

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CHEYENNE RIVER SIOUX TRIBE,

-Plaintiff,

and

ROSEBUD SIOUX TRIBE,

-Plaintiff,

and

OGLALA SIOUX TRIBE

-Plaintiff,

v.

**STEVEN MNUCHIN, SECRETARY,
UNITED STATES DEPARTMENT OF
THE TREASURY**

Defendant.

Case No.

**MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION**

**MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION
(Oral Argument Requested)**

Pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65.1, Plaintiffs Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, and the Oglala Sioux Tribe, (“the Tribes”) hereby respectfully move this Court for a Temporary Restraining Order and Preliminary Injunction against Defendant Secretary of the United States. Treasury Steven Mnuchin to (1) prevent him from allocating and distributing funds set aside for Tribal governments under Title V of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) to Alaska Native Claims Settlement Act regional and village corporations, which do not meet the CARES Act’s statutory

definition of “Tribal government” and therefore cannot receive funds set aside for Tribes in the Act and (2) to require him to allocate and distribute funds to Tribal governments as properly defined under the act no later than April 26, 2020. The basis for such an injunction is contained in the memorandum of points and authorities in support of this motion filed herewith.

CERTIFICATION OF COUNSEL PURSUANT TO LCvR 65.1 (a)

Pursuant to LCvR 65.1(a), I hereby certify that on April 22, 2020, in advance and in addition to filing via ECF, I notified Defendant of this action and caused true and correct copies of the Plaintiffs' Complaint, Civil Cover Sheet, Motion for Temporary Restraining Order and Preliminary Injunction, Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order and Preliminary Injunction, and all supporting papers to be sent by overnight express mail to the following addresses:

Steven Mnuchin, Secretary
United States Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, D.C. 20220

Brian Callanan, General Counsel
United States Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, D.C. 20220

In addition, I notified Defendant's counsel of this action and caused true and correct copies of the Plaintiffs' Complaint, Civil Cover Sheet, Motion for Temporary Restraining Order and Preliminary Injunction, Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order and Preliminary Injunction, and all supporting papers to be sent by electronic mail to the following address: Jason.Lynch@usdoj.gov. It is my understanding and belief that Jason Lynch represents Defendant Steven Mnuchin in a related action within this Court.

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CHEYENNE RIVER SIOUX TRIBE and
ROSEBUD SIOUX TRIBE,**

Case No.

-Plaintiffs,

V.

**STEVEN MNUCHIN, SECRETARY,
UNITED STATES DEPARTMENT OF
THE TREASURY**

Defendant.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

INTRODUCTION

Tribes such as Plaintiffs Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, and Oglala Sioux (“the Tribes”) were already among the most vulnerable and disadvantaged populations in the United States before the COVID-19 pandemic began spreading across the globe in early 2020. As a consequence of over 200 years of ill-conceived federal Indian policy, the Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe, and the Oglala Sioux Tribe exercise their sovereign powers of self-government on vast rural reservations with limited means to generate revenue to fund governmental functions because of their location, abysmal infrastructure, and virtually nonexistent economic opportunity. The people of the Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe, and the Oglala Sioux Tribe therefore, suffer among the highest rates of poverty, unemployment, alcoholism, suicide, and chronic diseases like diabetes, cancer, heart disease, and asthma in the nation. Before the emergence of the Coronavirus this spring, the Tribes were already on the brink

of disaster. The current public health and economic crisis, therefore, poses an existential threat to the Tribes.

On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Securities Act (“CARES Act”), H.R. 748, 116th Cong. (2d Sess. 2020) to respond to the national crisis, appropriating roughly \$2 trillion to provide emergency relief to the nation. The CARES Act is broadly conceived and includes specific relief for, among others, large corporations, small businesses, individuals, and, importantly, State, Tribal, and local governments. Specifically, Title V of the CARES Act sets aside \$150 billion for State, Tribal, and local governments to ensure that these governments can adequately provide *government services* necessary to respond to the crisis during a time when regular sources of government revenue have plummeted as a result of the pandemic. Title V expressly appropriates \$8 billion for *Tribal governments*.

The Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe, and the Oglala Sioux Tribe are seeking this temporary restraining order (“TRO”) and preliminary injunction because Defendant Steven Mnuchin, Secretary of the Department of the Treasury (“Treasury”), has determined to allocate CARES Act Title V (“Title V”) monies set aside expressly for Tribal governments to Alaska Native Claims Settlement Act (“ANCSA”) corporations (“ANCs”) —for-profit, non-governmental entities that are not eligible for those funds under Title V. ANCs are multi-billion dollar corporations with subsidiaries located globally whose illegal and unexpected addition to the Title V funding formula will necessarily divert substantial resources away from Tribes like the Cheyenne River Sioux Tribe and the Rosebud Sioux Tribe who require those funds to avert a public health disaster and an existential threat to their people and their way of life.

