No. 21-678

In the Supreme Court of the United States

BIG SANDY RANCHERIA ENTERPRISES,
a federally recognized Indian Tribe incorporated
under the Indian Reorganization Act,
Petitioner,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California; and NICOLAS MADUROS, in his official capacity as Director of the California Department of Tax and Fee Administration,
Respondents.

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

Brief of Amicus Curiae Flandreau Santee Sioux Tribe, Twenty-Nine Palms Band of Mission Indians, the Fort Independence Tribe of Paiute Indians, the Saint Regis Mohawk Tribe, Alturas Indian Rancheria in Support of Petitioner

SETH C. PEARMAN
Attorney General
603 W. Broad Ave.
Flandreau, SD 57028
(605) 573-4206
Counsel for the Flandreau Santee Sioux Tribe

RANDOLPH H. BARNHOUSE
Counsel of Record
BARNHOUSE KEEGAN SOLIMON & WEST LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123 (Telephone)
(505) 842-6124 (Facsimile)
dbarnhouse@indiancountrylaw.com
Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. Prior to European Colonization, Intertribal Trade was Central to Indigenous Economies and Culture 6

II. The Federal Government Early Established Exclusive Federal Control over Trade with Native Peoples 8

III. Even at the Height of Heavy-Handed Federal Interference in Native Life, the Federal Government Permitted Intertribal Trade 14

IV. In the Twentieth and Twenty-First Centuries, the Federal Government Came to Embrace and Promote Tribal Corporations and Intertribal Trade 21

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Big Sandy Rancheria Enterprises v. Bonta,
1 F.4th 710 (9th Cir. 2021) 2, 25

Cotton Petroleum v. New Mexico,
490 U.S. 163 (1989) 3

Cherokee Nation v. Georgia,
30 U.S. 1 (1831) 15

McGirt v. Oklahoma,
140 S. Ct. 2452 (2020) 2

St. Cloud v. United States,
702 F.Supp. 1456 (D.S.D. 1988) 26

Washington State Dep't of Licensing v. Cougar Den, Inc.,
139 S. Ct. 1000 (2019) 8

Worcester v. Georgia,
31 U.S. 515 (1832) 3

Yakama Indian Nation v. Flores,
955 F.Supp. 1229 (1997) 17, 25

CONSTITUTION

U.S. Const. art. I § 8 ..... 4, 5, 11

STATUTES

25 C.F.R. Part 140 12

25 U.S.C. §§ 261-64..... 12

Act Of July 22, 1790, ch. 33, 1 Stat. 137..... 11

Act Of Apr. 18, 1796, ch. 13, 1 Stat. 452..... 11

Act Of June 30, 1834, ch. 161, 4 Stat. 729..... 12

Indian Community Economic Enhancement Act of 2020, 25 U.S.C. § 4301 24

Indian Reorganization Act, ch. 576, 48 Stat. 984... 21

Indian Civil Rights Act ("ICRA") of 1968, 25 U.S.C. § 1301 25

Treaty with the Nisqualli et al., Mar. 3, 1855, 10 Stat. 1132..... 16

Treaty with the Comanches et al., May 15, 1846, 9 Stat. 844 17

Treaty with the Navaho, Sept. 9, 1849, 9 Stat. 974 17

Treaty of Hopewell, U.S.-Chickasaws, Jan. 10, 1786, 7 Stat. 24 10

Treaty of Hopewell, U.S.-Choctaws, Jan. 3, 1786, 7 Stat. 21 10

Treaty of Hopewell, U.S.-Cherokees, Nov. 28, 1785, 7 Stat. 18 10

OTHER AUTHORITIES

Articles of Confederation of 1781 ..... 3, 9

1 Office of the Solicitor, Department of the Interior, *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974* (1979) 22, 23

31 *Journals of the Continental Congress, 1774-1789* (1934) 9, 10

Abraham Yates, Jr. (Sydney), To the Citizens of the State of New York (June 13-14, 1788), *reprinted in* 20 *The Documentary History of the Ratification of the Constitution* (John P. Kaminski et al. eds., 2004) 12

A Bill To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-government And Economic Enterprise: Hearing on H.R. 7902 Before the House Committee on Indian Affairs, 73rd Cong., 2nd Sess., Part 2 (1934) 22

Brian DeLay, *War of a Thousand Deserts: Indian Raids and the U.S.-Mexican War* (2008) 16

Cori Knudten & Maren Bzdek, *Crossroads of Change: The People and the Land of Pecos* (2020) 7

Daniel K. Richter, *Native Americans, the Plan of 1764, and a British Empire That Never Was*, *in Cultures and Identities in Colonial British America* (Robert Olwell & Alan Tully eds., 2006) 9

David Andrew Nichols, *Engines of Diplomacy: Indian Trading Factories and the Negotiation of American Empire* (2016) 11

Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880* (2007) 13

Elizabeth A. Fenn, *Encounters at the Heart of the World: A History of the Mandan People* (2014) 7

Elmer R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act* (2000)..... 21, 22

Emanuel J. Drechsel, *An Integrated Vocabulary of Mobilian Jargon, a Native American Pidgin of the Mississippi Valley*, 38 Anthropological Linguistics (1996)..... 7

Felix S. Cohen, *Handbook of Federal Indian Law* (Nell Jessup Newton ed., 2012) 21

Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1780-1834* (1962)..... 14

Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (1984) 18

Frederick Jackson Turner, *Character and Influence of the Indian Trade in Wisconsin: A Study of the Trading Post as an Institution* (1891) 6

Graham D. Taylor, *The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-45* (1980) 23

Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 Yale L.J. 1792 (2019)..... 13

Gregory Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999 (2014)..... 10

Henry Zenk & Tony A. Johnson, *A Northwest Language of Contact, Diplomacy, and Identity: Chinuk Wawa / Chinook Jargon*, 111 Or. Hist. Q. (2010) 7

James Brooks, *Captives & Cousins: Slavery, Kinship, and Community in the Southwest Borderlands* (2002) 16

James Madison, *Vices of the Political System of the United States*, *in* 9 *The Papers of James Madison, Congressional Series* (Robert A. Rutland & William M.E. Rachal eds., 1975) 10

James P. Ronda, *On the Columbia: The Ruling Presence of this Place, in* Center for Columbia River History, *Great River of The West: Essays On The Columbia River* (William L. Lang & Robert Carriker eds., 2013) 7

James P. Ronda, *Lewis and Clark Among the Indians* (1984) 15

Jennifer McLerran, *A New Deal For Native Art: Indian Arts and Federal Policy 1933-1943* (2009) 23

John Phillip Reid, *A Better Kind of Hatchet: Law, Trade, and Diplomacy in the Cherokee Nation During the Early Years of European Contact* (1976) 8

Joseph M. Hall, *Zamumo's Gifts: Indian-European Exchange in the Colonial Southeast* (2009)..... 8

Justin Gage, *We Do Not Want the Gates Closed between Us: Native Networks and the Spread of the Ghost Dance* (2020) 18, 20

Kathleen DuVal, *The Native Ground: Indians and Colonists in the Heart of the Continent* (2006) 15

Letter from George Washington to the United States Senate (Aug. 4, 1790), *in* 6 *The Papers Of George Washington: Presidential Series* (Mark A. Mastromarino ed., 1996)..... 13

Letter from George Washington to Thomas Mifflin, Governor of Pennsylvania (Sept. 4, 1790), *in* 6 *The Papers of George Washington: Presidential Series* (Mark A. Mastromarino ed., 1996) 12

Letter from Governor of the Southwest Territory to the Secretary of War (Aug. 13, 1793), *in* 4 *The Territorial Papers of the United States* (Clarence Edward Carter ed., 1936) 14

Neal Salisbury, *The Indians' Old World: Native Americans and the Coming of Europeans*, 53 William & Mary Q. (1996) 8

Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 Am.L.Rev. 109 (1992) 25, 26

Ned Blackhawk, *Violence Over the Land: Indians and Empires in the Early American West* (2006) 16

Office of Indian Affairs, Department of the Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* (1839)..... 18

Office of Indian Affairs, Department of the Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1870* (1870) 18

Office of Indian Affairs, Department of Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1873* (1874) 19

Office of Indian Affairs, Department of Interior, *Annual Report of the Commissioner of the Office of Indian Affairs to the Secretary of the Interior for the Year 1875* (1875)..... 20

Office of Indian Affairs, Department of Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1877* (1877) 19

Office of Indian Affairs, Department of Interior, *Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1898* (1898) 19

Office of Indian Affairs, Department of Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of Interior for the Year 1951* (1951) 24

Pekka Hämäläinen, *The Comanche Empire* (2008) 16

Plan for Imperial Control of Indian Affairs, July 10, 1764, *reprinted in* 10 Collections of the Illinois State Historical Library (Clarence Walworth Alvord ed., 1903) 9

Stuart J. Fiedel, *Prehistory of the Americas* (2nd ed. 1992) 6

Susan L. Meyn, *More Than Curiosities: A Grassroots History of the Indian Arts and Crafts Board and its Precursors, 1920-1942* (2001) 23

The Federalist No. 42 (James Madison) 10, 11

The Journals of the Lewis and Clark Expedition: March 23-June 9, 1806 (1983) 15

Tim Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* (2002) 13

Thomas Jefferson, *Instructions for Meriwether Lewis* (June 20, 1803), *in* 40 *Papers of Thomas Jefferson: Main Series* (Barbara B. Oberg ed., 2013) 14

William A. Turnbaugh, *Wide-Area Connections in Native North America,* 1 Am. Indian Culture and Rsch. J. (1976) 6

INTERESTS OF AMICI CURIAE[1]

Amici curiae are the Flandreau Santee Sioux Tribe, the Twenty-Nine Palms Band of Mission Indians, the Fort Independence Tribe of Paiute Indians, the Saint Regis Mohawk Tribe, Alturas Indian Rancheria and their Inter-Tribal Trade Consortium, a group of tribes, tribally owned businesses and Native owned businesses working to secure the historic right of tribes to trade with each other free of state regulation. Amici respectfully file this unopposed brief in support of Big Sandy Rancheria Enterprise because the petition raises critical issues regarding the sovereign right of Native American Tribes to engage in intertribal trade within and between their reservations and territories.

