UNDER SEAL

CASE NO. 18-35868

In the United States Court of Appeals
For the Ninth Circuit

SOUTHCENTRAL FOUNDATION
Plaintiff-Appellant,

v.

ALASKA NATIVE TRIBAL HEALTH CONSORTIUM
Defendant-Appellee,

Appeal from the United States District Court
for the District of Alaska
The Honorable Timothy M. Burgess, Presiding

APPELLANT'S OPENING BRIEF

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UNDER SEAL

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff Appellant Southcentral Foundation states that it is a nonprofit corporation that has no parent corporation and no stockholders.

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I.
INTRODUCTION

Section 325 of Public Law 105-83 ("Section 325") endows Plaintiff-Appellant Southcentral Foundation ("SCF") with certain governance, participation, and accompanying informational rights in Defendant-Appellee Alaska Native Tribal Health Consortium ("ANTHC"). SCF clearly and unambiguously alleged that ANTHC abridged these rights, and sought a declaration so stating. The District Court, however, held that ANTHC's actions did not injure SCF and that SCF therefore lacked Article III standing, even though SCF is mentioned by name in Section 325. This ruling erred as a matter of law and should be reversed.

SCF is a tribal organization under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 5304. 2ER-110. It provides more than 80 healthcare programs and services to 65,000 Alaska Native and American Indian people in Anchorage, the Matanuska-Susitna Borough and 55 rural Alaskan villages pursuant to a Compact and Funding Agreement with the U.S. Department of Health and Human Services ("DHHS"). 2ER-42. ANTHC is an inter-tribal consortium created by Congress in Section 325 to enter into a Compact and Funding Agreement with DHHS pursuant to the ISDEAA to provide certain statewide health services at the Alaska Native Medical Center ("ANMC") in Anchorage. *See* Section 325; 2ER-110. SCF is one of the participants in the consortium. Section 325 permits it, along with other Indian tribes, tribal

organizations, and twelve other specifically-named regional health entities, to designate a representative on the ANTHC Board.

In Section 325, Congress "set[] out a framework for ANMC governance [through the creation of ANTHC] which draws on the expertise of our fine Alaska Native regional health corporations, and at the same time, provides for representation of all recognized Native entities in Alaska." 2ER-47. In particular, Section 325 mandates that ANTHC "shall be governed by a 15-member Board of Directors, which shall be composed of one representative" from specifically enumerated tribes and tribal organizations, including SCF. Section 325 also provides that "[e]ach member of the Board of Directors shall be entitled to cast one vote" and that "[d]ecisions of the Board of Directors shall be made by consensus whenever possible." Congress created this structure to "ensure efficient, experienced Alaska Native management and control" of ANTHC. 2ER-45. ANTHC receives significant federal funding through DHHS. 2ER-45.

SCF's complaint alleges that ANTHC violated Section 325 in two ways. *First*, ANTHC violated Section 325 when it created an "Executive Committee," composed of five of the fifteen members of its Board of Directors, and delegated the full power of the Board to the Executive Committee. 2ER-115-16. ANTHC did this so that its President and Chair of the Board, Andy Teuber, could increase his total compensation from $110,000 to over $1 million, 3ER-160; 3ER-146,

without needing full Board approval. 2ER-117. ANTHC's decision to delegate the full power of the Board violated Section 325 because it contravened Section 325's mandate that "[e]ach member of the Board of Directors shall be entitled to cast one vote." In other words, it deprived SCF of the right to provide input over the "management and control" of ANTHC. 2ER-45.

Second, ANTHC violated Section 325 by restricting the information that SCF could receive. ANTHC instituted draconian information sharing restrictions through its Code of Conduct and Disclosure Policy that severely restricted the information that could be shared with SCF's Board. 2ER-117-22. Depriving SCF of critical governance information—including information about Mr. Teuber's new extravagant employment agreement—deprives SCF of its right to exercise its governance and participation rights effectively and intelligently because, as is well-established by both common sense and authorities on corporate law, information is critical to governance.

In holding that SCF lacked Article III standing to obtain a declaration regarding its rights under Section 325, the District Court ignored the injury to SCF's governance and participation rights, and misconstrued the nature of SCF's informational rights. SCF's governance and participation rights are clearly articulated in Section 325, and SCF, as an entity *specifically named* in Section 325, is clearly the proper party to assert them. SCF's informational rights are

inextricably tied to its governance and participation rights, as information is part and parcel of effective governance. Because SCF has standing to seek a declaration that ANTHC violated these rights, the District Court's decision to dismiss SCF's lawsuit on the pleadings for lack of standing should be reversed.

II.
JURISDICTIONAL STATEMENT

The District Court had federal question jurisdiction over SCF's declaratory judgment action pursuant to 28 U.S.C. § 1331. The District Court dismissed SCF's complaint for lack of Article III standing in a sealed order on September 17, 2018. 3ER-219-41. SCF filed a timely notice of appeal on October 16, 2018. 2ER-24-26. This Court has jurisdiction under 28 U.S.C. § 1291.

III.
STATEMENT OF THE ISSUES

The District Court dismissed SCF's complaint for lack of Article III standing. The issues in this appeal are:

(1) Whether the District Court erred, as a matter of law, in holding that SCF lacked standing to seek a declaration that ANTHC violated its right to participate in the governance of ANTHC under Section 325 when ANTHC formed the Executive Committee which could wield the full power of the Board of Directors, thereby abridging SCF's rights to govern and participate in ANTHC; and

(2) Whether the District Court erred, as a matter of law, in holding that SCF lacked standing to seek a declaration that ANTHC violated its right to information necessary to exercise its governance and participation rights under Section 325 by erecting certain information barriers, including the Code of Conduct and Disclosure Policy.

IV.
STATUTE

Section 325 is reproduced in full in an addendum to this brief.

V.
STATEMENT OF THE CASE[1]

A. The Federal Government's Obligation to Provide Healthcare, and Self-Determination

The federal government is obliged to provide healthcare to Alaska Native and American Indian peoples. *See, e.g.*, 25 U.S.C. §§ 1601 *et seq.*; 25 U.S.C. § 13. Although the federal government originally administered programs and provided services directly to Alaska Native and American Indian peoples through the Indian Health Service ("IHS"), an agency within the DHHS, in the early 1970's federal policy shifted toward empowering tribes and tribal organizations to take full

[1] The facts recited herein are taken from the complaint and other declarations that the District Court had before it at the time that it made its ruling. As the District Court made its ruling on ANTHC's Rule 12(b)(1) motion to dismiss for lack of standing after the parties had briefed summary judgment, the District Court had substantially more material before it than just SCF's complaint.

responsibility for managing and operating federal programs and services that were offered for the benefit of Alaska Native and American Indian peoples. *See* 25 U.S.C. § 5301.

The ISDEAA provides Indian tribes with the authority, control, discretion, and federal funding to administer the programs, services, functions, and activities the federal government has a duty to provide, including healthcare. 25 U.S.C. § 5321. In order to accomplish the purposes of the ISDEAA, and in the interest of tribal self-determination and self-governance, the ISDEAA allows tribes to form a "tribal organization" that is "controlled, sanctioned, or chartered" by a tribal governing body for the purpose of administering the health services and programs provided to tribes by the IHS, in a manner that best fits their local regions and communities. 25 U.S.C. §§ 5304(l) & 5321(a). Indian tribes and tribal organizations may also form an "inter-tribal consortium," which is defined in the ISDEAA as "a coalition of two [sic] more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations." 25 U.S.C. § 5381.

B. Section 325 and the Creation of ANTHC

The IHS began constructing the new ANMC building in Anchorage in the mid-1990's to serve Alaska Native peoples statewide. 2ER-43. The IHS planned to transfer management of the ANMC to Alaska tribal entities, however over 200

separate Alaska tribes and tribal organizations could not agree on a plan for its management structure, despite two years of negotiations. 2ER-112-13. Congress passed Section 325 in order to break the deadlock that had prevented agreement on a governance structure. 2ER-112-113; 2ER-45.

