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CONGRESS MAINTAINS THE CONSTITUTIONAL AUTHORITY TO LEGISLATE FOR STATE-RECOGNIZED TRIBES

SUBMITTED BY:

THE LITTLE SHELL TRIBE OF CHIPPEWA INDIANS

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INTRODUCTION

State-recognized tribes share a common history with federally recognized tribes. Both share a history of treaty relations with the authorized government – with state-recognized tribes often entering into treaties with the independent States prior to formation of the Union. Both share a history of continuous political existence despite the vacillating policies and pressures of the dominant society – with many state-recognized tribes located on the eastern seaboard having to endure those policies for decades longer than many other federally recognized tribes. And both share a history of Congressional action with regard to their lands, their health, their homes and their culture.

The Constitution expressly provides Congress with authority over "Indian tribes." As discussed in **Part I** below, this authority is broad and not limited to federally recognized tribes. Indeed, Congress has often legislated for Indian tribes whether or not they are federally recognized as such. Time and again, the courts have confirmed Congress' authority to do so. Indeed, to the extent that Congress so chooses, it may recognize tribes for particular, limited purposes such as federal programs related to health care. As discussed in **Part II**, when Congress acts on matters relating to Indian tribes, such legislation is constitutionally sound and does not conflict with the Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Tribes constitute political entities with authority over their members and their territory. When Congress legislates, such legislation does not provide benefits because someone is racially Indian, but rather it is based on whether that person is a member of a tribe. As such, legislation for the benefit of Indian tribes, whether recognized by a State or the Federal government, does not constitute racial discrimination.

I. THE INDIAN COMMERCE CLAUSE GRANTS CONGRESS PLENARY AUTHORITY OVER INDIAN AFFAIRS

The Indian Commerce Clause provides Congress with authority "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Const. Art. I § 8, cl. 3. The framers of the Constitution recognized early on that Congress would need plenary authority over Indian affairs. As Justice Marshall explained, the Constitutional Convention intended "to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it, as granted in the confederation." *Cherokee Nation v. Georgia*, 30 U.S. 1, 19 (1831). This past term, the Supreme Court underscored this intent, explaining that "[f]rom the Nation's beginning Congress' need for [plenary] legislative power would have seemed obvious. After all, the Government's Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time." *Lara*, 124 S. Ct. at 1634.

It is well-settled that Congress' authority pursuant to the Indian Commerce Clause is "broad," "plenary and exclusive." *United States v. Lara*, 124 S. Ct. 1628, 1633 (2004). Among other things, under this authority Congress may "recognize," "restore" and "terminate" the federally recognized status of Indian tribes. *Id.* at 1635. Congress' authority over Indian tribes includes the

power to legislate for tribes even if the federal relationship has not been continuous. *United States v. John*, 437 U.S. 634, 653 (1978) ("[n]either the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians . . . nor the fact that federal supervision over them has not been continuous, destroys the federal power [under the Indian Commerce Clause] to deal with them").

A. Congress' Plenary Authority Includes the Power to Recognize Tribes and Lesser Included Powers

Congress' authority under the Indian Commerce Clause is not limited to federally recognized tribes. Indeed, Congress often confers federal recognition to the tribal government in the first instance. If Congress maintains the ultimate authority to recognize Indian tribes in the first instance, it certainly retains the lesser authority of providing services or programs for non-federally recognized tribes. The scope of Congress' authority turns on the meaning of "Indian tribes" within the Indian Commerce Clause. At the turn of the century, the Supreme Court considered (in a statutory interpretation case) the question of what constitutes a "tribe." The Court defined it as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States*, 180 U.S. 261, 266 (1901). Shortly thereafter, the Court articulated the parameters of Congress' authority to legislate for "tribes" (in this case pueblos) under the Indian Commerce Clause, stating:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power *by arbitrarily calling them an Indian tribe*, but only that in respect of distinctly Indian communities the questions whether, *to what extent*, and for what time *they 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.

United States v. Sandoval, 231 U.S. 28, 46 (1913) (emphasis added). The Court, in distinguishing another case, expanded on Congress' broad authority under the Indian Commerce Clause, stating:

> We are not unmindful that in *United States v. Joseph* . . . there are some observations not in accord with what is here said of these Indians, *but as that case did not turn upon the power of Congress over them or their property* . . . that case cannot be regarded as holding that these Indians or their lands are beyond the range of *Congressional power under the Constitution.*

Id. at 48-49 (emphasis added). Thus, early on the Court recognized Congress' Constitutional authority to determine whether, and the extent to which Congress will recognize or confer benefits to Indian tribes. Indeed, the Court explained that Congress' constitutional authority over tribes "was a continuing power of which Congress could not divest itself. It could be exerted at any time and in various forms during the continuance of the tribal relation[.]" *United States v. Nice*, 241 U.S. 591, 600 (1916).

