IN THE SUPREME COURT OF THE STATE OF ALASKA

Yvonne Ito,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
Copper River Native Association,	)	Supreme Court No.: S-17965
	)	
Appellee.	)	
	)	

Trial Court Case No.: 3AN-20-06229 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE DANI CROSBY, PRESIDING

BRIEF OF AMICUS STATE OF ALASKA
IN SUPPORT OF APPELLANT

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<u>Title 25, Chapter 46</u>

25 U.S.C. § 5304. Definitions
For the purposes of this chapter, the term—
* * *
(e) "Indian tribe" or "Indian Tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;
* * *
(l) "Tribal organization" or "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant;
* * *

<u>Title 25, Chapter 46, Subchapter I – Indian Self-Determination</u>

25 U.S.C. § 5332. Sovereign immunity and trusteeship rights unaffected
Nothing in this chapter shall be construed as--

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

<u>Title 25, Chapter 46, Subchapter V – Tribal Self-Governance Indian Health Service</u>

25 U.S.C. § 5381. Definitions
* * *
(b) Indian tribe
In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this subchapter, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and

responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this subchapter). In such event, the term "Indian tribe" as used in this subchapter shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

25 U.S.C. § 5396. Application of other sections of this chapter
(a) Mandatory application

All provisions of sections 5305(b), 5306, 5307, 5321(c) and (d), 5323, 5324(k) and (l), 5325(a) through (k), and 5332 of this title and section 314 of Public Law 101-512 (coverage under chapter 171 of Title 28, commonly known as the "Federal Tort Claims Act"), to the extent not in conflict with this subchapter, shall apply to compacts and funding agreements authorized by this subchapter.

(b) Discretionary application

At the request of a participating Indian tribe, any other provision of subchapter I of this chapter, to the extent such provision is not in conflict with this subchapter, shall be made a part of a funding agreement or compact entered into under this subchapter. The Secretary is obligated to include such provision at the option of the participating Indian tribe or tribes. If such provision is incorporated it shall have the same force and effect as if it were set out in full in this subchapter. In the event an Indian tribe requests such incorporation at the negotiation stage of a compact or funding agreement, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

INTRODUCTION

This Court should not overturn *Runyon v. Association of Village Council Presidents*[1] and broaden the scope of tribal sovereign immunity. Tribal sovereign immunity can extend to a tribal entity that is "'so closely allied with and dependent upon the tribe' that it is effectively an 'arm of the tribe.'"[2] In *Runyon*, this Court held that when a tribal entity incorporates under state law so that the member tribes are not liable for the tribal entity's debts, the tribe is not the real party in interest and the tribal entity is not cloaked with tribal sovereign immunity.[3] Because Copper River Native Association incorporated under state law, its member tribes are not liable for the tribal entity's debts, and Copper River Native Association does not have tribal sovereign immunity under *Runyon*.

This Court should reaffirm the *Runyon* test for establishing tribal sovereign immunity because Copper River Native Association cannot meet the demanding standard for overturning precedent: *Runyon* was rightly decided, remains good law, and more good than harm would not result from overturning it.[4] Not only was *Runyon* right when it was decided, but the United States Supreme Court has recently used that same real-party-in-interest test to determine the scope of tribal sovereign immunity, although in a slightly

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1 84 P.3d 437 (Alaska 2004).

2 *Id.* at 439.

3 *Id.* at 441.

4 *See Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1176 (Alaska 1993) (standard for departing from stare decisis).

different context.[5] And expanding sovereign immunity would cause substantial harm by limiting enforcement of clearly-applicable state laws.

Even if this Court decides that the *Runyon* test is too narrow, it should not overturn *Runyon's* ultimate holding—that tribal consortia incorporated under state law do not have sovereign immunity—because that decision was correct for two other independent reasons. First, it is unlikely that tribal consortia can ever enjoy tribal sovereign immunity, because power-sharing arrangements between multiple sovereigns necessarily involve each tribe ceding some sovereignty and thus some derivative sovereign immunity. Second, a tribal entity that incorporates under state law does not have sovereign immunity because that corporation is a creature of state law and a separate legal entity that has agreed to be bound by Alaska's corporate law, which includes authorizing suits against it.

Since *Runyon*, other courts have taken varied approaches to this issue.[6] Like this Court, many other courts consider the financial relationship between the tribe and tribal entity when determining whether tribal sovereign immunity extends to a tribal entity.[7] But some courts analyze the financial relationship more broadly and look beyond whether

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[5] *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) (using the real-party-in-interest test to determine whether a tribal employee sued in his individual capacity was shielded by the tribe's sovereign immunity).

[6] *See, e.g.*, *Great Plains Lending, LLC v. Dep't of Banking*, 259 A.3d 1128, 1140-43 (Conn. 2021) (discussing different approaches federal and state courts have taken in determining whether tribal entity is arm of the tribe and shielded by sovereign immunity).

[7] *See, e.g.*, *White v. Univ. of California*, 765 F.3d 1010, 1025 (9th Cir. 2014).

the tribe is responsible for the entity's debts.[8] And some courts view financial relationship not as a threshold issue but as one factor in a multi-factor analysis.[9]

If this Court does decide to overrule *Runyon* and adopt a new framework, the State does not advocate for following in lockstep the Ninth Circuit's factors. Instead, the State suggests a more considered approach.

Finally, Copper River Native Association does not have tribal sovereign immunity under the Indian Self-Determination and Education Assistance Act, because that Act did not modify tribal sovereign immunity in any way.

I. This Court should not overturn *Runyon*.

A. *Runyon* precludes the Copper River Native Association from invoking tribal sovereign immunity.

In *Runyon*, this Court recognized that a tribal corporation may be so closely allied with and dependent upon a tribe that it is effectively an "arm of the tribe."[10] Crucially, sovereign immunity attaches to a tribal entity (as an arm of a tribe) only if the tribe is the real party in interest.[11] And it is "unlikely" that a tribal entity is the real party in interest if

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8 *See, e.g.*, *id.* at 1025 (considering whether a tribal entity is funded *exclusively* by tribes); *Great Plains Lending*, 259 A.3d at 1147 (noting that "[a]lthough direct tribal liability is neither a threshold requirement for immunity nor a predominant factor in the overall analysis, if a judgment against the entity would affect the tribe's assets, this factor will more likely weigh in favor of immunity, even if the tribe's liability is formally limited.") (internal quotation marks omitted).

9 *See, e.g.*, *White,* 765 F.3d at 1025.

10 84 P.3d at 439.