Congress' solution was to create a new consortium, ANTHC, that would be composed of, be run by, and draw on the expertise of the existing tribal entities that had provided healthcare to Alaska Native peoples for many years. 2ER-45. Congress made clear that Section 325 was intended to address the governance of this new consortium of tribal entities, due to their common interest in ensuring that scarce financial resources are fairly and sufficiently allocated to ANMC services, and that such ANMC services are equitably delivered statewide. In Section 325, Congress provided that the "Consortium *shall be governed* by a 15-member Board of Directors, which shall be composed of one representative" of each regional health entity specifically named in Section 325(a), and two additional representatives of various tribes and tribal organizations that either operate health programs that are not affiliated with a regional health entity or do not receive health services from any tribal, regional, or sub-regional health provider (the "Unaffiliated Tribes"). Section 325(b) (emphasis added). SCF is one of the regional health entities listed in Section 325(a) that formed ANTHC and is entitled to "participat[e] in the Consortium." Section 325 also provides that "*[e]ach*

member of the Board of Directors *shall be entitled to cast one vote*. Decisions of the Board of Directors *shall be made by consensus whenever possible*, and by majority vote in the event that no consensus can be reached." *Id.* (emphasis added).

The only legislative history concerning Section 325 is a Senate Committee Report and a letter from Alaska Senator Ted Stevens, the author of the legislation. The Senate Report reinforces the notion that Section 325 created governance rights for the tribal entities represented on the ANTHC Board of Directors, explaining that Section 325 addresses "the issue of governance of the new Alaska Native Medical Center *to ensure efficient, experienced Alaska Native management and control*" over ANMC. S. Rep. No. 105-56, July 22, 1997 ("Senate Report") (emphasis added) (reproduced in 2ER45-46). The Senate Report explains that it intended the new consortium to "*draw on the existing expertise of the Alaska Native regional health entities* now managing extensive regional health networks in Alaska." 2ER-45 (emphasis added). It states that the issue of governance of ANMC is important so that "the scarce funds available to meet the health needs of Alaska [will] be professionally and prudently managed to provide [the] maximum amount of high quality health services to Alaska Natives." 2ER-45. It was critical for Congress to address ANTHC's governance structure because, as the Report expressly acknowledges, "consensus around a particular governing structure" had

been "exceptionally difficult to achieve" given "the existence of over 200 recognized tribes, regional entities, and various other concerned organizations" that had not been able to agree on a governance structure "in over 2 years of negotiations." 2ER-45.

The Senate Report's explanation of the purpose of Section 325 is confirmed by a near-contemporaneous letter that the author of Section 325, Senator Stevens, sent to Sophia Chase, then-Chairperson of SCF, on September 10, 1997. 2ER-47-48 ("Stevens Letter"). In the letter, Senator Stevens explains, "I developed Section 325 . . . to ensure efficient, *experienced* Alaska Native *management and control* when responsibility for [ANMC's] operation is transferred from the [IHS] to Alaska Native management." 2ER-47. (emphasis added). He confirmed that Section 325 "sets out a framework for ANMC governance which draws on the *expertise* of our fine Alaska Native regional health corporations, and at the same time, provides for *representation* of all recognized Native entities in Alaska." 2ER-47 (emphasis added). The goal of Section 325, as was no secret, was to "ensure that scarce federal funds will be effectively and efficiently spent on providing high quality health care to Native Alaskans." 2ER-48.

These governance provisions, guaranteeing transparency to ANTHC's constituent organizations and equal access to ANTHC decision-making, were critical because Section 325 changed the structure of the tribal health system in

Alaska, providing ANTHC with the exclusive authority to provide certain statewide ANMC health services. In Section 325(c), Congress stated that the services that ANTHC was to provide shall "*only* be provided by the Consortium." (emphasis added). Congress intended to encourage the efficient management of ANMC by keeping the "statewide services of [ANMC] . . . intact in Anchorage." 2ER-45. At the same time, Congress recognized the importance of adequate safeguards to ensure that ANMC would be run professionally, transparently, and equitably. For this reason, Congress addressed the new consortium's governance structure directly: by appointing tribal entities to oversee the management of ANTHC, Congress ensured that each tribal entity would have a say in the governance of the Consortium.

C. ANTHC Creates the Executive Committee

Section 325 was enacted in 1997 and ANTHC began operation in 1999. The Board of Directors functioned well for many years. 2ER-44. This all changed in November 2014, when Andy Teuber, the President and Board Chair of ANTHC, sent a cryptic email to his fellow Directors on the ANTHC Board, stating that ANTHC would consider certain amendments to the ANTHC Bylaws at the Board of Directors' meeting set for December 2-3, 2014. 2ER-115. This announcement came shortly after ANTHC finalized a settlement with the IHS, where the IHS provided ANTHC a one-time payment of $153 million as a result of past failures to

pay certain contractual obligations. 2ER-31. Mr. Teuber did not attach or provide the text of the proposed Bylaw amendments. 2ER-115.

At the December 2-3 meeting, Mr. Teuber unveiled that his proposed amendments would create a five-person Executive Committee. 2ER-115. As proposed, this Executive Committee would wield the full power of the Board; could meet at any time and for any reason, not just in emergencies; and did not even need to provide notice to other Board members of the fact that it was meeting or of its decisions. 2ER-115-16. The authority delegated to the Executive Committee was very broad, and included serving as a *de facto* compensation committee. 2ER-115-16. In essence, the Bylaw amendments effectively delegated to a five-person committee the decision-making authority of the 15-member ANTHC Board that under Section 325 is supposed to make all Board-level decisions. This was a marked break from past practice, given that Section 325 requires that ANTHC "shall be" governed by the full Board, which "shall" make decisions by consensus when possible.

Also at the December 2-3, 2014 Board meeting, Mr. Teuber proposed evaluating the compensation paid to ANTHC Directors, including evaluating whether Directors should receive compensation *retroactively*, even though the ANTHC Articles of Incorporation from ANTHC's founding in 1999 until they were amended in 2011 did not permit Directors to receive compensation. 2ER-

116-17. The implicit message to ANTHC Directors was that if they adopted the Bylaw amendments that Mr. Teuber proposed, they would later be rewarded financially. 2ER-116-17. Unsurprisingly, Mr. Teuber's proposed amendments passed. 2ER-117.

Mr. Teuber's motives for changing ANTHC's governance structure soon became clear. On December 15, 2014, he convened the Executive Committee without notice to the ANTHC Board for the sole purpose of voting on new, incredibly lucrative compensation packages for him and ANTHC's CEO. 2ER-117. Mr. Teuber's new contract increased his base salary from $110,000 to $730,000, and added benefits that brought its total value to over $1,000,000. 3ER-160; 3ER-146.

SCF's designated Director was not informed that the Executive Committee had even met until Mr. Teuber summarized the results of the meeting in an email dated February 15, 2015—two months later. 3ER-166; 3ER-173-76. Although Mr. Teuber's email to the Board referenced the fact of his new contract, he did not disclose its terms. 3ER-173-76. And because the version of the Bylaws that Mr. Teuber had pushed through at the December 2-3, 2014 meeting did not require the full ANTHC Board to ratify Executive Committee action before it became effective, Mr. Teuber's new contract was a done deal: the Executive Committee

had bound ANTHC to the agreement without input from the Board, and there was nothing the Board could do about it.

SCF repeatedly expressed to ANTHC its position that the Executive Committee was illegal from the time it was proposed through January 2017, when SCF brought this lawsuit. 2ER-118-19. SCF repeatedly asked ANTHC to provide it with a legal opinion explaining how the Executive Committee was legal under Section 325. 2ER-119. SCF was never shown any such legal opinion. 2ER-119.

Over the ensuing years, the Executive Committee met on a handful of occasions, each time without notice, and each time to discuss executive compensation. 3ER-168. In September 2016, the ANTHC Board amended the Bylaws to require advanced notice of Executive Committee meetings, limit Executive Committee authority to urgent matters that arose between meetings, and make Executive Committee actions "subject to ratification or rescission by the Board of Directors" (but would not require Board ratification). 2ER-121-22.[2] While encouraging, these changes still permitted the Executive Committee to bind ANTHC without input from the full Board (for example, by agreeing to a contract with a third party), and there is no guarantee that ANTHC will not undo these changes after this lawsuit concludes.

[2] The ANTHC Bylaws were amended again, *after* this litigation began, to require ratification of Executive Committee actions. 2ER-65-66.

D. ANTHC Erects Informational Barriers

ANTHC cemented its ability to exclude SCF and other tribal entities from participating in the governance of the Consortium by erecting barriers to the information that the entities' designated Directors on the ANTHC Board could share with them. These restrictions treated SCF and the other tribal entities as ANTHC's competitors, rather than as collaborators in and with the Consortium as envisioned by Section 325.