Subsequent case law reinforces the federal courts' recognition of Congress' authority to recognize tribes for limited purposes. *See* Cohen's Handbook of Federal Indian Law, at 815 (1982 ed) ("Indian tribes can be recognized by the United States for some purposes and not for others."); 1942 edition, at 272 ("It remains true, however, that an Indian tribe may 'exist' for certain purposes, and not for others."). In *Menominee Tribe v. United States*, 391 U.S. 404 (1968), the Court held that the Menominee Tribe maintained federally protected hunting and fishing rights even though Congress terminated the federal government's relationship with the Tribe. Thus, the Constitution's grant of power to Congress over Indian tribes is exceedingly broad and limited only in the sense that Congress cannot arbitrarily label a group as an Indian tribe.

A prime example of Congressional action to extend its authority over all tribes, without regard to status as federally recognized, is the earliest and most fundamental act of Congress in Indian affairs, the 1790 Indian Trade and Intercourse Act. The Act provided for, among other things, the protection of Indian lands.[1] Congress broadly defined the lands protected, providing "that no sale of land made by *any Indians, or any nation or tribe of Indians within the United States*, shall be valid . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."[2] Although this first enactment was a temporary measure, Congress subsequently amended the Act and made its protections permanent. This Congressional protection applies to lands held by "Indian tribes" that exist as distinct political entities, even though a particular tribe may not be federally recognized. *See Passamaquoddy v. Morton*, 528 F.2d 370 (1st Cir. 1975).

B. Legislation Concerning Alaska Natives Supports Congressional Legislation for State-Recognized Tribes.

Because Congress' maintains the ultimate authority to both recognize and terminate the federal recognition of Indian tribes, Congress' authority under the Indian Commerce Clause necessarily includes lesser powers such as providing limited services to Indian tribes without conferring federal recognition. Congress' history of unique legislation relating to Alaska Natives supports Congress' approach of providing specified services and programs to state-recognized tribes.

Although most Native Villages are now included on Interior's list of federally-recognized tribes, when Congress enacted the Indian Reorganization Act ("IRA"), "most Alaska Natives did not live on reservations and were not grouped easily into bands or tribes[.]" Cohen's Handbook of Federal Indian Law, at 751 (1982 ed.). Recognizing the unique circumstances of Alaska Natives, "the IRA set out special criteria for defining a qualifying Alaska Native group. The constitutional

[1] Currently codified at 25 U.S.C. § 177, it provides that "no purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

[2] 1 Stat. 137, § 4 (1790) (emphasis added).

and corporate forms of organization could be adopted by 'groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district.'" *Id.* at 751. "The IRA provided that Eskimos and other aboriginal peoples of Alaska be considered Indians for purposes of the Act, but some sections . . . were held not to extend to Alaska." *Id.* Thus, pursuant to its *plenary* authority over Indian affairs, Congress defined not only which Indian groups were eligible for federal programs but it also withheld some program of the IRA from Alaska Native groups while extending other programs to them even though Alaska Natives did not easily fit within the typical definition of a tribe of band.

In addition to allowing Alaska Natives to participate in some IRA programs[3], Congress also enacted legislation to settle Alaska Native claims to lands within the state. This legislation left Alaska Natives with a land base drastically different from tribes in the lower 48 states in that it removed the Indian country status of most Indian lands in Alaska. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 524 (1998). As the Ninth Circuit has explained, this legislation, the Alaska Native Claims Settlement Act (ANCSA):

> provided for the establishment of thirteen regional Native corporations, 43 U.S.C. § 1606, and a large number of village corporations which represented the residents of Native villages, 43 U.S.C. § 1607. These entities were then entitled to select and obtain title to certain federal lands, and to share in proceeds of the cash settlement from the federal government.
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> A second method Congress has utilized to deal with the unique Alaskan situation has been to make a political definition of which Alaskan Natives are eligible for the federal benefits. The Reindeer Industry Act of 1937, 25 U.S.C. § 500, which provided federal funds and property to the natives of Alaska for subsistence and a self-sustaining economy, defined "Natives of Alaska" as:
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> > native Indians, Eskimos, and Aleuts of whole or part blood inhabiting Alaska at the time of the Treaty of Cession of Alaska to the United States and their descendants of whole or part blood, together with the Indians and Eskimos who, since the year 1867 and prior to September 1, 1937, have migrated into Alaska from the Dominion of Canada, and their descendants of whole or part blood.
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> 25 U.S.C. § 500n. ANCSA also utilized a similar criterion:
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> > "Native" means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination thereof. The term includes any Native as so

[3] Congress subsequently remedied this situation by extending Section 17 of the IRA to qualifying Alaska Native groups.