Amici are federally recognized Indian tribes with an interest in protecting their right to engage in intertribal trade as a part of their exercise of self-government. Amici independently have engaged in intertribal trade since time immemorial, participating in large trading networks throughout North America. Intertribal trade is an essential tool for protecting their sovereignty, economic

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in any part, and that no person or entity, other than amici and their counsel, made a monetary contribution to fund its preparation and submission. All parties have been timely notified of the filing of this brief and consented to its filing in accord with Supreme Court Rule 37.2.

independence, and tribal cultures, and is critically important to promotion of tribal self-sufficiency.

The Ninth Circuit Court of Appeal's opinion disrupts the historic and legal precedent confirming the sovereign right of Indian Tribes to engage in and regulate trade occurring within and between their reservations and territories. Although the opinion acknowledges that states cannot impose their laws on Indians living in Indian country and that state laws have no force in Indian country, the court erroneously affirmed the dismissal of Big Sandy Rancheria Enterprises' preemption challenges to California's taxation and regulatory authority. *See Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710, 724-26 (9th Cir. 2021) (hereinafter "BSRE"). The opinion impacts Amici's sovereign right of self-government and departs from basic legal principles of federal preemption and traditional notions of tribal self-government. This departure from well-settled law continues the erosion of historic tribal rights denounced by this Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). For these reasons and others presented in their brief, Amici submit this brief in support of Big Sandy Rancheria Enterprises' Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The inability of the states to regulate within Indian country has long been recognized. Historically, this Court held that Indian country was entirely outside of state territorial sovereignty and

therefore subject only to tribal and federal authority. *Worcester v. Georgia*, 31 U.S. 515 (1832). More recently, the Court has applied a "flexible preemption analysis" that requires a "particularized examination of the relevant state, federal, and tribal interests." *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 176 (1989) (quotations and citations omitted). In this process, the "history of tribal sovereignty" serves as a "necessary backdrop." *Id.* In considering BSRE's petition for writ of certiorari, history underscores the strength of the controlling tribal and federal interests in intertribal trade.

Prior to colonization, intertribal trade was critical to Indigenous peoples and culture. Archaeologists, historians, and anthropologists have uncovered the remarkable breadth and extent of intertribal trade networks throughout North America. This research shows that these intertribal transactions and exchanges, although economically vital, were also critical to Native diplomacy, culture, and identity.

The significance of trade between Native peoples demonstrates why commerce played a central role in relations between Native nations and European newcomers. Under the British Empire, colonies, and later the Crown, regulations were established to police Indian traders, thereby avoiding violence. With the creation of the United States, the new federal government quickly sought to establish its "sole and exclusive authority" over "regulating the trade . . . with the Indians." Articles of Confederation

of 1781, art. IX, para. 4. Yet the confusing qualifiers of the Articles helped prompt confusion and state resistance. The drafters of the Constitution responded by seeking to establish clear federal supremacy over "commerce . . . with the Indian tribes." U.S. Const. art. I § 8. After ratification, Congress quickly enacted a series of statutes known as the Trade and Intercourse Acts that established an extensive federal licensing and regulatory regime for traders in Indian country that endures to the present. Indeed, so concerned was Congress about the power of trade to shape relations with Native nations that, for thirty years, it funded federally owned and operated trading posts aimed at directly managing Indian trade. And, although states routinely challenged almost every aspect of federal Indian policy during this early period, they accepted exclusive federal authority over trade as the necessary consequence of the Indian Commerce Clause.

In its early years, the federal government, though well familiar with intertribal trade, made little effort to police or regulate it. Early federal trade regulations were almost single-mindedly concerned with the risk that Europeans or U.S. citizens might use Indian trade to compromise U.S. sovereignty and influence in Indian country. Intertribal trade, by contrast, did not similarly challenge the new nation's precarious authority. By the mid-nineteenth century, however, the federal government began to enter treaties that sought to police intertribal exchange to avoid bloodshed and

conflict. By the late nineteenth century, as the United States sought to confine Native peoples to reservations and force them to assimilate, federal Indian agents chafed at the persistence of intertribal trade in the form of "friendly visits." Although these agents sometimes acted on their own to try to suppress this trade, the Office of Indian Affairs never banned these visits, and most happened with the grudging blessing of federal officials.

In the twentieth and twenty-first centuries, federal Indian policy shifted again, as did federal attitudes toward intertribal trade. With the Indian Reorganization Act, the federal government shifted its approach to embrace tribal self-governance and economic independence. It shifted from reluctantly accepting intertribal trade to actively supporting and even funding it. By the late twentieth century, intertribal trade and economic cooperation was flourishing, in part because of federal support and blessing. This current efflorescence represents the culmination of millennia of Indigenous intertribal trade and centuries of federal law and policy affirming exclusive federal authority over "commerce . . . with the Indian tribes." U.S. Const. art. I § 8.