ANTHC sought to restrict the information that the tribal entities could see (and, in some cases, the information that ANTHC Directors could see) through three principal documents. All three documents employ common tactics: grant total discretion to Mr. Teuber and ANTHC leadership to determine what is confidential; prohibit the sharing of confidential information with the tribal organizations that participate in ANTHC; and ignore Congress' mandate that ANTHC is supposed to be governed cooperatively by the tribal entities.

1. The January 2016 "Gag Order"

In early January 2016, SCF's alternate designated Director learned (accidentally) about a meeting of the Executive Committee. 3ER-168-69. Concerned about this secret Executive Committee meeting, she decided to attend. 3ER-168-69. At the meeting, the Executive Committee was presented with ANTHC's long-promised opinion purporting to explain the legality of the

Executive Committee. 3ER-168-69. SCF's alternate Director, however, was not permitted to view this legal opinion unless she signed an onerous confidentiality agreement. 3ER-168-69; 2ER-119. This agreement would have restricted distribution only to Directors of any information that ANTHC "considered to be sensitive, confidential, or proprietary, including information related to discussion held in executive session," and would have explicitly prevented Directors from sharing such information with their Congressionally-appointed designating entities. 3ER-168-69; 3ER-177-180. It also would have prohibited Directors from disclosing such information to their own personal attorneys. 3ER-168-69; 3ER-177-180. Breaches of the agreement were grounds for termination as a Director and subjected the breaching party to liquidated damages of up to $10,000 per breach. 3ER-177-180. In other words, ANTHC denied its own Directors access to information that they had an absolute right to see and information that was critical to running the organization. Because Directors could not see this information, they could not share it with their designating organizations.

SCF's primary and alternate designated Directors refused to sign the agreement, which they characterized as an "oppressive gag order" in an email to ANTHC. 3ER-181. SCF maintained that its designated Directors had an absolute right to such information, and that provision of such information was critical to them being able to execute the fiduciary duties they owed to ANTHC. 3ER-181.

And in order to fulfill those duties, and consistent with the design envisioned by Section 325, the designated Directors needed to consult with the tribal entities that appointed them.

2. The ANTHC Code of Conduct

ANTHC's Code of Conduct sets certain ethical rules for ANTHC Directors. Prompted by ANTHC's insistence that SCF's designated Directors sign the "gag order," SCF proposed amending ANTHC's Code of Conduct to clarify that designated Directors have the right and obligation to share confidential information and documents and confer with the boards of their appointing entities in order to obtain direction and input from those entities—as envisioned by Congress in Section 325—without fear that ANTHC would see such sharing as a breach of duty to ANTHC. 2ER-120-21. Information sharing would be subject to the board of the designating entity keeping the information confidential, and carried other common sense restrictions to ensure that disclosure did not harm ANTHC and that designating entities could not use information for their own benefit at the expense of ANTHC. 3ER-199. SCF's proposed changes sought to acknowledge that the tribal entities are supposed to play a critical role in the governance of the

Consortium pursuant to Section 325, and that they cannot play that role without access to information. 3ER-204-05.[3]

Despite extensive negotiations, ANTHC's leadership disagreed. In its view, the ANTHC Board is composed of fifteen individuals who must figure out how to govern ANTHC on their own, without input from the organizations that they represent. 3ER-170-71. ANTHC refused to entertain SCF's proposed revisions to the Code of Conduct, and actually proposed its own revisions that the Board adopted at the June 2016 Board meeting. 3ER-170-71; 3ER-209-18. While these changes clarified that Directors could share Board resolutions, final meeting minutes, and Board packet materials with their designating entities, they stopped far short of permitting full disclosure of all ANTHC Board material. 3ER-170-71. Any "confidential or sensitive" information (as designated by ANTHC) required designated Directors to receive permission from Mr. Teuber (or the Chair of the ANTHC Ethics and Compliance Committee) before sharing. 3ER-170-71. And the amendments made no progress toward recognizing that the Congressionally-designated tribal entities were supposed to have a major role in governing the

[3] SCF did not propose materially changing or eliminating the section of the Code of Conduct dealing with actual conflicts of interest that would require recusal. 3ER-200-03. SCF agrees with and acknowledges that it will follow the conflict of interest provisions in ANTHC's Bylaws and Code of Conduct if there is a *bona fide* conflict of interest. 2ER-76. In other words, SCF's proposed revisions would apply only in situations where there was no conflict of interest.

Consortium under Section 325. 3ER-170-71. A version of these ANTHC-driven changes was passed by the ANTHC Board in September 2016. 3ER-170-71.

3. The Disclosure Policy

ANTHC also introduced a new "Disclosure of Records and Information Policy" that Mr. Teuber had the ANTHC Board vote on and approve at the September 2016 ANTHC Board meeting. 2ER-121. The policy further restricted the information that ANTHC could share with both the tribal entities that designated Directors to the ANTHC Board, as well as with the Directors themselves, by drastically limiting ANTHC Directors' access to what ANTHC considered to be "confidential, proprietary, and other sensitive information." 2ER-121. The policy stated that Directors may "make reasonable inquiries" to fulfill their fiduciary duties. 3ER-171. But the definition of "[r]easonable inquiry" under the policy required a Director to convince ANTHC that he/she had "a specific, stated, legitimate purpose" for seeking the information. 3ER-171. The policy stated that "[o]rdinarily, requests are unreasonable to the extent they are unduly burdensome; likely to disrupt operations; . . . or otherwise inconsistent with the scope of a Director's responsibilities." 3ER-171. The policy further provided that "Confidential, proprietary and other sensitive information" could be shared with ANTHC Directors (or other organizations) "in appropriate cases" and only if "adequate safeguards are in place" to ensure confidentiality. 3ER-171.

In short, the Disclosure Policy gave unidentified ANTHC personnel absolute discretion to determine what information would be shared and with whom, including Directors, with a rebuttable presumption against disclosure. The Disclosure Policy, thus, not only ran counter to Section 325, but also appeared to violate the Directors' rights to information under Alaska law.

E. The Proceedings Below

SCF brought this lawsuit in January 2017, seeking a declaration that ANTHC's actions in forming the Executive Committee and erecting informational barriers violated Section 325. 2ER-109-26. ANTHC brought essentially mirror-image counterclaims, seeking a declaration that its disputed corporate governance practices complied with state and federal law. 2ER-77-108. The parties agreed to informal discovery and information exchanges, and then brought dispositive motions in August 2017. SCF and ANTHC both moved for summary judgment on their declaratory relief claims. ANTHC also moved to dismiss SCF's complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of standing (and on mootness grounds).

The District Court heard oral argument on the various motions in February 2018 and issued its ruling in September 2018. 3ER-219-41. The only substantive discussion of any of the three dispositive motions in its ruling concerned ANTHC's motion to dismiss for lack of standing. The District Court ruled that

SCF lacked standing to assert any injury premised on being denied information because, in its view, Section 325 does not provide any freestanding right to information. The District Court did not address SCF's need for information in order for it to be able to exercise its governance and participation rights effectively. 3ER-239-40.

The District Court was aware that SCF had a claim that the Executive Committee violated Section 325. 3ER-240, n. 93. Nevertheless, it did not directly address SCF's claim premised on the creation of the Executive Committee. It acknowledged that "Section 325's history indicates that Congress intended the statute to create a governance framework for [ANMC] that drew upon the expertise of Alaska Native regional health entities," and noted that "SCF may have statutory rights stemming from section 325's provisions on regional health entities 'participating' in the Consortium and/or regional health entities' rights to appoint 'representatives' to 'govern' the Consortium as members of the Board of Directors." 3ER-239. However, it did not opine on whether the creation of the Executive Committee deprived SCF of its ability to exercise its governance and participation rights and constituted an injury-in-fact.[4]

SCF filed a timely notice of appeal on October 16, 2018. 2ER-24-26.

[4] Because the District Court dismissed SCF's complaint on standing grounds, its decision explicitly did "not address whether ANTHC's particular conduct is illegal." 3ER-241 (quotation marks omitted).

VI.
SUMMARY OF ARGUMENT

(1) The "legal wellspring" of the rights that SCF asserts in this action is Section 325. *Clark v. City of Seattle*, 899 F.3d 802, 810 (9th Cir. 2018). The plain language, purpose, and legislative history of Section 325 all indicate that Congress granted the tribal entities that formed and participate in ANTHC, including SCF, governance and management rights in ANTHC. ANTHC violated these rights by delegating the power of the full fifteen-person Board of Directors to a five-person Executive Committee. The District Court erred by failing to recognize this injury as sufficient to confer standing.