11 *Id.* at 440.

a judgment against it would not reach the tribe's assets.[12] The Court's use of the word "unlikely" indicates that in certain circumstances this factor might not be dispositive. However, in *Runyon*, this factor was determinative. The Court held that a non-profit corporation founded by multiple tribes and incorporated under state law did not have sovereign immunity because the member tribes were not bound by any judgment against the corporation.[13] "By severing [the member tribes'] treasuries from the corporation, they have also cut off their sovereign immunity before it reaches [the corporation]."[14]

While the Court left open the unlikely scenario whereby a tribal entity might still have sovereign immunity despite its tribal members not being bound by its debts, this is not that case. The facts of this case are indistinguishable in all relevant respects from the facts in *Runyon*, meaning this case does not present the unlikely circumstance in which financial relationship would not be dispositive. Copper River Native Association is a non-profit founded by multiple tribes and incorporated under state law. [Ae. Br. 2] As was the case in *Runyon*, the villages that formed the Association (i.e., the members of the

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12 *Id.*

13 *Id.* at 441. The highest court in New York state also applies the *Runyon* test. *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E.3d 928, 935 (N.Y. 2014) ("If a judgment against a corporation created by an Indian tribe will not reach the tribe's assets, because the corporation lacks the power to bind or obligate the funds of the tribe, then the corporation is not an 'arm' of the tribe. However, if a tribe is legally responsible for a corporation's obligations, the tribe is 'the real party in interest.'") (internal quotation marks and citations omitted).

14 *Runyon*, 84 P.3d at 441.

nonprofit corporation) "are not ... liable ... on [the corporation's] obligations."[15] As was the case in *Runyon*,

> [a]ny judgment against [the Association] will be paid out of the Association's coffers alone. Even if they fall short, the villages' assets will be safe from execution. This legal insulation makes clear that [the Association] is not an arm of the villages. The villages therefore are not the real parties in interest to this lawsuit. And [the Association] is not entitled to the protection of the villages' tribal sovereign immunity.[16]

Copper River Native Association argues that application of the rule in *Runyon* should come out differently in this case. [Ae. Br. 26-28] But there are no relevant distinguishable facts in this case and *Runyon*: both involve a non-profit tribal consortium that is incorporated under state law and that receives tribally authorized federal funding under the Indian Self-Determination and Education Assistance Act (ISDEAA).[17] The fact that *Runyon* involved a consortium's Head Start program, which, according to Copper River Native Association, was not part of an ISDEAA contract,[18] is immaterial. [Ae. Br. 29] Sovereign immunity is jurisdictional and shields an entity from being hauled into court.[19] It is not a defense to a particular claim against that entity.[20] Thus, under a

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15 *Id.* (ellipses and brackets original).

16 *Id.*

17 *Id.* at 438-39.

18 This brief refers to contracts made pursuant to ISDEAA as ISDEAA contracts, but they are often called "638 contracts," after Pub. L. 93-638, the initial enactment of ISDEAA.

19 *Douglas Indian Ass'n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1179 (Alaska 2017).

20 *See Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008) ("[A]n entity either is or is not an arm of the State: The status of an entity does not

straightforward application of *Runyon*, Copper River Native Association does not have sovereign immunity.

B. Recent United States Supreme Court precedent endorsing a similar real-party-in-interest test shows that *Runyon* was correctly decided and remains good law.

Because *Runyon* forecloses extending tribal sovereign immunity in this case, Copper River Native Assocation invites this Court to overrule *Runyon*. Before doing so, the Court must be "clearly convinced" that *Runyon* was "originally erroneous or is no longer sound because of changed conditions" *and* that "more good than harm would result from a departure from precedent."[21] Copper River Native Association's argument fails both prongs.

United States Supreme Court precedent demonstrates that *Runyon* was correct and remains good law. In *Lewis v. Clarke*, a 2017 decision, the Court used the real-party-in-interest test to determine whether a tribe's sovereign immunity shielded a tribal employee sued in his individual capacity.[22] The Court advised that "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit."[23] Although the Court analyzed whether a tribal *employee* had sovereign immunity rather than whether a tribal *entity* had sovereign immunity, the Court

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change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors.").

[21] *Pratt & Whitney Canada*, 852 P.2d at 1176.

[22] 137 S. Ct. 1285 (2017).

[23] *Id.* at 1290 (using caselaw "in context of lawsuits against state and federal employees or entities" to determine outcome in suit against tribal employee).

recognized that lawsuits against a sovereign's employee are similar to suits against a sovereign's instrumentality.[24]

The Court based its decision on its prior caselaw analyzing whether a state's sovereign immunity extended to a state university.[25] The Court explained that in that prior case, an individual tried to sue a state university and the Court's "analysis turned on where potential legal liability lay, not from whence the money to pay the damages award ultimately came."[26] The Court further explained that when courts have extended sovereign immunity to companies, it is because those companies are fiscal intermediaries and the sovereign is the "real party in interest."[27] Focusing on who is the real party in interest, namely where the legal liability rests, remains good law.

While it is true that since *Runyon*, some courts have eschewed this focus when determining whether a tribe's sovereign immunity extends to a tribal entity,[28] this Court is not bound by those courts' decisions. This Court is bound only by the United States

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[24] *Id.* at 1293.

[25] *Id.* at 1292 (citing *Regents of the University of California v. Doe*, 519 U.S. 425 (1997)).

[26] *Lewis*, 137 S. Ct. at 1292.

[27] *Id.* at 1293 (discussing how Medicare Administrator is the real party in interest in cases against private healthcare insurance companies that are agents of the federal government and that the government indemnifies).

[28] *See Great Plains Lending,* 259 A.3d at 1140-43 (discussing some state and federal cases attempting to outline an approach to determining whether an entity is an arm of the tribe).

Supreme Court, which uses the real-party-in-interest test to determine which entities have sovereign immunity.[29]

C. Overturning *Runyon* to expand tribal sovereign immunity would do more harm than good by limiting enforcement of clearly applicable state laws.

This Court should not expand tribal sovereign immunity because doing so would create more harm than good. To be clear, the State is not advocating for shrinking the doctrine, but simply for maintaining the status quo and not expanding it.

One problem with extending tribal sovereign immunity—as Copper River Native Association and other amici urge—is that any extension shields more entities from enforcement of clearly applicable state law. The issue in this case is not whether democratically-enacted state laws apply to tribes and tribal consortia—they clearly do[30]—but rather whether the State and local governments can enforce those laws in court.[31] When it comes to application of state law to tribes and tribal entities shielded by

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[29] *Native Vill. of Tununak v. State, Dep't of Health & Soc. Servs., Off. of Children's Servs.*, 334 P.3d 165, 175 (Alaska 2014) (The Alaska Supreme Court is "not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law."); *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.").