ARGUMENT

I. Prior to European Colonization, Intertribal Trade was Central to Indigenous Economies and Culture.

The many Indigenous peoples of North America have engaged in intertribal trade and exchange since time immemorial. Extensive, long-distance trading networks spanning much of the continent long marked Native North America. *See* William A. Turnbaugh, *Wide-Area Connections in Native North America*, 1 Am. Indian Culture and Rsch. J. 22–28 (1976) ("Trade is probably both the major incentive for and the major agent of wide-areas connections in native America."). Historians and anthropologists have recognized the importance of intertribal trade networks at least as far as back as the nineteenth-century. Frederick Jackson Turner, *Character and Influence of the Indian Trade in Wisconsin: A Study of the Trading Post as an Institution* 10 (1891) ("Long before the advent of the white trader, inter-tribal commercial intercourse existed . . . . It was on the foundation, therefore, of an extensive inter-tribal trade that the white man built up the forest commerce."). Evidence of extensive intertribal trade comes from multiple sources. Archaeologists excavating prehistoric Indigenous sites have routinely uncovered the presence of trade goods that had traveled thousands of miles—turquoise from the Southwest, parrots from Mexico, and pipestems from Minnesota. Stuart J. Fiedel, *Prehistory of the Americas* 115, 169 (2nd ed. 1992).

Linguists have traced the widespread use of intertribal trading jargons like Chinook in the Pacific Northwest and Mobilean in the Southeast. Henry Zenk & Tony A. Johnson, *A Northwest Language of Contact, Diplomacy, and Identity: Chinuk Wawa / Chinook Jargon*, 111 Or. Hist. Q. 444–61 (2010); Emanuel J. Drechsel, *An Integrated Vocabulary of Mobilian Jargon, a Native American Pidgin of the Mississippi Valley*, 38 Anthropological Linguistics 248–354 (1996). And when Europeans arrived in North America, they recorded the presence of grand intertribal trade fairs throughout the continent, including at the Dalles along the Columbia River. James P. Ronda, *On the Columbia: The Ruling Presence of This Place*, *in* Center for Columbia River History, *Great River of the West: Essays on the Columbia River* 76-89 (William L. Lang & Robert Carriker eds., 2013), at Pecos and other pueblos in present-day New Mexico, Cori Knudten & Maren Bzdek, *Crossroads of Change: The People and the Land of Pecos* (2020), and at the Mandan and Hidatsa villages along the Missouri River, Elizabeth A. Fenn, *Encounters at the Heart of the World: A History of the Mandan People* (2014).

For Native peoples, these networks of commerce and exchange were economically significant and often vital for survival. But they were also more than simple arms-length economic transactions. Rather, intertribal trade was central to Indigenous cultures as part of a broader set of ties that linked together the continent's many peoples. *See, e.g.*, *Washington State Dep't of Licensing v.*

Cougar Den, Inc., 139 S. Ct. 1000, 1017 (2019) ("Travel for purposes of trade was so important to the Yakamas' way of life that they could not have performed and functioned as a distinct culture . . . without extensive travel." (citations and internal quotation marks omitted)) (Gorsuch, J., concurring); Neal Salisbury, *The Indians' Old World: Native Americans and the Coming of Europeans*, 53 William & Mary Q. 435–58 (1996) ("At the heart of these intersections [among Native peoples] was exchange. By exchange is meant not only the trading of material goods but also exchanges across community lines of marriage partners, resources, labor, ideas, techniques, and religious practices.").

II. The Federal Government Early Established Exclusive Federal Control over Trade with Native Peoples.

As Europeans began colonizing North America, they quickly grasped the centrality of trade for their relations with Native peoples. Such exchange networks were "the defining feature of Native-colonial relations." Joseph M. Hall, *Zamumo's Gifts: Indian-European Exchange in the Colonial Southeast* 5 (2009). Commerce between European traders and Natives was both a key source of imperial power and a routine subject of disagreement, even warfare. As a result, British colonies like South Carolina and New York early enacted laws to license and regulate Indian traders. *See, e.g.*, John Phillip Reid, *A Better Kind of Hatchet: Law, Trade, and*

Diplomacy in the Cherokee Nation During the Early Years of European Contact (1976). In 1764, in the aftermath of the violence of the Seven Years' War and Pontiac's Rebellion, the British Crown issued regulations to centralize authority over the Indian trade in the hands of two royally appointed Superintendents of Indian Affairs. Plan for Imperial Control of Indian Affairs, July 10, 1764, *reprinted in* 10 *Collections of the Illinois State Historical Library* 273–81 (Clarence Walworth Alvord ed., 1903); *see also* Daniel K. Richter, *Native Americans, the Plan of 1764, and a British Empire That Never Was*, *in Cultures and Identities in Colonial British America* 269, at 279-82 (Robert Olwell & Alan Tully eds., 2006).

Like its predecessor, the new federal government created by the American Revolution was vitally concerned with the Indian trade. The new nation's foundational document, the Articles of Confederation, granted the Continental Congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states; provided that the legislative right of any state, within its own limits, be not infringed or violated." Articles of Confederation of 1781 art. IX, para. 4. In 1786, Congress, citing this authority, enacted the Ordinance for the Regulation of Indian Affairs. 31 *Journals of the Continental Congress, 1774-1789*, at 490 (1934). Like the British imperial plan, the Ordinance established two federal superintendents who would issue mandatory licenses to all persons

who wished to "trade with any Indian or Indian nation" in the United States. *Id.* at 492. Moreover, in a series of foundational treaties with Native nations, federal negotiators affirmed that the "United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians." Treaty of Hopewell, U.S.-Chickasaws, art. VIII, Jan. 10, 1786, 7 Stat. 24, 25; Treaty of Hopewell, U.S.-Choctaws, art. VIII, Jan. 3, 1786, 7 Stat. 21, 22; Treaty of Hopewell, U.S.-Cherokees, art. IX, Nov. 28, 1785, 7 Stat. 18, 20.

