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in support of Defendant  
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4/23/18 (ECF No. 31)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

STEPHEN MCCOY,	Case No.: CV 17-88-M-DLC
Plaintiff,	<b>BRIEF <i>AMICUS CURIAE</i> OF THE</b>
v.	<b>AMERICAN INDIAN HIGHER</b>
SALISH KOOTENAI COLLEGE, INC.,	<b>EDUCATION CONSORTIUM IN</b>
Defendant.	<b>SUPPORT OF DEFENDANT'S</b>
	<b>MOTION TO DISMISS</b>

## **INTEREST OF *AMICUS CURIAE***

The American Indian Higher Education Consortium (AIHEC) was founded in 1973 and is the national 501(c)(3) organization for American Indian and Alaska Native Tribal Colleges and Universities (TCUs). AIHEC presently has 36 member TCUs. AIHEC provides leadership and advocacy for TCUs on federal law and policy to strengthen tribal sovereignty and improve higher education. AIHEC has a substantial interest in a correct and consistent resolution of the federal statutory interpretation issue of first impression raised in this case, which is whether a tribal college is an employer subject to suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17. AIHEC submits this *amicus* brief to provide the Court with relevant backdrop and framework information about TCUs generally that has not been presented by the parties in this action but which will assist the Court’s analysis and determination of the issue.

## **ARGUMENT**

### **I. A BRIEF HISTORY AND PRESENT OVERVIEW OF TRIBAL COLLEGES AND UNIVERSITIES (TCUS) SHOWS THE POTENTIAL IMPACT OF THE FEDERAL STATUTORY INTERPRETATION ISSUE RAISED IN THIS CASE**

In 1968, the largest federally recognized American Indian tribe, the Navajo Nation, whose Reservation extends within the States of Arizona, New Mexico, and Utah, established the first tribal college as an innovative, culturally-based way to meet the long unmet postsecondary educational needs of its people. *See About*

*Diné College*, Diné College, <http://www.dinecollege.edu/about/history.php> (last visited April 30, 2018). Soon, Congress began to fund the college. See the Navajo Community College Act of 1971, Pub. L. 92–189, 85 Stat. 646, *codified as amended at* 25 U.S.C. § 640a. Within the next ten years, “other tribes [began] to establish community colleges.” Felix S. Cohen, *Handbook of Federal Indian Law* § 22.03[2][b][i] (Nell Jessup Newton ed., 2012) (citing H.R. Rep. No. 95-1558, at 2 (1978)). Between 1978 and 2011, “the number of tribally controlled colleges [grew] from just a handful to 33.” *Id.* (citation omitted).

“[TCUs] are chartered by their respective tribal governments, including the ten tribes within the largest reservations in the United States.” *Who We Serve*, AIHEC, <http://www.aihec.org/who-we-serve/index.htm> (last visited Apr. 30, 2018). Today, 36 TCUs nationwide “operate more than 75 campuses in 16 states.” *Id.* TCUs “serve students from well more than 250 [of the 567] federally recognized Indian tribes,” and they also serve non-Indians.<sup>1</sup> *Id.* On an annual basis, TCUs collectively typically serve about 23,000 academic students directly, and an additional more than 160,000 American Indians, Alaska Natives, and other rural community residents in academic-related and community-based programs.

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<sup>1</sup> It was reported a decade ago that “[a]bout 20% of students attending tribal colleges are non-Indian, although the [TCUs] rarely receive funds to educate them.” Cohen, § 22.03[2][b][i] (citing U.S. Dep’t of Educ., President’s Board of Advisors on Tribal Colleges and Universities, *Tribal Colleges and Universities: Education as the Engine for Economic Development in Indian Country* 7 (2007)).