[30] *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 74-75 (1962) (discussing broad application of state law to tribes and tribal members, especially as applied off-reservation).

[31] *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998) (majority) and *id.* at 764 (dissent) (recognizing disconnect between states' power to regulate off-reservation tribal activity and lack of power to adjudicate disputes relating to that activity); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of*

sovereign immunity, the United States Supreme Court has repeatedly noted the "difference between the right to demand compliance with state laws and the means available to enforce them."[32] For this reason, any expansion of tribal sovereign immunity incurs serious consequences.

The State's workers' compensation law provides a good example. The law requires employers to purchase workers' compensation insurance.[33] Civil penalties apply to uninsured employers.[34] Those penalties help finance the workers compensation fund, so that when an employee suffers a work-related injury and their employer is uninsured or does not pay for their injuries, that employee can seek money from the fund.[35] But the State cannot use the courts to assess civil penalties or damages against entities with tribal sovereign immunity, meaning the State must pick up the tab should a tribal entity with sovereign immunity choose not to follow state law. In the context of ISDEAA contractors, this concern is somewhat mitigated because workers' compensation insurance is an "allowable" (albeit not required) expense that tribal entities may include in ISDEAA contracts.[36] Even assuming a tribal consortium obtains federally-funded

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Oklahoma, 498 U.S. 505, 514 (1991) (describing State's authority to tax and regulate tribal activities without attendant adjudicatory power).

[32] *Kiowa*, 523 U.S. at 755 ("To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit.").

[33] AS 23.30.075.

[34] AS 23.30.080.

[35] AS 23.30.082(a), (c); AS 23.30.055.

[36] *See* 25 U.S.C. § 5328 (restricting federal government's authority to create regulatory requirements except as "specifically authorized" in that subsection); 25 C.F.R. § 900.5 (describing non-binding legal effect of rules not specifically provided for by the

workers compensation insurance through ISDEAA, such insurance would not cover on-the-job injuries that occur outside the scope of ISDEAA contracts. And many ISDEAA contractors, like the consortium at issue in *Runyon*, run both ISDEAA and non-ISDEAA programs.[37]

Sovereign immunity also impedes enforcement of taxes. As a general rule, tribes and their members are subject to nondiscriminatory state taxes levied in connection with property located or activities occurring outside of Indian country.[38] And there is very little Indian country in Alaska. This means that tribal property and business activities in Alaska are generally subject to taxation. But the State and municipalities cannot judicially enforce their tax laws against entities cloaked with tribal sovereign immunity.[39] Nor can they even compel documentation from a sovereign entity when investigating suspected discrepancies with tax filings.[40] For municipalities like Anchorage, which gains

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Act), and IHS's Indian Health Manual, Part 6, Chapter 3 (2019), making workers compensation an "allowable" contract cost under ISDEAA, https://www.ihs.gov/ihm/pc/part-6/p6c3-ex-g/.

[37] *See, e.g.*, *Runyon*, 84 P.3d at 438-39 (discussing the "wide range" of programs the tribal consortium operates, made possible by various sources of federal and state funding).

[38] *See, e.g.*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-50 (1973) (upholding states sales taxes against tribe as applied off-reservation).

[39] *Oklahoma Tax Comm'n*, 498 U.S. at 514 (1991) (holding that sovereign immunity bars state from suing tribes to recover valid taxes); *cf. Cayuga Indian Nation of New York v. Seneca Cty., New York*, 978 F.3d 829, 841 (2d Cir. 2020) (discussing how sovereign immunity does not bar county from *imposing* property taxes but it does bar county's ability to *collect* those taxes).

[40] *See, e.g.*, *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1160 (10th Cir. 2014) ("The logical conclusion, therefore, is that a subpoena duces tecum served directly

more than half its yearly revenue from real property tax, effectively exempting entities from taxation is a significant harm.[41] And the state imposes numerous types of taxes, including but not limited to taxes on charitable gaming, corporate income, and tobacco,[42] which are not enforceable against entities with tribal sovereign immunity.

Expanding sovereign immunity would also impede the State's enforcement of other laws that protect employees and consumers. For example, the State would not be able to sue tribal entities with sovereign immunity to enforce its unfair trade practices law,[43] data privacy laws,[44] and anti-discrimination laws.[45] Expanding sovereign immunity casts a shadow of uncertainty over the State's enforcement of its environmental regulations, fish and wildlife regulations, gaming laws, and alcohol and marijuana

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on the Tribe, regardless of whether it is a party to the underlying legal action, is a 'suit' against the Tribe, triggering tribal sovereign immunity.").

[41] *See, e.g.*, Anchorage's 2020 Comprehensive Annual Financial Report 10-11, https://www.muni.org/Departments/finance/controller/CAFR/2020%20MOA%20Annual%20Report-%20Final%20Web%20Version%20w%20Cover-%2010.15.21.pdf;

Anchorage's 2018 Proposed General Government Operating Budget 1, https://www.muni.org/Departments/budget/operatingBudget/2018%20Main%20Page/2018%20ppsd%20GGOB/03%20-%20Revenues.pdf.

[42] For a more comprehensive list of state taxes, see Alaska Department of Revenue, Tax Division, Tax Types, http://tax.alaska.gov/programs/index.aspx.

[43] AS 45.50.471.

[44] AS 45.48.010.

[45] AS 18.80.200 *et seq.*. The Municipality of Anchorage would likewise be inhibited from enforcing its anti-discrimination laws. *See* Chapter 5.20 of Municipality of Anchorage Code ("Unlawful Discriminatory Practices").

regulations, to name just a few. Nor would the State be able to issue subpoenas against entities to discover violations against such laws.[46]

To be clear, this does not mean the State and municipalities are without recourse for violations of state and municipal law. To prevent a lack of enforcement authority, the State seeks waivers of sovereign immunity when it transacts with entities having or suspected of having tribal sovereign immunity. The State can seek damages against tribal employees in their individual capacity.[47] The State can prosecute tribal employees for violating state criminal law.[48] Finally, the State can likely seek prospective injunctive relief against tribal officials for violations of state law under *Ex parte Young*.[49]

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[46] *See Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172-73 (1977) (vacating order compelling tribe to identify tribal members who engage in steelhead fishing and to report number of fish caught each week); *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1108 (Colo. 2010) (holding tribal sovereign immunity applies to judicial enforcement of state investigative subpoenas issued to businesses to determine whether their lending practices violated Uniform Commercial Credit Code and Colorado Consumer Protection Act); *United States v. James*, 980 F.2d 1314, 1319 (9th Cir.1992) (holding that sovereign immunity prevented enforcement of subpoena against tribe in course of criminal investigation against tribal member).

