. 122 (“The ANCSA statutory scheme simply does not permit tribes to create Indian country in Alaska by unilateral action, nor by virtue of * * * tribal ownership to impose federal restrictions on the land that Congress in ANCSA sought to avoid.”).

Accordingly, the unilateral decision of the ANCSA corporations to convey the Venetie tract to the Native Village of Venetie—as opposed to some other bidder—could not and did not transform the land into Indian country.

2a. The requisite federal superintendence is also lacking. In every case in which this Court has found such superintendence the land at issue—having been expressly set aside as a reservation or its equivalent—was under the jurisdiction and control of the federal government.^[FN29] Thus, for example, in *McGowan* the Court held that the land was “under the superintendence of the Government,” because “[t]he Government retain[ed] title to the lands which it permits the Indians to occupy.” [302 U.S. at 539](#). And in *Pelican* the Court emphasized that “the lands * * * were to be held in trust by the United States,” and “[t]hat *40 the lands, being so held, continued to be under the jurisdiction and control of Congress for *all* governmental purposes, relating to the guardianship and protection of the Indians.” [232 U.S. at 447](#) (emphasis added). See also [Sandoval](#), [231 U.S. at 37 n. 1](#) (land placed under “‘absolute jurisdiction and control of the Congress of the United States’”) (quoting statute).

FN29. While we discuss the “set aside” and “superintendence” requirements separately, this Court has said that to be Indian country land must be set aside *under* federal superintendence. See *supra* at 24. Thus, it is not enough to have a set aside without the requisite superintendence; indeed, it is not at all apparent that one could exist without the other. In any event, under ANCSA it is clear that *neither* requirement is present.

In addition, in the cases in which this Court has found superintendence, the federal government was not simply a presence in the lives of the Native occupants of the land, but rather by statute had expressly assumed jurisdiction and control over virtually all facets of the community in order directly to supervise, protect, and, indeed, sustain the Indians residing there. Thus, the government sent “agents and superintendents” directly to the Pueblo communities at issue in *Sandoval* to “guard[] their interests” because, in its view, the Pueblo Indians were “dependent upon the fostering care and protection of the Government, like reservation Indians in general.” [231 U.S. at 40-41](#). And the government established the “Indian Colony” in *McGowan* to create a “permanent settlement” for “needy Indians”—who were “liv[ing] just from hand to mouth” with “no protection whatever”—and undertook “to equip and supervise these Indians.” [302 U.S. at 537 & n. 5](#) (internal quotation marks omitted).

b. ANCSA is flatly inconsistent with such notions of Indian dependence and federal superintendence. Indeed, the “basic purpose of the legislation is to give Alaska Native[] people the tools for making their *own* decisions, and the funds and expertise for carrying out their *own* programs.” S. Rep. No. 91-925, *supra*, at 90 (emphases added). Accord [43 U.S.C. § 1601\(b\)](#); S. Rep. No. 92-405, *supra*, at 108. Thus, the ANCSA Congress eliminated any reservation or trustee relationship with the land and conveyed it in fee simple to state-chartered corporations, to do with as they please. See *supra* at 27-31, 35-38.^[FN30] And, *41 as the Ninth Circuit itself acknowledged, “[t]oday, Venetie owns its land in fee simple, and the federal government exercises few controls (if any) over Venetie’s territory.” Pet. App. 29a. That hardly bespeaks of federal superintendence.

FN30. See also [H.R. Rep. No. 92-523](#), *supra*, at 9 (ANCSA “corporations will be organized under State law, and will not be subject to Federal supervision except to the limited extent specifically provided in the bill.”) (emphasis added); Federal Field Committee for Development Planning in

Alaska, *Alaska Natives and the Land* 546 (1968) (Native leadership preferred that “the management responsibility be given to the people rather than to the Department of the Interior”).

ANCSA not only relinquished federal jurisdiction and control over the land, it did so in favor of the *State*. Thus, to receive land under the settlement Congress required Native villages-including Venetie-to form corporations that were creatures of and subject to state law. See [43 U.S.C. §§ 1606, 1607](#). In addition, Congress encouraged those Native villages that did not already have them to adopt municipal governments under state law. See *id.* [§ 1613\(c\)](#). That approach was of course entirely consistent with the fact that Alaska Natives-unlike reservation Indians in the lower 48 States-had historically been subject to the same territorial and state laws as non-natives. See *supra* at 5-7.