*Tribal Colleges & Universities: Educating, Engaging, Innovating, Sustaining*, AIHEC, [http://www.aihec.org/who-we-are/docs/AIHECbrochure\\_2016.pdf](http://www.aihec.org/who-we-are/docs/AIHECbrochure_2016.pdf) (last visited Apr. 30, 2018). “TCUs vary in enrollment (size), focus (liberal arts, sciences, workforce development/training), location, (woodlands, desert, frozen tundra, rural reservation, urban). *Who We Serve, supra*. “However, tribal identity is the core of every TCU, and they all share the mission of tribal self-determination and service to their respective communities.” *Id.*

Coincidentally, seven TCUs, including Defendant Salish Kootenai College in this action, are located in the State of Montana. *See* Hope Stockwell, *Tribal Colleges in Montana: Funding and Economic Impacts* (2016), <http://leg.mt.gov/content/Committees/Interim/2015-2016/State-Tribal-Relations/Meetings/July-2016/tribal-college-report-strc-july-2016.pdf>. In fact, Montana is the only state in which each federally recognized tribe has established a fully accredited TCU. In Academic Year 2013-2014, TCUs in Montana served 2,401 full-time students. *Id.* at 2 (footnote omitted). In 2009, TCUs “in Montana infused \$76.2 million directly into the state’s economy.” Montana Budget & Policy Center, *An Outstanding Return on Investment: Tribal Colleges and Their Contributions to Montana* 1 (2017), <http://montanabudget.org/report/tribal-colleges-and-their-contributions-to-montana> (citing Stockwell, *supra*).

## **II. THE FEDERAL STATUTORY INTERPRETATION ISSUE SHOULD BE EXAMINED IN THE CONTEXT OF THE FEDERAL – TRIBAL GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITHIN WHICH TCUS EXIST**

From its inception, the United States has had official government-to-government relations with Indian tribes. *See, e.g., Warren Trading Post Co. v. Ariz. State Tax Comm’n*, 380 U.S. 685, 687 n.4 (1965) (first United States treaty with an Indian tribe was in 1778). In addition to the Constitutional provisions in Article I, *see United States v. Lara*, 541 U.S. 193, 200-201 (2004), “for much of the Nation’s history, treaties, and legislation made pursuant to those treaties, [have] governed relations between the Federal Government and the Indian tribes.” *Id.* at 201 (citation omitted). Court decisions likewise have defined aspects of the federal-tribal relationship now for “[t]wo centuries . . .” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2040-2041 (2014) (Sotomayor, J., concurring).

The core of federal-tribal relations today is the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975. 25 U.S.C. §§ 450-450n. Formally recognized as “milestone” legislation when it was enacted, *see Statement on Signing the Indian Self-Determination and Education Assistance Act*, The American Presidency Project (Jan. 4, 1975), <http://www.presidency.ucsb.edu/ws/index.php?pid=4739>, the ISDEAA remains “one of the most important legislative acts affecting Indian country of the last four decades.” S. Rep. No. 114-060, at 2 (2015). The ISDEAA expressly incorporates

the federal-tribal relationship. “Congress [has carefully reviewed] the Federal Government’s historical and special legal relationship with, and resulting responsibilities to, American Indian people.” 25 U.S.C. § 5301(a) (Congressional statement of findings). “Congress declares its commitment to the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole . . . .” 25 U.S.C. § 5302(b) (Congressional declaration of policy). Legislative history confirms Congress’ specific reliance on the federal-tribal relationship as the ISDEAA’s foundation. H.R. Rep. No. 93-1600 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7775, at 7781 (the new federal policy of Indian self-determination is “consistent with the maintenance of the Federal trust responsibility and the unique Federal-Indian relationship.”).

While “Tribes themselves provided the genesis” of the original Tribally Controlled Community College Assistance Act (TCCCAA) of 1978, *see* Cohen, § 22.03[2][b][i], Congress made clear the TCCCAA’s direct ascension from the ISDEAA and its federal-tribal government-to-government foundation. TCUs “represent a model expression of [Indian] self-determination as enunciated in” the ISDEAA. H. Rep. No. 95-1558, at 3 (1978). The TCCCAA “channels . . . funds to tribal entities and is consistent with the current congressional thrust toward [Indian] self-determination.” *Id.* at 7. The TCCCAA “is also intended to

recognize the legal responsibility that the federal government has for the education of the American Indian, a responsibility embedded in the more than 200 Treaties which exist between the federal government and the Indian Nations.” *Id.* at 2.