[47] *Lewis*, 137 S. Ct. at 1288 ("[I]n a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated.").

[48] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014).

[49] Although this court has not decided whether *Ex parte Young* applies to tribal officials violating *state* law (as opposed to tribal officials violation *federal* law), *Douglas Indian Ass'n*, 403 P.3d at 1180, the United States Supreme Court has indicated it applies, *Michigan*, 572 U.S. at 796, and other courts have so held. *See, e.g.*, *See Hengle v. Treppa*, 19 F.4th 324, 345-48 (4th Cir. 2021) (permitting tribal officials to be sued for violations of state law under the fiction of *Ex parte Young*); *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 1122-25 (2d Cir. 2019) (same); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015) (same); *Great Plains Lending*, 259 A.3d at 1154-56 (Conn.) (same).

While the State and municipalities are able to use the abovementioned tools to enforce state and municipal law, expanding tribal sovereign immunity makes enforcement more challenging and less effective. For instance, while suing tribal employees might be a way to enforce state law, sovereign immunity makes it difficult to determine which employees are responsible for violations of law because it severely limits discovery and the State's subpoena power.[50] And suits for damages against individual tribal employees are often barred for other reasons.[51] Finally, the fact that the State *seeks* a waiver of sovereign immunity does not mean it will necessarily *receive* such a waiver. Overturning precedent would not, in this instance, do more good than harm.[52] Rather, it would impede enforcement of clearly-applicable, democratically-enacted laws.

Copper River Native Association has not persuasively explained how overturning precedent and expanding tribal sovereign immunity will do more good than harm. The Association argues that it is spending too much money on litigation, which could otherwise go to support services it provides through ISDEAA contracts. [Ae. Br. 10, 28] But defensive litigation always costs money. Even if a tribal entity might have sovereign

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50 *See Puyallup Tribe, Inc.*, 433 U.S. at 1772-73 (concluding that order compelling tribe to product information to discover who violated state law was barred by tribal sovereign immunity).

51 *See Genskow v. Prevost,* 825 F. App'x 388, 390-91 (7th Cir. 2020) (despite Supreme Court's holding in *Lewis*, sovereign immunity barred suit against individual tribal officers because court found they were acting pursuant to the Tribal Chairman's directive and were therefore acting as an arm of the tribe); *Great Plains Lending*, 259 A.3d at 1156 (despite Supreme Court's holding in *Lewis*, tribal sovereign immunity barred civil damages against tribal official sued in his individual capacity because the tribe was the real party in interest).

52 *See Pratt & Whitney Canada*, 852 P.2d at 1176.

immunity, there are still litigation costs in proving that immunity.[53] Plus, expanding tribal sovereign immunity comes at the cost of inhibiting enforcement of state laws and preventing plaintiffs from accessing the courts. If what Copper River Native Association argues is that it should not bear the litigation costs for unmeritorious claims, it can take advantage of Alaska's fee shifting provisions to mitigate the cost of litigation, just as any other defendant can do. But if what Copper River Native Association argues is that it should not bear litigation costs for defending against meritorious claims, then it is asking this Court to preclude application of duly enacted laws and cut off access to the courts. Finally, if Copper River Native Association and similarly situated tribal entities that receive ISDEAA funding are spending too much on litigation, Congress can appropriate more money for overhead costs or assume some litigation and liability costs, as it has previously done by amending ISDEAA.[54] Expanding sovereign immunity beyond *Runyon* simply reaches too far.

Copper River Native Association also explains that if it has to pay out damages from a lawsuit—regardless whether damages are merited—that will drain resources that would otherwise go to healthcare services. [Ae. Br. 26] In essence, it seems to argue that providing healthcare for its members is of paramount concern and overrides making a tort

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53 *See, e.g.*, *Douglas Indian Ass'n*, 403 P.3d at 1180 (discussing jurisdictional discovery to determine whether a tribal organization is an arm of the tribe).

54 *See, e.g.*, 25 U.S.C. § 5321(c)(1)) (requiring federal government to provide liability insurance for tribes and tribal organizations carrying out ISDEAA contracts); 25 U.S.C. § 5321(d) (making claims against tribes and tribal organizations carrying out ISDEAA contracts to be actions against the United States and defended by the Attorney General under the Federal Tort Claims Act).

victim whole and supersedes the enforcement of laws that protect the public such as workers' compensation and employment laws. There is simply no merit to this.

II. Even without *Runyon*, state-law chartered nonprofits formed by tribes do not enjoy sovereign immunity.

It is very unlikely that a consortium made of multiple tribes can ever be shielded by tribal sovereign immunity. When multiple sovereigns join together to create a wholly new entity, each sovereign necessarily cedes some of its sovereign authority (from which sovereign immunity derives) in order to coordinate and unify action. This is inherent in any power-sharing arrangement. In the two instances in which the United States Supreme Court has considered whether a multi-state-created entity retains sovereign immunity, the Court has found no immunity.[55] In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the United States Supreme Court noted that although the two member states of a bistate agency individually had sovereign immunity, the bistate agency did not itself have sovereign immunity.[56] One of the Court's reasons for finding no immunity was that the agency could make its own rules and was not subject to state veto.[57] And in *Hess v. Port Authority Trans-Hudson Corporation*, the governors of New York and New Jersey each had separate veto power over actions taken by the Port Authority, both states could appoint and remove the Authority's commissioners, and both state legislatures determine the projects the Port Authority undertakes, yet the Court still stressed that "no

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55 *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994); *Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391 (1979).

56 440 U.S. at 402.

57 *Id.*

one State alone can control the course of [the multi-state entity]."[58] Even when each individual sovereign retains substantial control over a multi-sovereign entity, the United States Supreme Court still presumes that a multi-sovereign entity does not enjoy sovereign immunity.

Although tribal consortia likely do not enjoy sovereign immunity, they may still take advantage of other benefits Congress affords tribes and tribal entities. For instance, Congress has statutorily exempted tribes (and, by extension, tribal consortia) from laws like Title VII of the Civil Rights Act.[59] [Ae. Br. 29] But federal legislation affirmatively exempting tribes and tribal entities from complying with specific federal laws is distinguishable from sovereign immunity, which bars parties from suing tribes even when laws clearly apply to them.[60] By way of another example, Congress has shifted tort liability from tribes to the federal government when a tort occurs within the scope of performance of self-determination contracts under ISDEAA.[61] But Congress's shifting some legal responsibility for certain alleged tortious conduct from tribes and tribal

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[58] 513 U.S. at 47.