(2) In order for SCF and other tribal entities to exercise their governance and participation rights effectively, they must be able to view all of the information necessary to ANTHC's governance. ANTHC's informational barriers deprived SCF and the other tribal entities of access to critical governance information, which in turn made it impossible for them to exercise their governance and participation rights in an informed and meaningful way. The District Court erred by holding that SCF suffered no injury-in-fact on account of being denied access to ANTHC governance information.

(3) There is sufficient adversity between SCF and ANTHC for SCF to have standing, as evidenced by the near mirror-image counterclaims that ANTHC filed.

VII.
STANDARD OF REVIEW

The Court exercises *de novo* review over decisions granting motions to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of standing. *Hawkins v. Kroger Co.*, 906 F.3d 763, 768 (9th Cir. 2018). Allegations in the complaint must be construed in favor of the plaintiff (here, SCF). *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 979 (9th Cir. 2013). The Court may also rely on affidavits or other evidence properly before the Court in ruling on a motion to dismiss under Rule 12(b)(1). *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007).

VIII.
ARGUMENT

The standing doctrine "ensures both that the legal issues presented to the court are sharpened by the presence of concrete adversity and that judicial review is sought by those who have a direct stake in the outcome." *Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1233 (9th Cir. 2017). "To establish standing, a plaintiff must show that (1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015) (quotation marks omitted). The

burden is on the plaintiff to establish standing. *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008).

The only element of Article III standing that the District Court addressed was whether SCF had suffered an injury-in-fact. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Id.* (quotation marks omitted). "A 'concrete' injury must be '*de facto*'; that is, it must actually exist," and be "real" and "not 'abstract'" *Id.* (quoting Black's Law Dictionary).

The Supreme Court has stressed that in determining whether harm to an intangible interest (such as the harm to SCF's right to participate in ANTHC's governance, as alleged here) constitutes an injury-in-fact, "both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549. As explained below, both history and Congressional intent, as manifested in Section 325, indicate that depriving a tribal entity of its participation, governance, and accompanying informational rights is an injury that can serve as the basis for federal court jurisdiction.

SCF's complaint alleges two injuries: *first*, that SCF was injured when ANTHC created the five-person Executive Committee and delegated the full power of the fifteen-person Board to it; and *second*, that SCF was injured by the informational barriers that ANTHC erected, which deprived SCF of its ability to exercise its governance and participation rights intelligently and effectively. As explained below, both injuries are sufficient for Article III standing.

A. The Creation of the Executive Committee Was an Injury-in-Fact Sufficient for Article III Standing

1. Section 325 Creates Governance and Participation Rights for SCF

The text, legislative history, and purpose of Section 325 make clear that it creates participation and governance rights for SCF.

"The starting point for our interpretation of a statute is always its language." *United States v. Gallegos*, 613 F.3d 1211, 1214 (9th Cir. 2010). Section 325 reads like a miniature constitution for ANTHC. It is only a few hundred words long, but enshrines important rights for the tribal entities that participate in the Consortium, including SCF. In particular, it guarantees (a) the rights of the regional health entities that formed the Consortium to "participat[e] in the Consortium" (so long as the regional health entity operates a regional health program under the ISDEAA) and (b) the rights of the tribal entities specified in Section 325 to be represented on the ANTHC Board of Directors. "The Consortium shall be governed by a 15-

member Board of Directors, which shall be composed of one *representative of* each regional health entity listed in subsection (a) above," including SCF, and two Directors representing tribes and tribal organizations that are not affiliated with any existing regional health entity. Section 325(b) (emphasis added).

The term "representative of" is important. A "representative" is "[s]omeone who stands for or acts on behalf of another." Black's Law Dictionary. The ANTHC Board members that SCF designates, therefore, "act on behalf" of SCF at ANTHC Board meetings. Congress could have used other language if it had wanted to indicate that the Board members were merely "appointed by" or "designated by" the regional health entities. But Congress went further, indicating not only that the tribal entities each had the right to designate a Director, but also that those Directors would *represent* the tribal entities on the Board. This terminology indicates that the *tribal entities* would be entitled to provide input to the ANTHC Board through their designated Directors.

This choice of language makes sense given the context in which Congress was acting. Both relevant pieces of legislative history—the Senate Report and the Stevens Letter—are fully consistent with the notion that Congress wanted the tribal entities not only to work with the new Consortium, but to participate in its management and governance as well, in order to provide their expertise in running the new hospital. In other words, Congress envisioned that the tribal entities

themselves, not just the individuals they happened to designate to serve on the ANTHC Board, would exercise governance rights over ANTHC.

The Senate Report[5] emphasizes that a goal of Section 325 was to "ensure efficient, experienced Alaska Native management and control" of ANMC when responsibility was transferred from the IHS. 2ER-45. This phrase is consistent with the notion that Congress wanted the *regional health entities* themselves to exercise such "management and control," given their extensive experience in providing healthcare in Alaska. Providing governance rights only to the individuals that the regional health entities designate to serve on ANTHC's Board would not "ensure" that the "management and control" of ANMC would be "experienced," as Congress did not insert any qualification requirements governing the Director that each regional health entity could designate to serve on the ANTHC Board. But endowing the regional health entities with the right to participate in the management and control of the new Consortium *would* ensure that appropriate experience is brought to bear on the new entity. Congress was creating a new organization with an important mandate and a very large budget. And it was not drawing on a blank slate: the tribal entities had been working in Alaska for many years providing healthcare to Alaska Native peoples. It is entirely

[5] Courts routinely look to these reports as relevant legislative history. *See, e.g.*, *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1142 (9th Cir. 2006) (looking to a Senate report to confirm legislative intent for 18 U.S.C. § 16(a)).

unremarkable that Congress would have wanted "experienced Alaska Native management and control" of ANMC, given that it would have "an annual operating budget approaching $100,000,000," which, at the time, was the "largest self-governance contract yet." 2ER-45.

Congress also explained that "[i]n an era of limited funding for the Indian Health Service, the Committee considers it imperative that scarce funds available to meet the health needs of Alaska Natives be *professionally and prudently managed* to provide the maximum amount of high quality health services to Alaska Natives." 2ER-45. (emphasis added). Again, because Congress did not set any minimum qualification requirements as to whom the tribal entities could designate to serve on the ANTHC Board, the only way to carry out Congress' intent would be for the tribal entities themselves to be able to offer their deep experience and expertise.

In fact, Congress ultimately spelled out that the governance rights that it was creating would run in favor of the tribal entities, not merely the people they nominated to ANTHC's Board. Congress stated that "the Committee intends in this section [Section 325] to lay out a framework for Alaska Native governance of [ANMC]" to "*draw on the existing expertise of the Alaska Native regional health entities* now managing extensive regional health networks in Alaska." 2ER-45 (emphasis added). Section 325, therefore, "calls for formation of a new

consortium made up of *representatives of* each of Alaska's regional Native health entities . . . and governed by a board of directors." 2ER-45. In other words, Congress specifically devised the structure it did *in order to* provide the tribal entities with management and control rights.

The Stevens Letter is entirely consistent with the Senate Report.[6] It emphasizes that the purpose of Section 325 was to "ensure efficient, *experienced* Alaska Native *management and control*" of ANMC and to "draw[] on the *expertise* of our fine Alaska Native regional health corporations, and at the same time, provide[] for *representation* of all recognized Native entities in Alaska." (emphasis added). It thus fully confirms the core aims of Section 325's plain language: to permit tribal entities, representing their constituent members, to participate in the management and control of ANTHC, and to lend their expertise and experience in doing so.