The federal government has an intergovernmental relationship with the Indian tribal governments. This legislation carries out this intergovernmental relationship by having funds go only to those institutions chartered and controlled by federally recognized tribes. These are, effectively, tribal entities and are viewed as such by both the tribal governments and the institutions.

*Id.* at 7. “There should be no doubt ... that [the TCCCAA is] build around the special legal relationship that exists between the federal government and Indian Nations.” *Id.* at 8.

Successive reauthorizations of and amendments to the TCCCAA, “renamed the Tribally Controlled College or University Assistance Act (TCCUAA) in 1998,” Cohen, § 22.03[2][b][i] (citing Pub. L. No. 105-244, § 901, 112 Stat. 1828 (1998)), have reaffirmed its ISDEAA and federal-tribal government-to-government foundations. *E.g.*, S. Rep. No. 98-64, at 3 (1983) (“Tribally Controlled Community Colleges are playing a vital role in the realization of Indian Self-Determination”). Such foundations also underlie the landmark Equity in Educational Land-Grant Status Act of 1994, *see* Pub. L. No. 103-382, 108 Stat. 3518 (1994), which extended land-grant status to TCUs and authorized appropriations consistent with that designation. S. Rep. No. 103-194, at 1 (1993). The new, additional federal financial support for TCUs was expressly based on

“the historic special relationship of the United States to American Indian tribal governments.” *Id.* at 3.

The Executive Branch of the United States government recently has duly carried out the federal-tribal government-to-government relationship in the context of TCUs. Beginning in 1996, three successive Presidents issued Executive Orders regarding TCUs. Exec. Order No. 13,021, 61 Fed. Reg. 54,329 (1996); Exec. Order No. 13,270, 67 Fed. Reg. 45,288 (2002) (expressly noting the “unique relationship between the United States and Indian tribes”); Exec. Order No. 13,592, 76 Fed. Reg. 76,603 (2011) (expressly noting that the “United States has a unique political and legal relationship with the federally recognized American Indian and Alaska Native . . . tribes”). The Executive Orders in turn have led to multiple TCU initiatives in and partnerships with federal agencies that acknowledge and implement “the relationship among sovereign Indian tribes, TCUs, and the Federal Government.” National Science Foundation, *NSF’s Tribal Colleges and Universities Program: Nations United in Improving Science and Technology Education for Native Americans*, NSF 02-072 at 6, <https://www.nsf.gov/pubs/2002/nsf02072/nsf02072.pdf> (last visited Apr. 30, 2018)

In sum, issues involving the status of TCUs under general federal statutes such as the Civil Rights Act must be understood and determined in the context of the historic federal – tribal government-to-government relationship, which in turn



is based on the sound recognition in federal law of tribal sovereignty. As “separate sovereigns pre-existing the Constitution,” *Michigan*, 134 S. Ct. at 2030 (Kagan, J., delivering the opinion of the Court) (citation omitted), and expressly recognized in the Constitution, Indian tribes in this country are well-understood to be “among the family of sovereigns” – nations with their own governments and laws, capable of entering into treaties with the United States. See William Wood, *It Wasn’t An Accident: the Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587, 1611 (2013). “Indian tribes are domestic dependent nations that exercise inherent sovereign authority.” *Michigan*, 134 S. Ct. at 2030 (internal quotations and citations omitted). As Congress aptly stated four decades ago, the TCUs that sovereign tribes establish and operate to meet the specific higher education needs of the local communities that they serve are most certainly “tribal entities and are viewed as such” by TCUs, tribal governments, and the federal government. H. Rep. No. 95-1558, at 7.

## CONCLUSION

For the reasons stated above and by Defendant, Defendant's motion to dismiss should be granted.

Respectfully submitted this 30th day of April, 2018.

/s/ Melody L. McCoy

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/s/ Michael G. Black

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2), I certify that the word count calculated by Microsoft Word for Windows is 1,767 words, excluding the caption, certificates of compliance and service, which is less than the permitted 6,500 words.

Dated this 30th day of April, 2018

/s/ Melody L. McCoy

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Attorney for *Amicus Curiae* American  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of April, 2018, I electronically transmitted the foregoing document to the Clerk of the Court using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants in this case:

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