[59] *See, e.g.*, *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998) (concluding that Congress intended to exempt tribes and collective groups of tribes from Title VII's application); *Dille v. Council of Energy Res. Tribes*, 801 F.2d 373 (10th Cir. 1986) (same).

[60] *See, e.g.*, *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999) (concluding that although ADA applied to tribes, sovereign immunity barred private parties from enforcing ADA provisions).

[61] 25 U.S.C. § 5321(d).

consortia to the federal government is distinguishable from sovereign immunity, which completely bars suit against tribes regardless the cause of action.

Not only does a consortium's multi-tribe structure weigh against extending tribal sovereign immunity, but the consortium's corporate structure does as well. Corporations created under the state's general corporation law, like the ones at issue in *Runyon* and this case, do not enjoy tribal sovereign immunity. When a tribe decides to create an entity and incorporate that entity under state law, it creates a separate legal entity.[62] That separate legal entity's authority springs from state law.[63] By incorporating under state law, it agrees to suit under Alaska law: Alaska law provides that corporations may sue and be sued.[64]

Even courts that disagree with *Runyon* agree that incorporating under state law is either dispositive of no immunity or weighs against a finding of immunity.[65] This means

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62 James D. Cox & Thomas Lee Hazen, Treatise on the Law of Corporations § 7:1 (3d ed.).

63 *Id.* § 1:2 (discussing Chief Justice Marshall's definition of a corporation as a "mere creature of law, it possess only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence").

64 AS 10.20.011(2) (authorizing corporation to "sue and be sued").

65 *See, e.g.*, *State by & through Workforce Safety & Ins. v. Cherokee Servs. Grp., LLC*, 955 N.W.2d 67, 73 (N.D. 2021) ("When a tribal entity subjects itself to a state by organizing under the state's laws, it waives sovereign immunity."); *Somerlott v. Cherokee Nation Distributors*, Inc., 686 F.3d 1144, 1149-50 (10th Cir. 2012) (concluding that sovereign immunity does not extend to a tribal entity that incorporated under state law and thus voluntarily subjected itself to another sovereign's laws which allows them to be sued); *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1176 (D.S.D. 2012) (concluding that the tribal entity's creation under state law cut against a finding of sovereign immunity, but ultimately finding sovereign immunity after analyzing the other factors); *People v. Miami Nation Enterprises*,

that nonprofits incorporated under state law,[66] such as amici Alaska Native Tribal Health Consortium, Council of Athabascan Tribal Governments, Maniilaq Association, and Southeast Alaska Regional Health Consortium, and appellee Copper River Native Association [Exc. 34] do not have tribal sovereign immunity.

III. If this Court overturns *Runyon*, it should not adopt the Ninth Circuit's balancing test, which provides little guidance, unfairly favors immunity, and ignores state interests.

Before discussing the Ninth Circuit's *White*[67] (i.e., *Breakthrough*[68]) factors, there is a question as to who must prove whether an entity enjoys tribal sovereign immunity. Contrary to Copper River Native Association's assertion, a plaintiff suing a tribally affiliated entity does not carry the burden to prove the defendant entity is not an arm of the tribe and not entitled to sovereign immunity. [Ae. Br. 4-5] In cases in which the burden has been contested, courts "have consistently concluded that although a tribe itself does not bear the ultimate burden of proving tribal sovereign immunity, an entity claiming to be an arm of that tribe bears the burden of demonstrating the existence of that relationship and the entity's ultimate entitlement to share in tribal sovereign immunity."[69]

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386 P.3d 357, 372 (Cal. 2016) (". . . formation under state law has been held to weigh against immunity. . . .").

[66] To search the Department of Commerce's database to determine whether tribal entities have been incorporated under state law, see https://www.commerce.alaska.gov/cbp/main/search/entities.

[67] *White v. Univ. of California*, 765 F.3d 1010 (9th Cir. 2014).

[68] *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010).

[69] *See Great Plains Lending*, 259 A.3d at 1138-40 (collecting cases); *see also Miami Nation Enterprises*, 386 P.3d at 371 ("[U]ntil the entity has proven it should be treated as

The superior court erred in accepting Copper River Native Association's argument that the burden rests with the plaintiff. [Exc. 188]

If this Court decides to overrule *Runyon*, it should not adopt the *White*[70] factors in lockstep. These factors are difficult, if not impossible to consistently administer and are set up to tilt heavily in favor of expanding sovereign immunity while completely ignoring state interests.

A. Structure, Ownership, Management, and Control.

Courts considering this factor analyze how much legal and actual control the tribe has over an entity.[71] More control weighs in favor of sovereign immunity while less control weighs against it. This Court has agreed that "how much control the tribe exerts" over a tribal entity may be relevant—assuming a tribal entity meets the *Runyon* test (i.e., "the tribe would be legally responsible for the entity's obligations").[72] The State agrees that control is relevant in theory. In practice, however, it is not administered consistently.

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an extension of the tribe, it is no more entitled to a presumption of immunity than any other party. Accordingly, we conclude that a tribally affiliated entity claiming immunity bears the burden of proving by a preponderance of the evidence that it is an arm of the tribe."). Copper River Native Association cites a Ninth Circuit case stating that the burden for 12(b)(1) motions is normally on the party asserting jurisdiction. [Ae. Br. 5 n. 19 (citing *Pistor v. Garcia*, 791 P.3d 1104, 1112 (9th Cir. 2015) and other cases following *Pistor*)] But a review of the briefing in that case (*Pistor*) reveals that no one actually raised whether the burden of proof should be different in this unique situation. As discussed above, in the cases in which the issue has actually been contested, courts consistently hold that the burden rests on the tribal entity to prove tribal sovereign immunity.

[70] *White v. Univ. of California*, 765 F.3d 1010 (9th Cir. 2014).

[71] *See, e.g.*, *Miami Nation Enterprises*, 386 P.3d at 373.

[72] *Runyon*, 84 P.3d at 440-41.