The express intent of Congress to place the land under the primary control of state and local authorities-not federal superintendents-also conformed with the wishes of Alaska Natives, who were “trying to get away from the BIA, frankly, and from the Secretary of the Interior and accomplish a transition into American society to preserve for Indians as well as for the whites the mobility which exists in American society today.” *Hearings on S. 2906, supra*, at 90 (emphasis added). As former Justice Arthur Goldberg-who represented AFN during the hearings-put it, “[p]aternalism [was] neither required nor wanted.” *Hearings on H.R. 13142, supra*, at 189.

c. Against this backdrop, the Ninth Circuit found federal superintendence in the fact that Alaska Natives *42 participate in what the court itself termed simply a “patch-work of benefit programs.” Pet. App. 22a. That conclusion speaks volumes about the Ninth Circuit's superintendence inquiry. Indians and tribal organizations across the United States-like myriad other individuals and groups-are eligible for participation in any number of federal benefits programs, not all of which are tied to their Indian status; their participation in such programs

does not establish federal superintendence over their land or communities, and thus does not transform their land or homes into Indian country.[FN31]

FN31. The Ninth Circuit recognized Congress' intent that the ANCSA corporations “ ‘not be subject to Federal supervision,’ ” Pet. App. 23a (quoting [H.R. Rep. No. 92-523, supra](#), at 9), but concluded that “subsequent legislative action belies this intention,” referring to Congress' decision to make Alaska Natives eligible for various programs benefiting Indians. Pet. App. 23a. Although the extension of such benefits does not amount to federal superintendence, or establish the Natives' dependency, the manner in which Congress extended such benefits provides still additional evidence that it does not regard ANCSA lands as Indian country. Eligibility for such benefits is often established by cross reference to [18 U.S.C. § 1151](#). Congress has recognized, however, that tying benefits to [Section 1151](#) would exclude Alaska Natives, because they do not occupy Indian country. As a result, when benefits are extended based on reference to [Section 1151](#), Congress has included an additional reference to ANCSA lands when it wants such benefits to reach Alaska Natives. See, e.g., [25 U.S.C. §§ 1452\(d\)](#) (entitlement to benefits under Indian Financing Act of 1974), 1903(10) (eligibility for tax benefit under Internal Revenue Code).

As this Court's precedents establish-and as virtually all of the federal circuits that have considered the matter but the Ninth have held-federal superintendence requires active, pervasive federal jurisdiction and control over the land, sufficient to confirm not only that the federal government has purposely undertaken to guard, protect, and sustain the community, but to displace state law and local authorities in doing so.^[FN32] The focus on Congress' intent to *43 assume such a role is critical because, as discussed, the practical effect of recognizing Indian

country is to displace state jurisdiction over important regulatory matters and, in most States (though not Alaska, which is among the Public Law 280 States), over serious criminal conduct as well. *See supra* at 18.

FN32. *See supra* at 20-23 (discussing *Sandoval* and *McGowan*); [United States v. Adair](#), 111 F.3d at 776-777 & n. 7 (fact that inhabitants of area “are eligible for a variety of federal or tribal services” does not establish superintendence because there was no indication that the federal government had assumed “control or authority over the area as a whole”); [Naragansett Indian Tribe](#), 89 F.3d at 922 (federal government’s “intent to assist” members of Indian community does not establish “a commitment to exercise jurisdiction and ‘superintendence’ over all activities on th[e] land * * * to the presumptive exclusion of state law”); [Buzzard](#), 992 F.2d at 1076 (superintendence lacking because “federal government has not retained title to th[e] land or indicated that it is prepared to exert jurisdiction over the land”); Pet. App. 65a (District Court).

d. As is readily apparent, the federal government’s involvement in the lives of Alaska Natives is entirely different than its involvement with respect to the “dependent Indian communities” in *Sandoval* and *McGowan*. Indeed, as explained, the history of Alaska Natives is, if anything, one of *independence*, not superintendence. Alaska Natives were never categorically displaced from their land and confined to federal enclaves. Since the Treaty of Cession, many Alaska Natives have participated in and contributed to Alaska’s economy, and those that have not have largely managed to live off the land and its resources, which—unlike the American west—remain largely capable of supporting such a lifestyle even today. *See supra* at 4-6. Thus, while Alaska Natives are eligible for and have participated in various federal programs, they have never been entirely dependent upon or subject to the superintendence of the federal government. To the

contrary, from the Alaskan purchase to statehood, “the federal government was involved only *minimally* with Alaska Natives.” Cohen, *supra*, at 739 (emphasis added).