However, many states resented the federal government's assertion of supremacy under the Articles, even purporting to nullify federal Indian treaties. Gregory Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999, 1018-38 (2014). This stemmed in part from what James Madison called the "obscure and contradictory" wording of the Indian affairs power in the Articles. *The Federalist No. 42*, at 217 (James Madison). As a result, James Madison and other advocates began to argue for a stronger national government that would, among other aims, remedy state interference in Indian affairs. *See, e.g.*, James Madison, *Vices of the Political System of the United States*, *in* 9 *The Papers of James Madison, Congressional Series* 345, 348 (Robert A. Rutland & William M.E. Rachal eds., 1975) (enumerating "Encroachments by the States on the federal authority"—the very first of which was "the wars and Treaties of Georgia with the Indians.")

The drafters of the Constitution helped achieve that aim by granting Congress authority "over commerce . . . with the Indian tribes." U.S. Const. art. I § 8. This "regulation" of Indian commerce, James Madison observed, was "very properly unfettered from [the] two limitations in the articles." *The Federalist No. 42*, at 217 (James Madison). The First Congress soon codified this authority through a foundational statute known as the Trade and Intercourse Act, the first in a long series of federal laws governing Indian trade. Act of July 22, 1790, ch. 33, 1 Stat. 137. Like the earlier Ordinance, the Act required that any person wishing to "carry on any trade or intercourse with the Indians" must receive a license from a federally appointed superintendent; they would then be subject to "such rules and regulations as the President shall prescribe." *Id.* § 1.

Soon afterward, Congress went further still. In 1796, it authorized the President to establish a series of trading houses to conduct "a liberal trade" with Native nations. Act of Apr. 18, 1796, ch. 13, 1 Stat. 452. These posts--not intended to make a profit but to operate at cost, *id.* § 4—functioned for the next thirty years. *See* David Andrew Nichols, *Engines of Diplomacy: Indian Trading Factories and the Negotiation of American Empire* (2016). Ultimately, private traders, angered by the public competition, persuaded Congress to end the trading factories in 1822. *Id.* at 151-71. However, Congress maintained, and even bolstered, the exclusive federal regulatory scheme over Indian trade through subsequent

versions of the Trade and Intercourse Act. *See* Act of June 30, 1834, ch. 161, 4 Stat. 729. To this day, versions of the original 1790 requirements of licensure and federal regulation remain part of the U.S. Code as part of the so-called Indian Trader Statutes, 25 U.S.C. §§ 261-64. Moreover, the Bureau of Indian Affairs has enacted a comprehensive set of regulations applying this statutory authority. *See* 25 C.F.R. Part 140.

Exclusive federal authority over Indian trade and commerce was part of a broader assertion of federal supremacy over states in Indian affairs. Opponents and advocates of the Constitution alike concluded the document would grant the federal government, not the states, authority over relations with Native peoples. *See, e.g.*, Abraham Yates, Jr. (Sydney), To the Citizens of the State of New York (June 13-14, 1788), *reprinted in* 20 *The Documentary History of the Ratification of the Constitution* 1153, 1156-67 (John P. Kaminski et al. eds., 2004) (opposing the Constitution by warning that ratification would "totally surrender into the hands of Congress the management and regulation of the Indian affairs, and expose the Indian trade to an improper government"); Letter from George Washington to Thomas Mifflin, Governor of Pennsylvania (Sept. 4, 1790), *in* 6 *The Papers of George Washington: Presidential Series* 396 (Mark A. Mastromarino ed., 1996) (instructing the Governor that "the United States . . . possess[es] the only authority of regulating an intercourse with [the Indians], and redressing their grievances."). Despite

the clear constitutional language, this authority nonetheless proved controversial, as states continued to resist federal supremacy throughout much of the nineteenth century. *See* Tim Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* (2002); Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880* (2007). However, despite states' creative reinterpretations of constitutional text in an attempt to negate federal authority over Indian affairs, *see* Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 Yale L.J. 1792, 1855-60 (2019), states and state officials nonetheless accepted exclusive federal authority over Indian trade, unable to escape the clear implications of the constitutional term "commerce." *See* Rosen, *supra*, at 57-67.

For its part, the federal government's insistence on its supremacy over Indian trade reflected a recognition of the trade's significance as a site of diplomacy between Native nations and the United States. Because trade was so culturally and economically vital for Native peoples, federal officials recognized that it was critical to ensuring peace and governing Indian affairs. *See, e.g.*, Letter from George Washington to the United States Senate (Aug. 4, 1790), *in* 6 *The Papers Of George Washington: Presidential Series, supra*, at 188-89 ("[T]he trade of the Indians is a main mean of their political management."). Early federal officials worried endlessly about the influence that the neighboring British and Spanish Empires continued

to exert over Native peoples within the United States through trade, and so sought to bar such foreign traders from Indian country. *See, e.g.*, Letter from Governor of the Southwest Territory to the Secretary of War (Aug. 13, 1793), *in* 4 *The Territorial Papers of the United States* 297-98 (Clarence Edward Carter ed., 1936). Similarly, they fretted that the "power and influence of trade" with Indians, *id.*, would also allow individuals and states to interfere with federal aims and forestall a unified federal Indian policy. *See* Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1780-1834,* at 69-98 (1962).