Defendant Mnuchin, moreover, premised his determination that ANCs are entitled to Title V funds set aside for Tribal governments on a callow and unnuanced interpretation of the Indian

Self-Determination and Education Assistance Act (“ISDEAA”), Pub. L. No. 93-638, 88 Stat. 2203 (1975), that attempts to call into question what it means to be a “Tribal government.” This Court need not consider the complicated question of whether ANCs are “Indian Tribes,” under the ISDEAA, because they simply are not *Tribal governments* and therefore are not entitled to Title V funds. As set forth in detail herein, the Tribes respectfully requests that this Court immediately enjoin Defendant from allocating and distributing Title V funds to ANCs.

FACTUAL BACKGROUND

I. THE CHEYENNE RIVER SIOUX TRIBE AND THE ROSEBUD SIOUX TRIBE

The Cheyenne River Sioux Tribe is a federally recognized Indian tribal government whose governing body is recognized by the Secretary of the Interior. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5,462, 5,463 (Jan. 30, 2020). The Tribe is comprised of four of the seven bands of the Lakota: *Itazipco* (Sans Arc), *Mnicojou* (Planters by the Water), *Oohenumpa* (Two Kettle), and *Siha Sapa* (Blackfoot). The Cheyenne River Sioux Tribe exercises powers of self-governance and jurisdiction over the Cheyenne River Sioux Reservation, which the Tribe reserved to itself in the Treaty of Fort Laramie with the Sioux, Etc. art. 5, Sept. 17, 1851, 11 Stat. 749, and the Treaty with the Sioux—Brule, Oglala, Mniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee—and Arapahoe, Apr. 29, 1868, 15 Stat. 635, and as is set forth in the Act of March 2, 1889, 25 Stat. 888.

The Cheyenne River Sioux Reservation is located in north-central South Dakota and is comprised of 2,833,158 acres of trust land. *See* Decl. of Chairman Frazier, ¶ 4, attached hereto as **Exhibit A**. The Reservation is approximately 90 miles wide and 60 miles long. *Id.* The Cheyenne River Sioux Tribe has 21,965 enrolled members, about 10,000 of whom live in 22 tribal

communities spread across this vast Reservation. *Id.*

The most recent census revealed that Ziebach County on the Cheyenne River Sioux Reservation is the poorest in the nation, where 62% of residents live in poverty. *Id.* at ¶ 6.

The Cheyenne River Sioux Tribe provides governmental functions similar to those that a state provides. Under normal operating conditions, the Tribe runs a housing authority that provides housing to over 650 families on the Cheyenne River Sioux Reservation. The Tribe provides land and natural resource management and operates environmental protection and agricultural management departments. The Tribe has its own police force that operates alongside its robust Tribal court system, including a public defender's and prosecutor's office. The Tribe also provides human welfare services, such as Indian Child Welfare, emergency victim shelters, family violence response, homeless shelters, the WIC program, and food distribution. The Tribal Education Department operates six schools in addition to Head Start. The Tribal Health Department provides a wide array of services, including general medical services, behavioral health counseling, addiction services, dental care, a community health program, a fitness center, and several diabetes programs.

The Cheyenne River Sioux Tribe's initial COVID-19 Response plan initiated health and safety checkpoints at the borders of the Reservation and recommended that local businesses, restaurants, bars, and the like should be closed or converted to curbside or takeaway services. On April 8, 2020, the Tribe's Executive Committee passed two Emergency Executive Orders. The first, Emergency Executive Order #02.2-2020-CR required 14-day mandatory isolation for infected or suspected infected persons upon return to the Reservation from either community spread areas of South Dakota or anywhere outside the state, including provisions for court-ordered quarantine if the person is non-compliant with Tribal Health Department voluntary quarantine

procedures. Decl. of David D. Nelson at ¶ 6, attached hereto as **Exhibit B**. The second, Emergency Executive Order #02.3-2020-CR, issued a Stay-at-Home Recommendation, in addition to a prohibition on gatherings of ten or more people, an order closing all non-essential businesses, and limiting travel within, into, or out of the Reservation, to only essential activities. *Id.* at ¶ 7. All non-essential government offices have been closed, and those employees placed on administrative leave. *Id.*

The Cheyenne River Sioux Tribe activated their emergency response Command Center with the Declaration of Emergency. The Command Center coordinates essential Tribal resources during crises and operates as a reservation-wide point of contact for the public and entities during the crisis. Decl. of Chairman Frazier, ¶ 3. The Command Center coordinates “increased food distribution demand” as well as PPE stockpiling. *Id.* at ¶¶ 3, 4. Responding to the increased need of Tribal members, the Command Center opened an emergency food bank. *Id.* at ¶ 4. Policing efforts have increased exponentially with the implementation of the Border Patrol, whose job is to ensure all traffic on and off the Reservation goes through one of the eight checkpoints. *Id.* at ¶ 5. Over 150 deputies have been hired as of April 18, 2020. *Id.* As of April 21, 2020, there are no confirmed cases of COVID-19 on the Cheyenne River Reservation.