Moreover, as the District Court found—and even the Ninth Circuit acknowledged—ANCSA fundamentally altered*44 the manner in which the federal government *is* involved in the lives of Alaska Natives in a fashion that forecloses any finding of superintendence today. *See* Pet. App. 28a (“Undoubtedly, the practice of federal agencies toward Venetie has changed since ANCSA was enacted in 1971. In many respects, the federal government has been replaced by either the State or the Tribe itself as the direct provider of services.”) (Ninth Circuit); *id.* 66a-67a (after ANCSA, federal assistance is “now available in the form of grants and other programs which are administered by Native people themselves with general oversight by agencies as opposed to direct agency services to the tribe.”) (District Court). In short, where the federal government’s presence has faded after ANCSA, the State’s has become more pronounced. *See* Br. for State of Alaska, pp. 44-48 (9th Cir.) (detailing involvement of State in day-to-day affairs of Native villages, including Venetie, in areas such as health, education, public works, and law enforcement).

Thus, as DOI has concluded, “[t]he present relationship between ANCSA-conveyed Native landholdings and the Federal government, particularly in light of the express language in ANCSA rejecting lengthy wardship or trusteeship, cannot be characterized as a guardianship or as related to a trust.” DOI Op., p. 121.

e. Finally, in holding that Congress intended “to maintain federal superintendence over Alaska Natives,” Pet. App. 21a, the Ninth Circuit also emphasized that “Congress declared that ANCSA did not ‘relieve, replace, or diminish any obligation of the United States or of the State or [sic] Alaska to protect and promote the rights or welfare of Natives * * *.’” *Id.* (quoting [43 U.S.C. § 1601\(c\)](#) (ellipses in Ninth Circuit opinion)). *See* Pet. App. 3a (same). Significantly, however, the Ninth Circuit omitted

the most telling language of the quoted provision, which-in place of the ellipses-continues “as *citizens* of the United States or of Alaska.” [43 U.S.C. § 1601\(c\)](#) (emphasis added). In other words, the federal obligation recognized under ANCSA did not concern Alaska Natives *45 as “dependent wards,” [Sandoval, 231 U.S. at 45](#)-or “Indians as such “-but rather as ordinary “citizens” of the land in which they live. That makes perfect sense in light of the unique history of the involvement of Alaska Natives in civic affairs, and it too belies any suggestion that Congress sought to establish or retain any federal superintendence over Alaska Natives under ANCSA.^[FN33]

FN33. None of the subsequent amendments to ANCSA alters the clear intent of the 1971 Congress that ANCSA land *not* be Indian country, or transforms ANCSA land *into* Indian country. See [Hagen v. Utah, 510 U.S. at 420](#) (“Because the textual and contemporaneous evidence of diminishment is clear, * * * the subsequent legislative record does nothing to alter our conclusion that the Uintah Reservation was diminished”); DOI Op., pp. 94-95 (“none of [the subsequent amendments to ANCSA] evince any purpose to alter the fundamental scheme established by the Congress in the original 1971 Settlement Act”). Indeed, the amendments on which respondents most heavily rely-originating in 1987-explicitly disavow any purpose to interfere with the intent of the 1971 Congress on the question of Indian country. See [Pub. L. No. 100-241, § 17\(a\)\(2\)](#), 101 Stat. 1814, [43 U.S.C. § 1601](#) note; Opp. 25-27; Reply to Opp. 10 n. 10.

III. THE JURISDICTIONAL AND PRACTICAL CONSEQUENCES OF RECOGNIZING INDIAN COUNTRY IN ALASKA COUNSEL AGAINST ANY JUDICIAL DESIGNATION OF ANCSA LAND AS INDIAN COUNTRY.