Congress could have set the management structure for ANMC in many different ways. It could have left ANMC with the IHS. It could have given

[6] While "ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history," this kind of legislative history can be "considered in light of other legislative history" and the statute's plain language. *Yang v. Cal. Dep't of Soc. Servs.*, 183 F.3d 953, 960 (9th Cir. 1999); *accord Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (instructing courts to consider comments by one legislator within the context of the remaining legislative history, but not disregarding it outright). When remarks by individual legislators "do not conflict with the plain meaning . . . but rather support it, they [can] add to the certainty" of this Court's interpretation. *Yang*, 183 F.3d at 960.

control of ANMC to a single regional health entity or other existing tribal organization. It could have explicitly excluded the regional health entities, had Congress viewed them as competitors with the new consortium. Instead, it selected a structure—an inter-tribal consortium—that would draw on the expertise of the experienced stakeholders already providing healthcare in Alaska. Congress did not have to draw on a blank slate, so it did not. It settled on a unique structure that allowed existing tribal entities to collaborate and provide expertise to run the new hospital.[7]

That the object of that collaboration was a *statewide hospital* is important too. The inpatient and specialty healthcare services ANTHC provides at ANMC are delivered to Alaska Natives and American Indians who reside throughout the State of Alaska. In other words, the ANMC services provided by ANTHC are healthcare services that all of the stakeholders in ANTHC would use. Through the

[7] Indeed, Congress exhibited its ability to promulgate varied governance structures later in the Report. In the course of explaining how SCF was to provide primary care services at ANMC, the Report states that Congress expects SCF "to form an advisory committee representative of persons eligible to receive primary care services" who reside outside of SCF's service region so that those people can provide input to SCF about the services SCF delivers. 2ER-45. The "advisory committee," however, is just that: advisory—it has no say in how SCF is managed or governed. Congress could have mandated a similar structure for ANTHC: formed an advisory committee composed of representatives from existing regional health organizations. But Congress did something else, something much stronger: it endowed the regional health entities with governance and participation rights in the new consortium.

inclusive governance structure set by Section 325, the tribal entities represented on the ANTHC Board are able to help ensure that (1) the ANMC services provided by ANTHC are equitably delivered statewide, (2) the ANTHC Board adequately addresses all the different local and regional health issues, interests, concerns, and obstacles faced by the tribal entities represented on the ANTHC Board, (3) the ANTHC Board sufficiently allocates scarce financial resources to ANMC services, (4) ANTHC's financial status and business activities are transparent, and (5) ANTHC executives and management are accountable. Moreover, Section 325(c) explains that certain statewide ANMC health services can be provided *only* by the Consortium. By granting tribal entities participation and governance rights in the Consortium, Congress provided a voice for the Alaska Native people who directly benefit from the healthcare services provided by ANTHC.

In sum, the plain language of Section 325 and its purpose and legislative history make clear that Congress envisioned that the tribal entities represented on the ANTHC Board have governance and participation rights in ANTHC.

2. ANTHC Deprived SCF of Its Governance and Participation Rights When It Created the Executive Committee, Thereby Injuring SCF

ANTHC deprived SCF of its governance and participation rights in ANTHC when it delegated the full power of the fifteen-person Board to a five-person Executive Committee. This took away the rights of the tribal entities represented

by the ten Directors who were not on the Executive Committee to learn about and provide input into the decisions that the Executive Committee made. It violated the literal text of Section 325, which guarantees the right of each Director to "cast one vote." This harm was concrete and particularized, and constitutes an injury-in-fact sufficient for Article III standing. The District Court appeared to recognize that SCF had suffered this harm, yet failed to recognize that suffering this harm was sufficient for Article III standing, which it is.

(a) The Injury Was Concrete and Particularized

A party has been injured for purposes of Article III standing when that party has suffered a harm that is "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). All of those requirements are met here.

A "concrete injury must be *de facto*; that is, it must actually exist," *Spokeo*, 136 S. Ct. at 1548, although "it need not be tangible," *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1173 (9th Cir. 2018). It must be "direct, real, and palpable." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292 (D.C. Cir. 2007) (collecting Supreme Court authority); *accord Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 971 (9th Cir. 2018) (injury must be "real and not merely abstract"). ANTHC's creation of the Executive Committee (and its decision to have the Executive Committee meet in secret to approve Mr.

Teuber's new lucrative employment agreement) was actual and palpable. It was a real action that deprived SCF of its concrete interest in exercising its governance and participation rights in ANTHC and ANTHC's executive compensation process. This deprivation actually occurred: it is not something hypothetical or inchoate.[8]

This concrete and actual injury affected SCF, and the other tribal entities that were deprived of input on matters considered by the Executive Committee, in a particularized way, unique to the entities that are represented on the ANTHC Board. "Particularized injuries 'affect the plaintiff in a personal and individual way.'" *Fleming v. Charles Schwab Corp.*, 878 F.3d 1146, 1151 (9th Cir. 2017) (quoting *Spokeo*, 136 S. Ct. at 1548); *see also Pub. Citizen, Inc.*, 489 F.3d at 1292 (particularized means "personal, individual, distinct, and differentiated—not generalized or undifferentiated"). The injury here was personal to SCF and the other regional health entities whose designated Directors were shut out of matters considered by the Executive Committee. SCF is listed in Section 325 *by name* as a regional health entity entitled to be represented on ANTHC's Board. Bypassing

[8] For the same reason, there is no question that this injury was "actual." SCF is not complaining about an injury that might happen in the future. ANTHC actually *did* create the illegal Executive Committee. This deprived SCF of its ability to exercise its governance and participation rights through its designated Director. There is nothing about this that is "too speculative for Article III purposes." *Clapper*, 568 U.S. at 409 (quotation marks omitted).

SCF's designated Director and depriving SCF of the ability to provide input on ANTHC's governance was an injury that ran directly to SCF, not "undifferentiated and 'common to all members of the public.'" *United States v. Richardson*, 418 U.S. 166, 177 (1974) (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937)). Indeed, infringing on the rights of a party that is specifically named in the federal law at issue seems much more particularized than the vast majority of cases or controversies that come before federal courts.

ANTHC's creation of the Executive Committee also violated Section 325 in that it abridged the right of each Director representing the regional health entities to "cast one vote." Such a right might be characterized as a procedural right, but "where Congress confers a procedural right in order to protect a concrete interest, a violation of the procedure may demonstrate a sufficient 'risk of real harm' to the underlying interest to establish concrete injury." *Strubel v. Comenity Bank*, 842 F.3d 181, 189 (2d Cir. 2016); *accord Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1116 (9th Cir. 2017). Congress endowed each Director with a right to "cast one vote," because Congress intended that the Directors on ANTHC's Board would represent their designating entities. In other words, by guaranteeing each Director the right to cast a vote, Congress ensured that no regional health entity would be shut out of ANTHC's governance, and that important decisions about ANTHC would be made by the *entire* Board. Indeed, Congress envisioned that the 15-person Board would

strive to reach consensus, if possible. In enacting this structure, Congress was protecting the regional health entities' substantive right to govern ANTHC. ANTHC abridged that right as to SCF when it cut out SCF's representative from the Board decision-making process entirely.

(b) The District Court Erred in Failing to Hold that ANTHC Injured SCF When It Created the Executive Committee

The District Court acknowledged that SCF brought a claim based on violation of its governance rights. It stated that "SCF challenges the Executive Committee as a violation of section 325's requirements for governance by a Board of Directors." 3ER-240, n.93. Elsewhere, it stated that Congress intended Section 325 "to create a governance framework for [ANMC]," that "the statute clearly envisioned a role for the regional health entities" in ANTHC, and that "SCF may have statutory rights stemming from section 325's provisions on regional health entities 'participating' in the Consortium and/or regional health entities' rights to appoint 'representatives' to 'govern' the Consortium as members of the Board." 3ER-239. The District Court even acknowledged that Section 325's guarantee that ANTHC is to be governed by a fifteen-person Board could be read to "entail[] a right of representation for the regional health entities." 3ER-240.

Nevertheless, the District Court concluded that SCF did not "frame its asserted injury" as an injury to its governance and participation rights. 3ER-240.

This conclusion was in error. SCF's complaint is replete with allegations that ANTHC violated Section 325 and injured SCF when it delegated the full power of the Board of Directors to a five-person Executive Committee. *See* 2ER-115-117; 2ER-122-23. SCF alleged that Section 325 "requires ANTHC's tribal entity participants [including SCF] to govern ANTHC collectively and directly" to ensure "that ANTHC fairly and sufficiently allocates scarce financial resources to ANMC services, and that such ANMC services are equitably delivered statewide." 2ER-123. Therefore, "the five-member Executive Committee" that ANTHC created "violates federal law." 2ER-123; *see also* 2ER-125 (in prayer for relief, requesting an "order declaring the ANTHC Executive Committee as currently constituted to be contrary to federal law"). The District Court failed to "look to [plaintiff's] complaint to determine whether [it] had standing." *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838–39 (9th Cir. 2007).