A few examples of court opinions show that deciding how much control is enough is an exceedingly difficult and seemingly arbitrary task. For instance, a district court in Virginia concluded that a tribal-member-managed company that was owned by a subsidiary of a tribe and authorized by a tribal council to operate as an online lending business was not entitled to sovereign immunity because the company, in practice, delegated operational decisions to another company that was not managed by or for tribal members.[73] The Fourth Circuit disagreed, concluding the tribal-member-managed company enjoyed sovereign immunity because, despite delegating its operational decision making, it was not legally obligated to do so and it remained involved in *some* discussions relating to the operating budget, employee handbook, and other policies and procedures.[74] The Fourth Circuit went on to analyze sovereign immunity for the delegee company that ran the online lending business's the day-to-day operations.[75] The Court concluded that the "control" factor weighed only slightly against sovereign immunity for that company despite the fact that the company was run by a non-tribal-member who set the company's strategy, executed documents on the company's behalf, opened and managed the company's bank accounts, and oversaw all daily operations.[76] Ultimately, the Fourth Circuit concluded that *both* companies enjoyed tribal sovereign immunity.[77]

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[73] *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 182-84 (4th Cir. 2019).

[74] *Id.*

[75] *Id.* at 183-84.

[76] *Id.*

[77] *Id.* at 185.

The California Supreme Court reached the opposition conclusion when faced with an online lending enterprise owned by tribal entities.[78] There, the tribe wholly owned the companies and tribal members sat on the board of one company and appointed board members of the other company.[79] While one of the companies approved loans and provided customer service, it outsourced much of the lending operations to another tribal-owned company that was managed by non-tribal members.[80] Despite the ownership of the companies, the legal control the tribe had over the operations, and evidence of *some* actual tribal involvement, the court highlighted that most of the loan operations were performed outside the reservation by non-tribal members.[81] This was enough, the court concluded, to foreclose sovereign immunity for the companies. The tribes were simply not sufficiently "enmeshed" in "the direction and control" of the lending business.[82]

In order for "control" to be a helpful factor in determining whether a tribal entity has tribal sovereign immunity, there would have to be clear guidelines articulating just how much control a tribe must retain in order for a tribal entity to possibly have tribal sovereign immunity. And, as discussed above, it seems unlikely that tribes comprising a tribal consortium would ever have enough control for a consortium to also have sovereign immunity.

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78 *Miami Nation Enterprises*, 386 P.3d at 376-77.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* at 377.

B. Creation.

Courts analyzing this factor tend to conclude that an entity created through tribal law weighs in favor of sovereign immunity, whereas an entity created by another sovereign (like a state or the federal government) weighs against sovereign immunity.[83] The State agrees that when a sovereign creates a corporation under another sovereign's laws, that weighs in favor of finding no sovereign immunity. This is, at least in part, because a state corporation is a creature of state law, created from the state's statutory grant of authority.[84] It is defined by and subject to the state incorporation law, which includes, among other provisions, the right to sue and be sued.[85] Corporations, especially ones formed under the laws of another sovereign, are fundamentally dissimilar from tribes, which have inherent sovereignty that predates the United States.[86]

The converse—what happens when a tribe incorporates under its own laws—should not necessarily weigh in favor of sovereign immunity so much as it should not weigh against a finding of sovereign immunity. But because Copper River Native Association is incorporated under state law, that issue need not be addressed at this time.

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[83] *Great Plains Lending*, 259 A.3d at 1143 (explicating caselaw on this issue)

[84] Cox, Treatise on the Law of Corporations § 1:2.

[85] *See id.*; AS 10.20.011(2).

[86] *See United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (discussing tribes' powers of sovereignty as "inherent" and existing "[b]efore the coming of the Europeans").

C. Purpose.

Courts analyzing this factor consider whether the purpose of the tribal entity is governmental or commercial—governmental purposes weigh in favor of sovereign immunity and commercial purposes weigh against immunity.[87] But this distinction seems meaningless in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*,[88] which held that sovereign immunity shields a tribe from breach-of-contract suits regardless whether those contracts are governmental or commercial. Moreover, so long as a commercial operation financially benefits a tribe, any commercial operation can be used to raise revenues and support governmental expenditures.[89]

D. Intent.

Some courts consider whether a tribe has stated an intent to share its sovereign immunity.[90] But a mere stated intent to share sovereign immunity is not compelling evidence of an affiliated entity's sovereign immunity. Immunity is not a gift or bargaining chip. For instance, if a consortium is comprised of both federally-recognized tribes and other entities, the federally-recognized tribes cannot give sovereign immunity

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[87] *See, e.g.*, *Breakthrough*, 629 F.3d at 1192 (concluding that commercial enterprise that finances tribe is a governmental purpose).

[88] 523 U.S. 751 (1998).

[89] *See, e.g.*, *Breakthrough*, 629 F.3d at 1192-93 (finding purpose factor to weigh in favor of immunity because the tribe's casino financially benefited the tribe, enabling the tribe to engage in governmental functions); *Miami Nation Enterprises*, 386 P.3d at 372-73 (recognizing that most purposes will weigh towards extending sovereign immunity unless the tribal enterprise enriches primarily persons outside of the tribe or only a handful of tribal leaders).

[90] *See, e.g.*, *Big Picture Loans*, LLC, 929 F.3d at 184.

to the other entities merely by intending that the consortium have sovereign immunity. Likewise, when contracting, a tribal entity's expressed intent to waive sovereign immunity or the State's seeking waiver of sovereign immunity from entities suspected of possibly having sovereign immunity is not proof that an entity has sovereign immunity. That's just smart drafting. Expressed intent seems relevant only if a sovereign declares its intent to waive sovereign immunity that a subsidiary might otherwise have.[91]

E. Financial Relationship.

When analyzing the financial relationship between a tribe and tribal entity, some courts, like this one, consider whether a tribe will be liable for the tribal entity's obligations.[92] This Court has held that an entity is not shielded by sovereign immunity when a judgment against the entity doesn't run against the sovereign.[93]

Other courts consider more broadly how a lawsuit against a tribal entity will affect a tribe's finances, considering not just the legal liabilities but the practical effect.[94] The superior court in this case deviated from *Runyon* and looked beyond the legal liability and

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91 *Cf. Tahoe Reg'l Plan. Agency*, 440 U.S. at 401 (finding that multi-state authority did not share states' sovereign immunity because, among other reasons, the states "disclaim[ed] any intent to confer immunity").

92 *Runyon*, 84 P.3d at 441 (holding that "legal insulation," which makes members tribes not liable for the tribal consortium's obligations, means tribal consortium is not cloaked with sovereign immunity); *cf. Lewis v. Clarke*, 137 S. Ct. at 1291 ("Our analysis turned on where the potential *legal* liability lay, not from whence the money to pay the damages award ultimately came.") (emphasis original)

93 *Runyon*, 84 P.3d at 440-41.