III. Even at the Height of Heavy-Handed Federal Interference in Native Life, the Federal Government Permitted Intertribal Trade.

The early federal government was well aware of the prevalence of intertribal trade. Indeed, one of the principal purposes for dispatching the Lewis and Clark expedition westward in 1803 was to explore possibilities for "commerce" with the region's Indigenous inhabitants. Thomas Jefferson, *Instructions for Meriwether Lewis* (June 20, 1803), *in* 40 *Papers of Thomas Jefferson: Main Series* 176, 178 (Barbara B. Oberg ed., 2013). President Jefferson specifically instructed Meriwether Lewis to ascertain each nation's "relations with other tribes or nations" and "articles of commerce they may need or furnish, & to what extent." *Id.* Lewis and Clark diligently

followed the President's instructions, extensively recording the Indigenous trading networks they encountered that spanned North America. *See* James P. Ronda, *Lewis and Clark Among the Indians* (1984). In passing through the Dalles along the Columbia River, for instance, Clark described the site as "the Great Mart of all this Country," where numerous Indigenous peoples from across the Pacific Northwest and Great Plains converged to exchange horses, robes, beads, metal goods, and fish. *The Journals of the Lewis and Clark Expedition: March 23-June 9, 1806*, at 129 (1983).

Yet, for most of its early history, the federal government did not seek to control trade *among* Native peoples, instead focusing its efforts on regulating what officials called "white" traders. In part, this approach reflected the fact that federal officials believed that European traders from rival empires presented a far greater threat to U.S. claims to sovereignty and control than Native commerce: Native peoples, after all, were regarded as "domestic dependent nations," and so their authority could coexist under the umbrella of federal authority. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). But it also reflected the reality that the federal government's authority over much of the continent remained tenuous and uncertain well into the nineteenth century, with Native nations exercising much of the effective control over what federal officials called "the West." *See, e.g.*, Kathleen DuVal, *The Native Ground: Indians and Colonists in the*

Heart of the Continent (2006); Pekka Hämäläinen, *The Comanche Empire* (2008).

Beginning in the middle of the nineteenth century, however, the federal government began to take early steps to regulate the trade of Native peoples as well as European traders. Some treaty provisions of the era, for instance, sought to restrict tribes from trading with either whites or Natives outside of the borders of the United States because of the concern over British and other foreign European influence. *E.g.*, Treaty with the Nisqualli et al., Mar. 3, 1855, art. XII, 10 Stat. 1132 ("The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent."). Moreover, the federal government became increasingly concerned about the consequences of intertribal trade in captives and stolen goods *among* tribes. In particular, the government fretted that these long-standing regional practices of raiding and exchange, especially in the volatile Southwest, would spawn violence between Native peoples. *See, e.g.*, Ned Blackhawk, *Violence Over the Land: Indians and Empires in the Early American West* (2006); James Brooks, *Captives & Cousins: Slavery, Kinship, and Community in the Southwest Borderlands* (2002); Brian DeLay, *War of a Thousand Deserts: Indian Raids and the U.S.-Mexican War* (2008). And so many of the era's Indian treaties, particularly in the Southwest, contained provisions that sought to regulate relations *among*

tribes so as to preserve peace. *E.g.*, Treaty with the Comanches et al., May 15, 1846, art. XIV, 9 Stat. 844 ("The said tribes or nations, parties to this treaty are anxious to be at peace with all other tribes or nations, and it is agreed that the President shall use his exertions, in such manner as he may think proper, to preserve friendly relations between the different tribes or nations parties to this treaty, and all other tribes of Indians under his jurisdiction."); Treaty with the Navaho, Sept. 9, 1849, art. IV, 9 Stat. 974 ("[A]l Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes.").

By the late nineteenth century, federal authority over the continental United States was much more secure. During this period—known as the reservation and assimilation eras of federal Indian policy—the federal government became increasingly focused on obtaining title to Indian lands and controlling and managing all aspects of Native life. As tribes and federal officials negotiated the exchange of land, resources, and privileges, continued intertribal trading was among the many rights guaranteed to tribes by federal officials who were under pressure to secure title to Indian lands. *See Yakama Indian Nation v. Flores*, 955 F.Supp. 1229, 1266 ¶ 72 (1997) (describing federal-tribal negotiations for purposes of freeing "vast amounts of land for settlement as quickly as possible . . . it is

unlikely that [federal officials] intended to restrict" intertribal trade in any significant manner."). At the same time, the federal government increasingly sought to confine Native people to reservations overseen by federally appointed Indian agents, where they would use federal authority and coercion to compel Indians to abandon their historic trade and cultural practices in favor of supposedly "civilized" behavior. *See, e.g.*, Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (1984).