SCF advanced this theory of harm in multiple places in its briefing on ANTHC's motion to dismiss for lack of standing and in the summary judgment briefing. *See* 2ER-38 ("SCF filed a complaint seeking a declaration that (1) the delegation of almost the full power of the Board to the five-person Executive Committee . . . [was] contrary to Section 325 and illegal"); 2ER-74 (arguing that Section 325's guarantee that "ANTHC 'shall be governed' by a 15-person Board; that each Board member is entitled to one vote on all issues that the Board

considers; and that decisions should be made by consensus whenever possible" is "antithetical to concentrating power in an Executive Committee of less than a majority of Board members"); 2ER-75 ("Granting the full powers of the Board to the Executive Committee . . . violated the plain language of Section 325."); 2ER-76 ("Section 325 makes clear that ANTHC is to be run by Congressionally-appointed tribal *entities*," and the Director that SCF appoints "is a representative of the appointing entity."); 2ER-34 (Section 325 "mandates certain basic protections for SCF and the other Regional Health Entities, including the ability to vote on matters that come before the Board"); 2ER-35 ("ANTHC violated Section 325 by delegating nearly the full range of Board power to the Executive Committee…"); 2ER-36 ("Treating SCF as an unconnected 'third party'—some sort of officious intermeddler—is inconsistent with Congress specifically identifying SCF in Section 325 and specifically explaining that it wanted SCF to lend its expertise to bear in ANTHC's governance.").[9]

[9] At one point, the District Court noted that "informational injury would not necessarily establish standing for SCF's claims concerning the Executive Committee." 3ER-240, n. 93. However, SCF was not arguing that its *only* injury was to its right to information. As was clear in SCF's complaint, informational injury was only one of its two theories of how ANTHC violated Section 325. The other theory was premised on a much more obvious and direct violation of its right to participate in ANTHC's governance, and how that right was abridged when ANTHC created the Executive Committee. The law is clear that courts must "look to [plaintiff's] complaint to determine whether [it] had standing." *Skaff* , 506 F.3d at 838–39. Because ANTHC's motion to dismiss primarily challenged SCF's standing for its claim based on deprivation of access to information (which is

Yet, ultimately, the District Court did not find that ANTHC's deprivation of SCF's governance and participation rights constituted an injury-in-fact. This was error. Section 325 "clearly envisioned a role for the regional health entities," 3ER-239, and Congress made crystal clear that that role was "management and control" of ANTHC, 2ER-47. ANTHC took away SCF's right to participate in its management and control when it created the Executive Committee and shut SCF out of ANTHC's governance entirely. This injury was concrete and particularized and SCF has standing to pursue a declaration that ANTHC's actions violated Section 325. This Court should reverse the District Court's conclusion that SCF did not plead any injury based on SCF's governance and participation rights.

B. ANTHC Injured SCF By Erecting Information Barriers, Which Deprived SCF of Its Ability to Exercise Its Governance and Participation Rights Effectively

Creating the Executive Committee and bypassing SCF and other tribal entities was not the only way ANTHC injured SCF. ANTHC also injured SCF when it restricted the information that it shared with SCF and its designated Directors. The District Court dismissed SCF's entire complaint because of its view that Section 325 did not endow SCF with any "freestanding right of information." 3ER-237. This decision was in error because it overlooked SCF's argument that

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discussed in this brief *infra* at Section VII.B), SCF's opposition brief primarily focused on refuting ANTHC's argument that its informational barriers did not harm SCF.

access to information is necessary for SCF to exercise its participation and governance rights, and because it misconstrued applicable precedent as requiring a "freestanding" right to information, where no such requirement exists.

1. Access to Information Is Necessary for SCF to Exercise Its Governance and Participation Rights

Traditionally, governance rights derive from state law or corporate charter. The case at bar is unusual in that SCF's governance rights derive from Section 325 (as explained above), a non-traditional source. But regardless of the source, it is widely accepted that a party that is endowed with governance rights needs information in order to exercise those rights intelligently and effectively.

In the corporate context, traditional corporate directors "are entitled to full and complete information as to the corporation's affairs." 5A Fletcher Cyc. Corp. § 2235. It is "axiomatic that an individual director cannot make a full contribution to the management of the corporate business unless given access to the corporation's books and records. Such information is ordinarily requisite to the exercise of the judgment required of directors in the performance of their fiduciary duty." *Id.* Because a "director directs, guides, and manages" an organization, "it is necessary that the director have all the information in regard to the affairs of the company that the director can obtain in order that he or she may direct the

company's operations intelligently and according to his or her best judgment." 18A Am. Jur. 2d Corporations § 291.[10]

The link between information and governance exists in the public sector context as well. It is embedded in the First Amendment. *See Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1188 (3d Cir. 1986) ("'Without some protection for the acquisition of information about the operation of public institutions . . .the process of self-government contemplated by the Framers would be stripped of its substance.'" (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 32 (1978) (Stevens, J., dissenting)).[11] It is also rooted in the theory behind public records acts, which permit the public access to government information so that

[10] *See also Intrieri v. Avatex Corp.*, No. C.A. 16335-NC, 1998 WL 326608, at *1 (Del. Ch. June 12, 1998) ("a sitting director is entitled to unfettered access to the books and records of the corporation for which he sits and certainly is entitled to receive whatever the other directors are given"); *Chappel v. Applied Control Sys., Inc.*, 39 Pa. D. & C.4th 168, 178 (Com. Pl. 1998) ("Courts almost universally recognize that a director has something close to an absolute right to inspect those corporate books and records that a reasonably prudent director would seek to examine because otherwise the director cannot perform his or her statutory functions."). This right is often codified, as it is in Alaska. *See* Alaska Stat. Ann. § 10.06.450(d) ("A director has the absolute right at a reasonable time to inspect and copy all books, records, and documents of every kind. . . .").

[11] James Madison astutely observed the importance of information to exercising governance rights intelligently, writing that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed. 1910) (quoted in *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 18 (1986) (Stevens, J., dissenting).

citizens can exercise their rights to govern intelligently. *See, e.g., Rufin v. City of Seattle*, 199 Wash. App. 348, 355 (2017) ("full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society").

While the source of governance rights may vary, all of these authorities share in common the notion that information is essential to exercising such rights effectively. Without information, it is impossible to provide input intelligently on the best course of action for an organization to take. Those charged with governance cannot set priorities, allocate resources, or take care of the organization without the necessary information. In other words, without information, governance rights are illusory.

2. ANTHC's Informational Barriers Injured SCF

The District Court did not credit the link between governance and information, and therefore did not hold that ANTHC's information barriers injured SCF. This was in error. ANTHC's informational barriers made it impossible for SCF to exercise its governance rights intelligently and effectively. For example, ANTHC's informational barriers kept SCF completely in the dark about Mr. Teuber's proposed employment agreement: what it was, why it was necessary, and whether it was fair or justified. As a result, SCF could not exercise its rights to

"management and control" of ANTHC, which as described above, constitutes an injury for which SCF can seek redress.[12]

While SCF's ability to provide input into ANTHC's executive compensation process is important, ANTHC's informational barriers could pose even larger problems if SCF is unable to obtain the relief it seeks, given that under Section 325(c), ANTHC is the only provider of certain health services that are supposed to be delivered equitably statewide. For example, if SCF lacks standing to enforce its right to information, then ANTHC can hide decisions to allocate financial resources away from health programs and services that are needed by SCF's patients, leaving them without access to adequate care. This is why Congress wanted "to ensure efficient, experienced Alaska Native management and control" over ANTHC: so that tribal entities would cooperate to ensure that scarce financial resources are managed responsibly and the ANMC services provided by ANTHC

[12] ANTHC may argue that SCF or other regional health entities compete with ANTHC and therefore may have conflicts of interest that should preclude them from viewing ANTHC information. As noted above, *see* footnote 3, *supra*, SCF is *not* challenging any provision of the ANTHC Bylaws or Code of Conduct that deals with *bona fide* conflicts of interest or arguing that Section 325 would somehow override those provisions. If SCF has a *bona fide* conflict of interest such that it could not provide unconflicted input, then SCF, as it has always done and pledged again to do in the District Court, 2ER-76, would recuse itself from those decisions. But the fact that SCF may, on occasion, have a genuine conflict of interest does not mean that ANTHC should be able as a matter of course to preclude SCF from viewing information critical to ANTHC's governance, as its policies at issue in this litigation do.

are delivered equitably statewide. 2ER-45. Denying the tribal entities the information necessary to do this thwarts Congress' design.[13]

3. SCF Does Not Need a "Freestanding" Right to Information to Have Standing

Instead of focusing on the link between SCF's governance and participation rights and SCF's need to access information to exercise those rights effectively, the District Court focused on whether Section 325 provides a "freestanding right of information." 3ER-237. It reviewed Section 325's text and legislative history and then concluded that because neither provided any such freestanding right, there could be no "informational injury" to SCF. This analysis erred in multiple ways.