94 *See, e.g.*, *Big Picture Loans*, 929 F.3d at 184 ("If a judgment against the entity would significantly impact the tribal treasury, this factor will weigh in favor of immunity even if the tribe's liability for an entity's actions is formally limited.")

considered how a judgment against a tribal entity would, in practice, financially affect the member tribes. [Exc. 178-81]

To the extent this Court wishes to modify *Runyon*, asking simply whether the tribe will be financially harmed by a judgment against a tribal entity places no meaningful limits on sovereign immunity. Such a framework would nearly always lead to extending tribal sovereignty.[95] Because of this, courts that look beyond where the formal liability lay often consider how much a tribe depends on a tribal entity's finances, and as a result, how "significantly" a judgment against a tribal entity would affect a tribe.[96]

But using the magnitude of financial impact as a factor is also problematic. A policy extending sovereign immunity to a tribal entity only when a tribe gets a large portion of its revenue or revenue-fueled services from that entity penalizes tribes that diversify their assets and rewards tribes that receive financial assistance from more limited revenue streams. For example, if magnitude of financial impact is the metric, that penalizes a tribe that receives its funding or services evenly from ten different tribal entities and rewards a tribe that receives its funding or services through one or two tribal entities.

This Court should continue to follow *Runyon*. If it chooses to depart from precedent, it should still weigh most heavily the financial relationship between the tribe

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[95] *See Miami Nation Enterprises*, 386 P.3d 373-74 ("[B]ecause any imposition of liability on a tribally affiliated entity could theoretically impact tribal finances, the entity must do more than simply assert that it generates some revenue for the tribe in order to tilt this factor in favor of immunity.").

[96] *Id.*; *Great Plains Lending*, 259 A.3d at 1147.

and tribal entity, and conclude that legally insulating a tribe from a tribal entity's obligations weighs strongly against extending sovereign immunity.

F. State's interests.

Missing from the federal circuit courts' expansion of tribal sovereign immunity is any mention of state interests. Tribal sovereign immunity is a judge-made law.[97] In creating law, courts should consider the relevant interests at stake, including the interests of another sovereign (the State).[98] Indeed, when courts consider whether congressional acts in the Indian law context effectively preempt state law, they examine "not only the congressional plan, but also the nature of the state, federal, and tribal interests at stake . . . ."[99] When courts create law in this field, they should be held to the same standard as Congress.

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[97] *Kiowa,* 523 U.S. at 756.

[98] *Id.* at 765 (Stevens, Thomas, Ginsburg, JJ., dissenting) (discussing how expanding tribal sovereign immunity to off-reservation economic activities "completely ignores the State's interests"); *see also Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 818 (2014) (Thomas, Scalia, Ginsburg, Alito, JJ., dissenting) ("A rule barring all suits against a tribe arising out of a tribe's conduct within state territory—whether private actions or (as here) actions brought by the State itself—stands in stark contrast to a State's broad regulatory authority over Indians within its own territory. Indeed, by foreclosing key mechanisms upon which States depend to enforce their laws against tribes engaged in off-reservation commercial activity, such a rule effects a breathtaking pre-emption of state power.").

[99] *Kiowa,* 523 U.S. at 765 (dissent) (citing *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 884 (1986)).

IV. Congress did not intend to impliedly bring about one of the biggest expansions of tribal sovereign immunity by referencing tribal "rights" in a definitional subsection of ISDEAA.

Copper River Native Association argues that Congress, in a definitional section of a subchapter of ISDEAA, completely overhauled the contours of tribal sovereign immunity. [Ae. Br. 15-21] Congress did no such thing.

A little background on ISDEAA is helpful. The Act allows "Indian tribes" to direct that they, or a "tribal organization" they designate, enter into self-determination contracts with the federal government to provide economic, infrastructure, health, and education services formerly provided by the federal government.[100] A "tribal organization" is defined broadly and can include the governing body of a federally recognized tribe, a regional non-profit organization like Copper River Native Association, a non-profit organization affiliated with a for-profit regional ANCSA corporation, or even the board of directors of a for-profit regional ANCSA corporation.[101]

In amending the Act, Congress authorized certain Indian tribes to enter into self-determination *compacts* with the federal government.[102] *Compacts* differ from *contracts*

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[100] 25 U.S.C. § 5321(a); *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2439 (2021).

[101] 25 U.S.C. § 5304(l); *see, e.g.*, IHS, Fiscal Year (FY) 2018 Report to Congress on Contract Funding of Indian Self-Determination and Education Assistance Act Awards 10, https://bit.ly/2XKkNLI (listing federally recognized tribes and tribal organizations contracting and compacting with federal government for 638 contracts); *see also Chehalis*, 141 S. Ct. at 2452 (explaining that because an "Indian tribe" under ISDEAA includes for-profit ANCSA corporations, the governing body of that type of "Indian tribe" is the ANCSA corporation's board of directors).

[102] Tribal Self-Governance Act in P.L. 103-413 (1994) and Tribal Self-Governance Amendments of 2000, P.L. 106–260 (2000).

in that compacts allow tribes to enter into single funding agreements to plan, revise, and administer the programs, services, functions, and activities otherwise administered by the federal government with much less federal micromanagement.[103] As amended, Title IV of the Act provides for compacting with the Department of the Interior, while Title V provides for compacting with the Indian Health Service. Section 5381(b), the definitional section of the amendment pertaining to compacting with the Indian Health Service (in Title V), provides:

> (b) INDIAN TRIBE.—In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this title, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term "Indian tribe" as used in this title shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.[104]

Copper River Native Association asserts that by enacting § 5381(b), Congress intended to greatly expand sovereign immunity. [Ae. Br. 15-21] This is incorrect for numerous reasons.

First, the Act expressly disclaims modifying sovereign immunity: "Nothing in this chapter shall be construed as affecting, modifying, diminishing, or otherwise impairing

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[103] *See* IHS, FAQ, "What is the difference between Title V Compacting and Title I Contracting under the Indian Self-Determination and Education Assistance Act (ISDEAA)?", *https://www.ihs.gov/selfgovernance/faq/#5*.