The agents overseeing these newly created Indian reservations quickly discovered the persistence of intertribal trade networks even in the reservation era. One of most common observations of these agents was the frequency of what were called "friendly visits." *See, e.g.*, Office of Indian Affairs, Department of the Interior *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 501 (1839) (complaining that the Kansas Indians, though raising lots of corn, "are very generous in dividing with the Indians of other tribes that visit them for the purpose of beggin; they will give any thing to eat as long as they have"); Office of Indian Affairs, Department of the Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1870*, at 48 (1870) (reporting from the Olympic Peninsula that "[t]he most amicable relations exist among the various tribes, and frequent visits for the purposes of trade and friendly intercourse are exchanged."); *see generally* Justin Gage, *We Do Not Want the Gates*

Closed between Us: Native Networks and the Spread of the Ghost Dance 2-3 (2020) ("Native Americans made at least twelve hundred trips between western reservations, and probably many more, from 1880 to 1890"). These agents reported that these visits, like earlier intertribal trade, blended gift-giving, commerce, exchange, and social ties. *See, e.g.*, Office of Indian Affairs, Department of Interior, *Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1898*, at 269 (1898) (reporting from the Crow Reservation on "intertribal visiting . . . when a great deal of property is always recklessly distributed in making presents. The latter is of course practically a matter of exchange or barter, but no particular transaction is closed until the visit which inaugurated it is repaid, and business principels [sic] are entirely disregarded.").

Unsurprisingly, the agents continually bewailed these practices, which they consistently described as "among the chief obstacles to civilization." Office of Indian Affairs, Department of Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1877*, at 106 (1877). They repeatedly urged that limits be placed on such visits and "constant interchange," and even tried, on their own authority, to control them by cutting off their annuities. *See, e.g.*, Office of Indian Affairs, Department of Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1873*, at 228 (1874); *see also id*. at 197; Office of Indian Affairs, Department of Interior, *Annual Report of the*

Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1875, at 308 (1875) (identifying failed attempts to induce Indians to "forego their visits" to other tribes). However, federal agents often reluctantly authorized these visits "because Natives demanded it." Gage, *supra*, at 5; *see also id.* at 3 (estimating that federal officials had authorized two-thirds of the intertribal visits). Moreover, despite the constant requests of Indian agents on the ground, the Bureau of Indian Affairs never banned the practice of intertribal visiting, much to the agents' chagrin. *Id.* at 5; Office of Indian Affairs, Department of Interior, *Annual Report of the Commissioner of the Office of Indian Affairs to the Secretary of the Interior for the Year 1875*, at 260 ("[A]s the Department instructs me to adopt no forcible measures to prevent said Indians from making their visits to [other tribes in] the buffalo country, I can do simply nothing, as to reason with them is useless.").

This long history of federal involvement in intertribal trade over the nineteenth century suggests two broader conclusions. First, as far back as Lewis and Clark, the federal government recognized that intertribal trade was an important part of federal relations with Native peoples. And second, the federal government took increasing interest in governing and regulating intertribal trade over the course of the century. Nonetheless, even at the apex of aggressive federal intervention in all aspects of Native life, the federal government permitted intertribal trade out of an implicit recognition of its significance to Native culture.

IV. In the Twentieth and Twenty-First Centuries, the Federal Government Came to Embrace and Promote Tribal Corporations and Intertribal Trade.

The reservation and assimilation periods of federal Indian policy persisted into the early twentieth century. But, in the 1920s and '30s, the federal government dramatically recrafted its approach to Native nations in what scholars have dubbed the "Indian New Deal." In place of the older, heavy-handed model emphasizing subordination and assimilation, the federal government gradually embraced tribal self-governance and self-sufficiency. *See* Cohen, *supra*, at § 1.05.

The centerpiece of the Indian New Deal was the Indian Reorganization Act ("IRA"), ch. 576, 48 Stat. 984. Much of the statute dealt with tribal governance, *see, e.g.*, *id.* §§ 16, 18, but other sections sought to encourage "economic development" in Indian country, *id.* §§ 9-10. One key innovation permitted the creation of federally chartered tribal corporations, *id.* § 17. The corporate model had in fact played a key role in shaping and encouraging the development of the IRA, which grew partly out of proposed legislation that would have created a corporation for the Klamath Tribes of Oregon to manage their forest resources. Elmer R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act* 131 (2000).

Yet the IRA contained one critical innovation on these initial proposals. Originally, these

proposals had sought to subject Indians and Indian corporations to state and local jurisdiction, including taxation. *Id.* at 83, 131. However, in drafting the IRA, the Commissioner of Indian Affairs John Collier sought to preserve the long-standing principle of federal supremacy over state and local authority—particularly the immunity of tribes and individual Indians from state taxes. *See, e.g.*, *A Bill To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-government And Economic Enterprise: Hearing on H.R. 7902 Before the House Committee on Indian Affairs*, 73rd Cong., 2nd Sess., Part 2, at 64 (1934) ("There is only one element in the Indian situation that would continue to be peculiar. That is, for the time being, at least as far as any of this legislation contemplates, he would be free from local taxation."); *id.* (""I think under this plan they [the Indians] participate in all of the burdens [of citizenship] except taxation"). Soon after the IRA's enactment, the Solicitor of the Department of Interior ratified Collier's interpretations of tax immunity. In two opinions from the 1940s, the Solicitor determined that "because Congress had already given exclusive authority to the Commissioner of Indian Affairs to regulate trade with the Indians on Indian reservations and the prices at which goods should be sold to the Indians, the field was closed to State action." 1 Office of the Solicitor, Department of the Interior, *Opinions of the Solicitor of the Department of the Interior relating to Indian affairs, 1917-1974*,