1a. The enormous jurisdictional and practical consequences of thrusting a brand new Indian country regime upon Alaska also counsel in favor of reject-

ing the Ninth Circuit ruling. All 44 million acres of land conveyed pursuant to ANCSA-dispersed in a buckshot fashion throughout the State, *see* Pet. App. 173a (map)-qualify for claims of Indian country status under the Ninth Circuit decision. As Judge Fernandez observed below, the decision accordingly invites “a blizzard of litigation throughout the State * * * as each and every tribe seeks to test the limits of its power over what it deems to be *its* Indian country,” asserting “claims to freedom from state taxation and regulation, claims to regulate and tax *46 for tribal purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land.” Pet. App. 35a (emphasis added).

The courts will be called upon to resolve these claims in the innumerable instances in which they may arise, subjecting the boundaries and extent of state jurisdiction to exercise fundamental government powers to hundreds of case-by-case determinations. Congress surely did not intend that result when it sought through ANCSA to settle Native claims “rapidly, with certainty, * * * [and] without litigation.” [43 U.S.C. § 1601\(b\)](#). Indeed, as Judge Fernandez observed: “There are hundreds of tribes, and the litigation permutations are as vast as the capacity of fine human minds can make them.” Pet. App. 35a. Sorting all this out will be a time-consuming, expensive, and divisive endeavor-especially in light of the Ninth Circuit's indeterminate, multi-factor analysis for finding Indian country.

The resulting confusion and uncertainty over basic questions of governmental authority and operations itself provides a compelling reason to reject the Ninth Circuit Indian country regime. See [Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 425 & n. 8 \(1989\)](#) (opinion of White, J.) (rejecting holding that would create “uncertainty” due to “the necessarily case-by-case determination of which regulatory body (or bodies) has * * * jurisdiction over [certain] land, not to mention the uncertainty as to when a tribe will attempt to assert such jurisdiction”). On the other hand, if (as Congress quite clearly intended) ANC-

SA land is not Indian country, then the long-standing jurisdictional regime and settled understanding in Alaska-in which state laws apply to all Alaskans, without regard to the particular community in which they live-will simply remain intact.

b. As Judge Fernandez observed-and as the Native Village of Venetie itself has argued-another result of the decision below is that it vests tribes occupying ANCSA *47 land with newfound taxing authority, including “the power to tax and regulate the myriad of private corporations which received land under ANCSA.” Pet. App. 35a. This not only gives Native villages the ability “to control, regulate, and tax those corporaitons out of existence,” but “provide[s] a fruitful area for *intertribal* conflict.” *Id.* (emphasis added). Such efforts would-in plain derogation of Congress' intent-gut ANCSA's hallmark corporate governance scheme, providing a graphic illustration of Chief Justice Marshall's famous maxim. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (“[T]he power to tax involves the power to destroy.”). As amicus Shee Atika, Inc.-an ANCSA corporation-has warned, this threat is real, not imagined. Shee Atika Br. 26.

The practical consequences of the Ninth Circuit ruling on the regulatory front are no less severe. Alaskan, sought statehood in significant part to gain control of the virtually unparalleled natural resources in that State, especially fish and game. Indeed, Alaskans went so far as to ensure protection for these resources in their constitution, Alaska const. art. VIII, § 4, and since statehood have enacted a comprehensive regulatory scheme to preserve them. Alaska Stat. tit. 16; Alaska Admin. Code tit. 5. If ANCSA land is transformed into Indian country, the State's ability to regulate hunting and fishing in numerous important game areas will be restricted, or possibly even precluded altogether.[FN34] Moreover, because ANCSA land is dispersed throughout the State, and wildlife migrates without regard to jurisdictional boundaries, the Ninth Circuit ruling will prevent implementation of an effective, state-wide fish and game management scheme. Certainly, none of this was inten-

ded by ANCSA; that Act *48 expressly extinguished “any aboriginal hunting and fishing rights that may exist.” 43 U.S.C. § 1603(b).

FN34. See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 327 & n. 4, 329, 344 (tribal hunting and fishing rules preempted state law, even as to non-Indians, with respect to “package hunts” and other sporting activities in Indian country); *Montana v. United States*, 450 U.S. at 557 (tribes may bar non-members from hunting or fishing on Indian country, or “condition their entry by charging a fee or establishing bag and creel limits”).