> defined either or both of whose adoptive parents are not Natives. It also includes, in the absence of a minimum of blood quantum, *any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group.*
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> 43 U.S.C. § 1602(b). These classifications, though they utilize blood quantum criteria, are clearly *political classifications* based on the unique non-reservation and non-tribal situation of the Alaska Natives.

Alaska Chapter, Associated General Contractors of America v. Pierce, 694 F.2d 1162, n.10 (9th Cir. 1982) (emphasis added). In other words, through ANCSA, Congress redefined the parameters of Federal services and programs to Alaska Native groups pursuant to its authority under the Indian Commerce Clause. Congress' authority to legislate in this manner for Alaska Natives has been uniformly upheld by the Supreme Court. *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). Congress' broad authority to provide Alaska Natives with limited services and programs, and to define their eligibility for such programs, supports Congress' authority to legislate similarly for state-recognized tribes.

C. Congress Has Often Legislated for Non-Federally Recognized/State-Recognized Tribes

Over the years, Congress often has included state-recognized tribes within legislation applying to federally recognized tribes. Congress has subjected non-federally recognized tribes to Maine law and extinguished their claims to land within the State,[4] authorized state-recognized tribes to participate in Indian housing programs and Indian education programs,[5] included state-recognized tribes within the protections provided by the Indian Arts and Crafts Act,[6] protected state-recognized tribes' lands from alienation,[7] authorized the Department of Agriculture to include tribes with state reservations for various programs, [8] and authorized members of state recognized tribes to receive services from the Indian Health Service.[9]

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[4] 25 U.S.C. §§ 1721, 1723 (Maine Indian Claims Settlement Act).

[5] 25 U.S.C. § 4103 (defining "Indian tribe" as "a tribe that is a federally recognized tribe or a State recognized tribe."); 20 U.S.C. § 7491. Congress has also included state-recognized tribes under various Native American programs administered by the Secretary of Health and Human Services. 42 U.S.C. § 2992c.

[6] 18 U.S.C. § 1159(c)(3)(B).

[7] 25 U.S.C. § 177.

[8] 7 U.S.C. §§ 1926, 1932, 2009cc, 2661.

[9] 25 U.S.C. §§ 1601 *et seq.*

In many respects, Congress' treatment of state-recognized tribes is similar to Alaska Natives in that Congress has addressed the unique needs of state-recognized tribes as it deemed necessary for particular subject matters. We are unaware of any court that has found Congress' authority to authorize such programs for members of state-recognized tribal governments unconstitutional. As discussed below, Congress' legislation and approach in this regard hinges upon the political status of such tribes, and does not extend to every person that is racially Indian.

II. STATE RECOGNIZED TRIBES, LIKE FEDERALLY RECOGNIZED TRIBES, CONSTITUTE POLITICAL NOT RACIAL CLASSIFICATIONS

It is well settled that legislation passed for the benefit of Indian tribes does not constitute racial discrimination in violation of the Due Process Clause of the Fifth Amendment. *Morton v. Mancari*, 417 U.S. 535 (1974). In *Mancari*, the Court considered whether an employment preference for members of federally recognized tribes violated the Fifth Amendment. At the outset, the Court explained that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both *explicitly and implicitly from the Constitution itself*." *Id.* at 551-52 (emphasis added). Drawing upon Congress' broad power under the Indian Commerce Clause, the Court explained that:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Id. at 553. The Court reasoned that the legislation was not directed toward a racial group of "Indians" but was limited to recognized tribal governments and therefore constituted a political classification. *Id.* at 553 n.24. [10]

More recently, the D.C. Circuit upheld Congress' authority under the Indian Commerce Clause to legislate contracting preferences for Native American-owned entities under the Department of Defense Appropriations Act and upheld the Act's outsourcing preference to firms with 51% Native American ownership. *American Fed'n of Gov't Employees v. United States*, 330 F.3d 513

[10] Ten years after *Mancari*, Justice Scalia, while sitting on the D.C. Circuit, explained that "in a sense the Constitution itself establishes the rationality of the . . . classification, by providing a separate federal power that reaches only the present group." *United States v. Cohen*, 733 F.2d 128, 139 (D.C.Cir.1984) (en banc). Justice Scalia then quoted the following rationale from the Supreme Court, the "Constitution itself provides support for legislation directed specifically at Indian tribes." *United States v. Antelope*, 430 U.S. 641, 649 n. 11 (1977).