at 1234-35 (1979). Any state sales taxes, therefore, were preempted. *Id.*

The Indian New Deal also helped spur the growth and expansion of intertribal ties. Sometimes, this came about inadvertently. Experiences organizing around the IRA, for instance, helped create a core group of Native leaders who would establish the National Congress of American Indians in 1944, which remains the leading nationwide Native advocacy organization to this day. Graham D. Taylor, *The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-45*, at 144-49 (1980); *see also id.* ("[T]he Indian New Deal . . . . contributed more significantly to the development of pan-Indianism, a sense of shared problems and potentialities which transcended tribal and reservation boundaries."). But the federal government also explicitly helped foster and support intertribal business organizations. In the 1930s, this often came through the Indian Arts and Crafts Board, a federal body established to promote Native handicrafts and help ensure their authenticity. *See* Susan L. Meyn, *More Than Curiosities: A Grassroots History of the Indian Arts and Crafts Board and Its Precursors, 1920-1942* (2001); Jennifer McLerran, *A New Deal for Native Art: Indian Arts and Federal Policy, 1933-1943* (2009). As part of this process, the federal government funded a number of intertribal arts and crafts cooperatives, including the Northern Plains Arts and Crafts Association, Southern Plains Arts and Crafts Association, and the Alaska Native

Arts and Crafts Associations. Office of Indian Affairs, Department of Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of Interior for the Year 1951*, at 364 (1951).

Later in the twentieth century, federal policy shifted once again, entering what became known as the era of self-determination. This era saw substantial Native nation-building, including expanded efforts at economic development and intertribal organization. Such organizations have been especially important for tribes with shared economic interests, including the Council of Energy Resource Tribes (founded in 1975), the Inter-Tribal Timber Council (established in 1976), the Intertribal Fish Commission (established in 1977), and the Intertribal Bison Cooperative (established in 1992). Congress has recently endorsed such intertribal business organization in the Indian Community Economic Enhancement Act of 2020, which seeks to continue the congressional policy of furthering economic development in Indian country. Congress stated that the statute seeks "[t]o encourage intertribal, regional, and international trade and business development" and applied these findings to businesses regulated under the federal Indian trader statute. 25 U.S.C. § 4301(b)(5), (c).

This law continues a long historical tradition into the present. Intertribal trade traces back millennia and has endured as a core aspect of Indigenous identity culture, and government. Contrary to the words of the Ninth Circuit Court of

Appeals, the Indian Trader Statutes is not a "lone" federal regulation but instead is part of historical comprehensive and pervasive federal control over Indian trading. *BSRE*, 1 F.4th at 730. The historical record consistently demonstrates the federal government's preemptive control and federal oversight of intertribal trade – to the exclusion of the states. Exclusive federal control and regulation over Indian commerce has been part of American law since the very earliest years of the United States' existence.

While the Ninth Circuit Court of Appeals was correct when it confirmed that state law is inapplicable where there is "on-reservation conduct involving only Indians," it erred when it went on to assert that "Indians stand on the same footing as non-Indians resident on the reservation." *BSRE*, 1 F.4th at 725-26. The court compounded this error by relying on its erroneous interpretation of law to treat BSRE's intertribal trade as occurring "off-reservation." *Id*. at 728. In so holding, the court disregarded the historical federal-tribal relationship protecting Indian tribes from state regulation. *Yakama Indian Nation*, 955 F.Supp. at 1247, 1250-51 ("No instructions were given to place Indians on 'equal footing' with non-Indians."), 1266 ¶ 73. Contrary to the Ninth Circuit Court of Appeals opinion, the Federal Government has long recognized the "inherent power of Indian tribes" to include non-member Indians within the scope of their sovereign jurisdiction. *See* Indian Civil Rights Act ("ICRA") of 1968, 25 U.S.C. § 1301 (2); *see also* Nell Jessup

Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 Am.L.Rev. 109, 124 n.69 (1992) (*citing St. Cloud v. United States*, 702 F.Supp. 1456 (D.S.D. 1988)).[2] As they have done since time immemorial, Tribes across the country engage in intertribal trade restricted only by federal law – trade which is critically important to Tribal sovereign rights, self-government, culture and economic independence. The Ninth Circuit Court of Appeals erred when it ruled that this historic and protected trade is subject to state jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant Big Sandy Rancheria Enterprises' petition for writ of certiorari and reverse the Ninth Circuit Court of Appeals' opinion below.

---

[2] During the 1991 congressional amendments to ICRA and the reaffirmation of tribal jurisdiction over nonmember Indians, it was recognized that any other result would be inappropriate: "To begin at this point to dictate to federal governments who may partake in their political communities would be a breach of faith with Indian tribes unprecedented since the Dawes Act of the 1880s; a breach of treaty promises with many tribes; and a violation of developing standards of international law. On a purely practical basis, no tribe would accept this condition." Nell Jessup Newton, *supra*, at 125-26.

Respectfully Submitted,

RANDOLPH H. BARNHOUSE
Counsel of Record
BARNHOUSE KEEGAN SOLIMON & WEST LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123 (Telephone)
(505) 842-6124 (Facsimile)
dbarnhouse@indiancountrylaw.com
Counsel for Amici Curiae

SETH C. PEARMAN
Attorney General
603 W. Broad Ave.
Flandreau, SD 57028
(605) 573-4206
Counsel for the Flandreau Santee Sioux Tribe