(a) There Is No "Freestanding" Informational Requirement

The District Court erred in concluding that the law at issue must contain a "freestanding" right to information in order for a plaintiff to pursue a claim of informational injury. 3ER-237. The District Court relied primarily on two cases

[13] In SCF's brief opposing ANTHC's motion to dismiss, SCF explained that should the District Court find that SCF lacked standing, it was prepared to amend its complaint to add its designated Directors as plaintiffs. 2ER-39, n.42. The District Court opined that "to the extent that the Directors have rights to information, based on section 325, the Consortium's bylaws, or another source, and believe these rights have been violated, it is the Directors who should seek to vindicate these rights." 3ER-240. Yet the District Court's order dismissing SCF's complaint did not address SCF's offer to amend its complaint, nor did it provide leave to amend. For the reasons stated herein, SCF firmly believes that it has standing to raise the claims it advanced in its complaint. At the same time, SCF remains prepared to amend its complaint, if necessary.

for the notion that an informational injury *necessarily* must stem from a law that contains a "freestanding" right to information: *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989), and *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). These two cases do not support the District Court's conclusion.

In *Public Citizen*, the plaintiff sued the Department of Justice seeking release of certain information concerning judicial nominees under the Federal Advisory Committee Act ("FACA"). 491 U.S. at 447. The standing question in *Public Citizen* was not whether FACA provided a freestanding right to information, but whether the plaintiff's injury was sufficiently particularized, and not a "general grievance shared in substantially equal measure by all or a large class of citizens." *Id.* at 449. The Court held that the refusal to produce information under FACA "constitutes a sufficiently *distinct* injury to provide standing to sue." *Id.* at 449 (emphasis added). There is no language in *Public Citizen* that premises its outcome on a finding that FACA provided plaintiff a freestanding right to information.

The same is true of *Akins*. There, the standing question was whether the plaintiffs had been injured by the Federal Election Commission's decision not to designate a certain organization as a political committee. 524 U.S. at 18. The plaintiffs argued that they had been injured because the Federal Election Commission's failure to designate the organization as a political committee

deprived them of the information that the organization would be required to disclose if it were so designated, and the Supreme Court agreed. *Id.* at 21. The Supreme Court did not hold that the Federal Election Campaign Act ("FECA") contained any "freestanding" right to information, that FECA actually required disclosure of the information that the plaintiffs claimed it did, or that the plaintiffs were actually entitled to the information they claimed. Rather, in conducting the standing analysis, the Court concluded that "[t]he 'injury-in-fact' that [plaintiffs] have suffered consists of their inability to obtain information . . . that, *on [plaintiffs'] view of the law*, the statute requires that [the organization] make public." *Id.* at 21 (emphasis added). In other words, the inquiry was whether plaintiffs had suffered an injury, *assuming* plaintiffs were correct that they would be entitled to information under the statute. The Court held that such an "informational injury" was "sufficiently concrete and specific" to confer Article III standing. Again, there was no discussion that a "freestanding" right to information was necessary to the plaintiffs' claims.

In narrowly construing the notion of informational injuries to require them to stem from a statute that conveys a "freestanding" right to information, the District Court overlooked numerous other cases involving informational deprivations where standing was found. There are a host of other "statutory rights to

information" contained in other laws where provision of complete or truthful information is a means to effectuating the law, not an end in itself. These include:

- The Fair Housing Act, where Congress created "an enforceable right to truthful information concerning the availability of housing." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). Although this right is written into the law, it is done as a means of reducing housing discrimination, not as a "freestanding" right in itself.
- The Clean Water Act. In *American Canoe Association, Inc. v. City of Louisa Water & Sewer Commission*, 389 F.3d 536, 542 (6th Cir. 2004) (cited approvingly in *Wilderness Society, Inc. v. Rey*, 662 F.3d 1251, 1258 (9th Cir. 2010)), the court held that the "lack of information" regarding pollution levels "deprived [plaintiff] of the ability to make choices about whether it was safe to fish, paddle, and recreate," and constituted an informational injury sufficiently concrete and particularized to confer standing.
- Fair Credit Reporting Act ("FCRA"). In *Syed v. M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017), this Court held that certain disclosure requirements in FCRA create a "right to information" for job applicants, by requiring prospective employers to inform job applicants that they intend to obtain certain background information.

This right is necessary in order for applicants to exercise "their ability to meaningfully authorize" employers to obtain that information. *Id.* The deprivation of this "right to information" is sufficient to confer Article III standing. *Id.*

- California's Unfair Competition Law ("UCL"). In *Davidson v. Kimberly-Clark Corp.*, 889 F. 3d 956, 962 (9th Cir. 2018) (which the District Court cited for the notion that a "statutory right to information can give rise to concrete injury sufficient for the purposes of Article III standing," 3ER-235 (internal quotation marks omitted)), the plaintiff sued under several California statutes that regulate fair business practices, including California's UCL, alleging that she had been injured by purchasing wipes that were marketed as "flushable," when in fact they were not. This Court held that the plaintiff had standing to seek redress under California law, in part because an element of the plaintiff's injury was being "exposed to false information about the product purchased." *Id.* at 966. There is no freestanding right to information in the UCL, but standing was proper because certain truthful information was necessary in order to effectuate the UCL's purpose: to ensure fair competition in commercial markets.

In short, courts recognize informational injuries in a variety of contexts, not just when a law provides a "freestanding" right to information, and there is no requirement to demonstrate a "freestanding" right to information in order to claim that an informational deprivation caused an injury that suffices for Article III standing.

(b) The District Court's Heavy Reliance on *Wilderness Society v. Rey* Was Misplaced

The District Court also heavily relied on *Wilderness Society* in reaching its conclusion that SCF lacked standing. In *Wilderness Society*, the Forest Service implemented regulations limiting the notice, comment, and appeals procedures in the Forest Service Decisionmaking and Appeals Reform Act ("ARA"). 622 F.3d at 1252. The plaintiffs sued, claiming that the new procedures prescribed by the regulations were inconsistent with the statute. Plaintiffs argued that they had suffered "informational injury resulting from the violation of the obligation to provide notice" of Forest Service actions, and, because of truncated appeal procedures, they would be less likely to be able to obtain information from the Forest Service through a successful appeal. *Id.* at 1258, 1259.

This Court held that the plaintiffs lacked standing to pursue their claims because they were attempting to recast "an informational injury as a result of a procedural deprivation." *Id.* at 1260. The Court viewed this as a "procedural injury, standing on its own," and as an inappropriate "end run around the Supreme

Court's procedural injury doctrine." *Id.* In reaching this conclusion, this Court made four important observations that render *Wilderness Society* very different from the case at hand.

First, the plaintiffs in *Wilderness Society* were attempting to dress up a procedural injury as an informational injury on account of intervening changes in standing law. In *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the Supreme Court cut back on the kinds of bare procedural injuries that satisfy Article III standing requirements on facts that were directly analogous to those in *Wilderness Society*. The plaintiffs in *Summers* argued that they suffered procedural injury when they were "denied the ability to file comments on some Forest Service actions." 555 U.S. at 496. The Supreme Court rejected this challenge, explaining that "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." Faced with this legal obstacle that arose while *Wilderness Society* was on appeal, the plaintiffs had little choice but to strain to recast their procedural injury as something else. That is not the case here. SCF's right to information is not some technicality, but central to its substantive rights to govern and participate in ANTHC.

Second, the substance of the challenge in *Wilderness Society* was meaningfully different. The plaintiffs there were challenging Forest Service

regulations as inconsistent with the statute that those regulations were attempting to implement. 622 F.3d at 1253. In that way, the injury they alleged was significantly more diffuse: the alleged injury was the loss of notice, comment, and participation in the appeal process, which is an injury that, in theory, is shared by every member of the public. By contrast, here, SCF seeks to enforce rights that were granted to it in a public law that addresses SCF by name. This injury is far more particularized—about as particularized as an injury under a federal law can be—than the one that the Court considered in *Wilderness Society*.