(D.C. Cir. 2003). This litigation, which concerned preferences provided to Native Alaskan Corporations squarely presented the question of whether such legislation ran afoul of the constitution under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). In examining Congress' authority under the Indian Commerce Clause, the Court explained that "[w]hile Congress may use this power to regulate tribal members, regulation of commerce with tribes is at the heart of the Clause, particularly when the tribal commerce is with the federal government, as it is here." *Id.* at 521 (internal citations omitted).

In finding that the preference did not constitute racial discrimination in violation of the Fifth Amendment's Due Process Clause, the Court explained that Congress has the authority "to determine which distinctly Indian communities should be recognized as Indian tribes." *Id.* at 520 (internal citations and quotations omitted).

Although *Mancari* and *American Fed'n of Gov't Employees*, involved federally recognized tribes, their rationale applies equally to state-recognized tribes. State-recognized tribes are Indian tribes recognized by State governments as maintaining political authority over their members and their territory. Like federally recognized tribes, many state-recognized tribes were acknowledged through treaties that predated the formation of the United States while others' recognition is reflected in executive and legislative actions of state governments. *See* Treaty of 1677 between Virginia and the Indians, May 29, 1677 (discussed in Virginia Op. Att'y Gen, February 7, 1977, 1977 WL 27313); N.Y. Indian Law § 120; Conn. Gen. Stat. § 47-59a; Mass. E.O. No. 126 (1976); La. Con. Res. No. 60 (1974). Today, many states provide an administrative process for recognition of tribal governments. *See* Ala. Code § 41-9-708; Va. Code § 2.2-2629; N.C. Gen. Stat. § 143B-406; Md. Code Ann., Art. 83B, § 5-406.

Federal and State statutes that include services and programs for state-recognized tribes are not provided to all people who are racially "Indian." Rather, such programs are provided based on the political relationship between the Tribe and the State and the political relationship between the tribe and its members. The Department of Justice recently acknowledged that this political relationship is markedly different from racial classifications, explaining that "in contrast to 'immutable characteristic[s]' such as race, sex, and national origin that are 'determined solely by the accident of birth,' . . . tribal membership is purely voluntary, and it may be relinquished at any time." Brief for the United States at 35, *United States v. Lara*, 124 S. Ct. 1628 (2004).

Further, Congressional legislation tied to a political relationship between a tribe and a state can hardly be said to constitute an arbitrary recognition of a tribe. Indeed, state-recognition is often a precursor to federal recognition. Tribes such as the Jena Band of Choctaw Indians, the Mohegan Tribe, and the Tunica-Biloxi Indian Tribe were all recognized by states prior to being recognized through the Department of Interior's administrative process. As such, Congress' decision to legislate for the benefit of state-recognized tribes is based on a rational basis of tribal status.

Here, Congress has chosen to extend health care programs to members of state-recognized tribes. Certainly, Congress can base eligibility on an existing political relationship between a tribe and a state. For example, Indian Health Service regulations relating to scholarship grants require an

applicant that is a member of a state recognized tribe to "submit documentation as may be required by the Secretary that the tribe is a tribe . . . recognized by the State in which the tribe is located in accordance with the law of that State."[11] In other words, eligibility depends upon a political relationship between the tribe and a state. And since Congress' authority extends to any tribe that exists as a political entity, regardless of whether they are otherwise recognized by the United States, Congress can constitutionally extend IHS services to tribes recognized by states as political entities.

Finally, as the D.C. Circuit recognized, Congressional power to regulate commerce between tribes and the Federal government is at the heart of the Indian Commerce Clause. Here, Congress is legislating for to provide Federal health services and programs to members of state and federally recognized Indian tribes. Congress' action in this regard falls squarely within its plenary authority over Indian affairs.

CONCLUSION

For all of the forgoing reasons, Congress clearly has constitutional authority to legislate with regard to state-recognized tribes.

[11] 42 C.F.R. § 136.303(c).