Other important state regulatory programs are also at risk, including those concerning land use. Congress contemplated that “most of [the ANCSA land] will be selected for its *economic* potential.” H.R. Rep. No. 92-523, *supra*, at 5 (emphasis added). Developing that land implicates numerous state laws and regulations. For example, numerous ANCSA corporations harvest valuable timber on their land. See Shee Atika Br. 27. In order to inhibit erosion and protect wildlife such as salmon, the State's Forest Practices Act prohibits harvesting timber on private land within close proximity to streams and other bodies of water, see Alaska Stat. § 41.17.116-118; there is no comparable provision of federal law. If ANCSA land is Indian country, such state regulation may be thwarted. See Pet. 15-16 (discussing other programs). As in the case of fish and game, moreover, the haphazard nature in which ANCSA land is dispersed throughout the State will-if that land is deemed Indian country-hinder implementation of any effective statewide regulatory scheme. Efforts to protect a salmon stream are futile if long stretches along the stream are exempt from regulation.

c. Transforming ANCSA land into Indian country also would create a startling anomaly due to the enormous-even to this day-federal land holdings in Alaska, and comparatively small state and private holdings. All told, there are some 365 million acres of land in Alaska. Until 1958 the land was owned

by the federal government. Under the Statehood Act, Alaska was permitted to select 103 million acres of land. ANCSA conveyed 44 million acres of land to ANCSA corporations from existing federal holdings. This land accounts for at least 97% of all privately held land in the State. *Village Journey, supra*, at 143. After granting Alaska statehood, Congress surely did not mean to leave the State with full regulatory and taxing authority over only a tiny fraction-less than *49 3%-of all privately held land in the State (which, of course, constitutes a miniscule portion of all land in the State). Yet, if the land conveyed under ANCSA is Indian country, that is precisely what the State is left with.

d. Congress deliberated on ANCSA for more than four years. It conducted lengthy hearings on the Act, at which scores of State, Native, and federal officials and other witnesses testified about all facets of the settlement, and it produced numerous committee reports explaining the settlement. *See* 117 Cong. Rec. S11301 (daily ed. July 14, 1970) (Sen.Gravel) (“[T]here has been no bill in the history of the Committee on Interior and Insular Affairs which has demanded more in time, more in attention, and more in effort on the part of a chairman and on the part of the committee itself than this one.”). Yet the legislative record of ANCSA contains no discussion of the obvious jurisdictional and practical consequences of treating ANCSA land as Indian country. That silence is deafening, especially in light of the *express* intent discussed above. *See Chisom v. Roemer*, 501 U.S. 380, 396 n. 23 (1991) (“ ‘In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night’ ”) (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)); *Church of Scientology of California v. IRS*, 484 U.S. 9, 17-18 (1987) (same).

2. Finally, it bears repeating that judicial designation of ANCSA land as Indian country will have the effect of establishing a gigantic reservation system in Alaska, nearly doubling the total area of Indian

country nationwide. History and geography have spared Alaska and its Natives any such system thus far and, in ANCSA, Congress-at the urging of Alaska Natives and others-expressly repudiated the adoption of any such system as part of the final settlement of aboriginal claims. *See* [43 U.S.C. §§ 1601\(b\), 1618\(a\)](#). The courts should not now impose*50 that repudiated regime on the State of Alaska by way of an expansive and indeterminate “dependent Indian community” test, such as the one fashioned and applied by the Ninth Circuit below.

The nineteenth and early twentieth century history of dealings between the federal government and the Indians in the lower 48 States has left in its wake a decidedly mixed legal legacy, including the concept of a “dependent Indian community” itself, with its roots in outdated notions of cultural superiority. As the drafters of ANCSA recognized, Alaska-the Nation’s last frontier-provided an opportunity for a new approach, one freed from out-worn entanglements with a federal Indian policy shaped by the demands of a different time and place. Congress in ANCSA seized that opportunity and made clear its intent that ANCSA land not be Indian country, or anything like it. This Court should give effect to that intent.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit below.

U.S.Pet.Brief,1997.

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