Third, the injury in *Wilderness Society* was significantly less concrete than it is here. Plaintiffs had identified no "concrete and particular project" that was "connected to the procedural loss." 622 F.3d at 1260; *accord Summers*, 555 U.S. at 496 ("procedural right" must "protect *his concrete interests*"). By contrast, there is a concrete interest here that the right to information protects: SCF's interest in participating in the management and control of ANTHC. SCF has standing to enforce its rights, even if deemed procedural, "so long as the procedures in question are designed to protect some threatened concrete interest of [a party] that is the ultimate basis of [that party's] standing." *Lujan*, 504 U.S. at 573 n.8

Fourth, the Court explained that in order to determine whether a law provides a "right to information capable of supporting a lawsuit," courts must analyze Congress' purpose in enacting the law. *Wilderness Society*, 622 F.3d at

1259. Congress' purpose in enacting the ARA was to encourage voluntary participation by the public in the Forest Service's decision-making process. *Id.* The purpose of Section 325 was quite different: "to ensure efficient, experienced Alaska Native management and control" of ANMC. 2ER-47. It is impossible for SCF to exercise such management and control rights intelligently if ANTHC is permitted to withhold critical governance information from SCF. After all, those entrusted with governance rights must "have all the information in regard to the affairs of the [organization]" that they "can obtain in order that [they] may direct the company's operations intelligently and according to [their] best judgment." 18A Am. Jur. 2d Corporations § 291.

(c) The District Court Did Not Credit the Vital Link Between Governance and Information

The fundamental error in the District Court's analysis was that while appearing to recognize that SCF likely had certain governance and participation rights, 3ER-239-40, it failed to appreciate that exercising those rights effectively and intelligently is impossible without information. As explained above, *supra* section VII.B.1, black letter authorities on corporate law uniformly explain that it is "axiomatic" that those provided with governance rights "cannot make a full contribution to the management of the corporate business unless given access to the corporation's books and records." 5A Fletcher Cyc. Corp. § 2235. And for good reason: it is not possible for SCF to provide its expertise and input to its

designated Director if it is not aware of the issues that its designated Director must deliberate and vote on. This is a concrete, particularized interest that is harmed when ANTHC can withhold critical governance information.[14]

C. There Is Genuine Adversity Between ANTHC and SCF in This Case as Reflected in ANTHC's Mirror-Image Counterclaims

The "'gist of the question of standing' is whether the plaintiff has a sufficiently 'personal stake in the outcome of the controversy' to ensure that the parties will be truly adverse and their legal presentations sharpened." *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) (quoting *Mass. v. E.P.A.*, 549 U.S. 497, 517 (2007)). The standing inquiry requires a concrete and particularized injury to "ensure the proper adversarial presentation" of the issues in the case. *Mass. v. E.P.A.*, 549 U.S. at 517. There is no question that there is sufficient adversity between SCF and ANTHC as evidenced by the nearly mirror-image counterclaims that ANTHC filed. 2ER-77-108. In its Amended Answer and Counterclaims, ANTHC sought a declaratory judgment that the same actions about which SCF complained, *inter alia*, *comply* with "federal law." 2ER-107. There could be no clearer concrete adversity than two parties seeking mutually exclusive

[14] ANTHC's decision to create the Executive Committee also caused informational injury to SCF. Because SCF's designated Directors did not know about and were unable to attend Executive Committee meetings, they were unable to learn about information discussed at those meetings, and, in turn, unable to convey that information to SCF.

declarations about whether the same set of actions did or did not violate the same federal law.

IX.
CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's dismissal for lack of standing and remand the case for further proceedings on the merits.

Respectfully Submitted,

Dated: February 25, 2019

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STATEMENT OF RELATED CASES

Southcentral Foundation is not aware of any related cases pursuant to Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1 that the attached brief is proportionately spaced, has a typeface of 14 points, and, according to the word count feature of the word processing system used to prepare the brief (Microsoft Word 2016), contains 11,984 words.

Dated: February 25, 2019

/s/ William D. Temko

WILLIAM D. TEMKO

STATUTORY ADDENDUM

Section 325 of Public Law 105-83—Nov. 14, 1997:

(a) Notwithstanding any other provision of law, and except as provided in this section, the Aleutian/Pribilof Islands Association, Inc., Bristol Bay Area Health Corporation, Chugachmiut, Copper River Native Association, Kodiak Area Native Area Association, Maniilaq Association, Metlakatla Indian Community, Arctic Slope Native Association, Ltd., Norton Sound Health Corporation, Southcentral Foundation, Southeast Alaska Regional Health Consortium, Tanana Chiefs Conference, Inc., and Yukon-Kuskokwim Health Corporation (hereinafter "regional health entities"), without further resolutions from the Regional Corporations, Village Corporations, Indian Reorganization Act Councils, tribes and/or villages which they represent are authorized to form a consortium (hereinafter "the Consortium") to enter into contracts, compacts, or funding agreements under Public Law 93-638 (25 U.S.C. 450 et seq.), as amended, to provide all statewide health services provided by the Indian Health Service of the Department of Health and Human Services through the Alaska Native Medical Center and the Alaska Area Office. Each specified "regional health entity" shall maintain that status for purposes of participating in the Consortium only so long as it operates a regional health program for the Indian Health Service under Public Law 93-638 (25 U.S.C. 450 et seq.), as amended.

(b) The Consortium shall be governed by a 15-member Board of Directors, which shall be composed of one representative of each regional health entity listed in subsection (a) above, and two additional persons who shall represent Indian tribes, as defined in 25 U.S.C. 450b(e), and sub-regional tribal organizations which operate health programs not affiliated with the regional health entities listed above and Indian tribes not receiving health services from any tribal, regional or sub regional health provider. Each member of the Board of Directors shall be entitled to cast one vote. Decisions of the Board of Directors shall be made by consensus whenever possible, and by majority vote in the event that no consensus can be reached. The Board of Directors shall establish at its first meeting its rules of procedure, which shall be published and made available to all members.

(c) The statewide health services (including any programs, functions, services and activities provided as part of such services) of the Alaska Native Medical Center and the Alaska Area Office may only be provided by the Consortium. Statewide health services for purposes of this section shall consist of all programs, functions, services, and activities provided by or through the Alaska Native Medical Center

and the Alaska Area Office, not under contract or other funding agreement with any other tribe or tribal organization as of October 1, 1997, except as provided in subsection (d) below. All statewide health services provided by the Consortium under this section shall be provided pursuant to contracts or funding agreements entered into by the Consortium under Public Law 93-638 (25 U.S.C. 450 et seq.), as amended, and for such purpose the Consortium shall be deemed to have mature contract status as defined in section 4(h) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(h)).

(d) Cook Inlet Region, Inc., through Southcentral Foundation (or any successor health care entity designated by Cook Inlet Region, Inc.) pursuant to Public Law 93-638 (25 U.S.C. 450 et seq.), as amended, is hereby authorized to enter into contracts or funding agreements under such Public Law for all services provided at or through the Alaska Native Primary Care Center or other satellite clinics in Anchorage or the Matanuska-Susitna Valley without submission of any further authorizing resolutions from any other Alaska Native Region, village corporation, Indian Reorganization Act council, or tribe, no matter where located. Services provided under this paragraph shall, at a minimum, maintain the level of statewide and Anchorage Service Unit services provided at the Alaska Native Primary Care Center as of October 1, 1997, including necessary related services performed at the Alaska Native Medical Center. In addition, Cook Inlet Region, Inc., through Southcentral Foundation, or any lawfully designated health care entity of Cook Inlet Region, Inc., shall contract or enter into a funding agreement under Public Law 93-638 (25 U.S.C. 450 et seq.), as amended, for all primary care services provided by the Alaska Native Medical Center, including, but not limited to, family medicine, primary care internal medicine, pediatrics, obstetrics and gynecology, physical therapy, psychiatry, emergency services, public health nursing, health education, optometry, dentistry, audiology, social services, pharmacy, radiology, laboratory and biomedical, and the administrative support for these programs, functions, services and activities. Cook Inlet Region, Inc., through Southcentral Foundation, or any lawfully designated health care entity of Cook Inlet Region, Inc., may provide additional health care services at the Alaska Native Medical Center if such use and services are provided pursuant to an agreement with the Consortium. All services covered by this subsection shall be provided on a nondiscriminatory basis without regard to residency within the Municipality of Anchorage.

UNDER SEAL

CERTIFICATE OF SERVICE

I hereby certify that, at the Court's direction, I transmitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by email and/or secure file transfer on February 27, 2019.

I also hereby certify that, because the foregoing consists of corrected documents that the Court instructed should not be filed through its appellate CM/ECF system, I served the foregoing via email to the following email addresses:

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Dated: February 27, 2019

/s/ William D. Temko

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