[104] Section 458aaa(b) in Tribal Self-Governance Amendments of 2000, P.L. 106–260, 114 Stat 711 (2000) (now codified at 25 U.S.C. § 5381(b)).

the sovereign immunity from suit enjoyed by an Indian tribe."[105] This provision (titled "Sovereign immunity and trusteeship rights unaffected") was part of the original 1975 legislation.[106] Because this provision has since been renumbered and moved within the United State Code, for ease of reference, this brief calls this provision the "sovereign immunity unaffected" provision. When Congress amended the Act in 2000 to add Title V, it expressly made the sovereign immunity unaffected provision applicable to Title V.[107] The House report explained that by expressly incorporating the sovereign immunity unaffected provision into Title V, Congress meant to "clarify[] that Title V shall have *no impact* on existing sovereign immunity . . . "[108] Copper River Native Association argues that a phrase in a definitional section of a subchapter of a statute that applies to only part of the Act wildly expands sovereign immunity. [Ae. Br. 15-21] But that cannot be the case when the part of the statute that actually focuses on sovereign immunity says that Congress meant to maintain the status quo.

Second, sovereign immunity attaches to sovereigns. It is not a limited defense to certain claims against sovereigns: a tribal entity "either is or is not an arm of the [tribe]. The status of an entity does not change from one case to the next based on the nature of

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105 25 U.S.C. § 5332. The current section of the statute has not been modified, but it has been moved within the federal code. *See* Pub. L. 93-638, § 110 (1973).

106 Pub.L. 93-638, Title I, § 111, formerly § 110 (1975).

107 25 U.S.C. § 5396(a) (making what is now labeled as § 5332 applicable to Title V compacts).

108 H.R. Rep. 106-477 (1999) (emphasis added) (discussing Section 516 of amendments, which is now codified at 25 U.S.C. § 5396(a)).

the suit . . . ."[109] It is unbelievable that, in a definitional section with limited applicability, Congress meant to extend sovereign immunity for all claims regardless whether they even relate to an ISDEAA compact with the Indian Health Service. Copper River Native Association's argument would mean that in enacting a law transferring the management and delivery of health services to tribes, Congress meant to, for instance, make States and municipalities unable to sue a tribal consortium to abate a nuisance, to enforce its zoning laws, or to collect employment taxes. Notably, tribal consortia often operate a variety of programs, not just ISDEAA contracts and compacts.[110] Because sovereign immunity applies to entities, not claims, extending sovereign immunity to tribal consortia would make these consortia immune from suit even when engaging outside the scope of ISDEAA contracts and compacts. And for some programs involving ISDEAA contracts and compacts, there are multiple sources of funding, which makes distinguishing between revenue streams difficult or impossible.[111]

Third, construing 25 U.S.C. § 5381(b) as expanding sovereign immunity hides an elephant in a mousehole. The Act—at least in theory—allows a federally recognized tribe to authorize a for-profit ANCSA corporation to execute ISDEAA services.[112] Under

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[109] *Puerto Rico Ports Auth.*, 531 F.3d at 873.

[110] *See, e.g.*, David S. Case & David A. Voluck, Alaska Natives and American Laws 349 (3d ed. 2012) ("The Tanana Chiefs Conference operates a large variety and volume of federal- and state-funded programs.").

[111] *See generally id.*

[112] 25 U.S.C. § 5384(a) (directing the Secretary to enter into compacts with "Indian tribes"); 25 U.S.C. § 5381(b) (for compacting purposes, recognizing that "Indian tribes" may authorize another "Indian tribe" or "tribal organization" to carry out programs and services on its behalf); 25 U.S.C. § 5304(e) (defining "Indian tribe" as including for-

Copper River Native Association's construction of § 5381(b), a tribe could authorize a for-profit regional corporation to administer services and then the for-profit corporation would have sovereign immunity regardless of the nature of the suit.[113] Congress simply did not intend this.

Fourth, tribal sovereign immunity is a judge-made doctrine subject to Congressional abrogation.[114] The State has found no examples in which Congress has expanded the doctrine and it is not clear that Congress even has the authority to *enlarge* the judicial doctrine of tribal sovereign immunity.

Relatedly, Congress can create affirmative legislation pursuant to the Indian commerce clause[115] that shields tribes from certain lawsuits. But if Congress intends to preempt state law, it must be express: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."[116] If Congress

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profit regional ANCSA corporations); 25 U.S.C. § 5304(l) (defining "tribal organization" as the recognized governing body of an "Indian tribe").

113 *Puerto Rico Ports Auth.*, 531 F.3d at 873.

114 *Oklahoma Tax Comm'n*, 498 U.S. at 509.

115 U.S. Const. art. I, § 8.

116 *See Mescalero*, 411 U.S. at 148–49 (concluding that state taxes applied to off-reservation tribal property because the Indian Reorganization Act did not expressly confer tribal immunity from state taxes). Interpreting whether a federal law preempts state law on reservation lands is subject to different analysis, *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980), but this case deals with application of state law off-reservation.

had meant for § 5381(b) to preempt enforcement of state law against state corporations, it would have had to expressly say so. It did not.

Finally, when Congress wants to insulate tribes from litigation costs, it knows how to do so. Congress is well aware of the costs that tribes (and tribal consortia) incur when undertaking ISDEAA contracts and compacts. When Congress initially passed ISDEAA, "tribes faced much higher insurance costs and liability risks."[117] Because these costs led to financial management problems for tribes, Congress amended ISDEAA to make the federal government responsible for liability (including litigation costs) for torts committed under ISDEAA contracts.[118] What Congress did not do, however, was expand sovereign immunity.

Copper River Native Association's reliance on the Indian canon of construction is misplaced. [Ae. Br. 21-22] The canon does not authorize reading in "ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress."[119] Courts "cannot, under the guise of interpretation . . . rewrite congressional acts so as to make them mean something they obviously were not intended to mean."[120]

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[117] Felix Cohen, Handbook of Federal Indian Law § 22.02[4][a] (2012 ed.).

[118] *See id.*; *see also* S. Rep. 100-274, at 8-9, 15 (1988) (discussing how liability insurance had skyrocketed since ISDEAA was originally enacted and that in a three-year period in Juneau, medical malpractice costs for tribal health contractors had increased 448%); 25 U.S.C. § 5321(d) (making tort claims against tribes, tribal organizations, and Indian contractors carrying out ISDEAA contracts covered under the Federal Tort Claims Act).

[119] *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

[120] *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947).

Copper River Native Association urges this Court to affirm the superior court's decision without getting to the merits of its statutory argument. [Ae. Br. 16] This Court should instead provide a well-reasoned statutory analysis to guide lower courts. Congress clearly did not expand sovereign immunity in § 5381(b).

CONCLUSION

The Court should reaffirm *Runyon*, reverse the trial court's misapplication of *Runyon*, and conclude that ISDEAA did not expand tribal sovereign immunity.