The COVID-19 emergency has put the Cheyenne River Sioux people in dire jeopardy. Remoteness, millions of acres of land, and grossly insufficient federal funding mean a lack of adequate infrastructure. The Tribal government has 1,700 miles of road to maintain—many of which are unpaved—but it receives federal funding to maintain only 300 miles of road. Decl. of Chairman Frazier, at ¶ 5. During certain times of the year, like now, wet conditions and melting snow make some roads nearly impassable. *Id.* Compounding the issue, unrepaired damage from historic flooding in 2019 means that lengthy detours are still in place in some areas. *Id.*

Additionally, there is no cell phone or internet service in many areas of the reservation, which can make communication difficult. *Id.* Residents of outlying communities must travel up to 90 miles to reach basic Indian Health Services (“IHS”) medical care at the Tribal headquarters in Eagle Butte, South Dakota. *Id.* at ¶ 9. If more advanced medical intervention is needed for a COVID-19 patient, IHS has indicated that the patient will be transferred to an off-Reservation facility, the closest of which is 175 miles away, a three-hour drive. *Id.*

The Cheyenne River Sioux Tribe does not enjoy the luxury of robust, revenue-generating tribal enterprise because of its remote location and economic disadvantage. Instead, the Tribe relies heavily on its agricultural economy. Decl. of Chairman Frazier, ¶ 4. The pandemic has put this year’s growing season in serious jeopardy. Losses by individual growers will flow up and impact the Tribal government. The Tribe’s General Fund includes approximately \$6 million derived from agricultural leases, which are now at risk. *Id.*

Many Tribal members have limited access to food and supplies even during optimal situations, which makes the impacts of the Coronavirus that much more extreme. *Id.* at ¶ 11. There is extensive reliance on food assistance programs and the necessary furlough of essential staff who are at high risk of severe illness if they contract the virus has left many essential programs unable to operate fully. *See* Decl. of Jessica Four Bear at ¶ 2, attached hereto as **Exhibit C**. The Tribe has stepped in to obtain beef cattle to feed Tribal members, and the Land Use Program has stepped in to process beef for emergency food stores, but there is still a scarcity of many other food items. *Id.* at ¶ 11.

The Tribe’s children are struggling as school districts valiantly attempt to meet the demand for take-home meals with a staff of remaining employees and volunteers. *Id.* at ¶ 7. Many children on the reservation rely on school for at least one meal a day, but staff and volunteers have are

increasingly at risk of getting sick because they must gather to prepare the meals. The teachers at the six schools on the reservation are also making homework packets for students to take home, which must then be collected despite the risk of disease communication. *Id.* at ¶ 8. The paper packets are the schools' only option as the schools, and many students lack the technology, equipment, and connectivity to establish e-learning due to the fact that the schools and the education programs are in remote areas with no cellular or internet service. *Id.* The stress of increased food insecurity and decreased academic support caused by school closures has led to steadily declining homework packet return rates and a corresponding increase in student failure rates. *Id.*

With increased time at home, the Family Violence Program, the Indian Child Welfare Department, and the Prosecutor's Office are seeing increased requests for space in the domestic violence shelter and the children's shelter, increased emergency custody proceedings, and increased arrests for violent offenses and alcohol-related charges. Decl. of Jessica Four Bear, ¶¶ 6, 12.

Finally, Tribal Health Services is under immense strain in the face of the pandemic. The Tribal IHS Facility only has "8 inpatient beds, six ventilators, two negative pressure rooms, inadequate staff, and **zero respiratory therapists**" to care for the 10,000 Reservation residents. Decl. of Chairman Frazier, ¶ 9 (emphasis added). Many staff members at the Facility are high-risk, so they have been placed on administrative leave. Ex. C at ¶ 13. Those that remain are working day and night to prepare the Tribe for the pandemic as best they can. *Id.* Normal medical services have been largely discontinued, and social distancing requirements have canceled some services such as Alcoholics Anonymous and Narcotics Anonymous meetings. *Id.* Community Health, alongside Support Services, Food Distribution, Tribal Education, and the Maintenance

staff, are now responsible for sanitization and delivery of food and supplies to the Tribe's remote communities to reduce the need for people to travel into Eagle Butte. *Id.* at ¶¶ 5, 7, 9, 11, 13. The Tribal community is working ceaselessly to do what it can to prepare, but the essential staff are stretched thin and fatigued.

As set forth in the Complaint, the Rosebud Sioux Tribe is located in south-central South Dakota, provides essential governmental services to its 35,600 members, is similarly situated as the Cheyenne River Sioux Tribe, and faces similar harms and hardships from the COVID-19 pandemic.

As set forth in the Complaint, the Oglala Sioux Tribe is located in south-west South Dakota, on the Pine Ridge Indian Reservation, which consists of Oglala Lakota County, Bennett County, a portion of Jackson County, South Dakota, and land in Sheridan County, Nebraska. The total number of acres over which the Oglala Sioux Tribe has jurisdiction and/to which the Tribe provides services consists of over 2.78 million acres. The Oglala Sioux Tribe provides essential governmental services to its 46,855 members, is similarly situated as the Cheyenne River Sioux Tribe, and faces similar harms and hardships from the COVID-19 pandemic.

II. TRIBES AND THE CORONAVIRUS RELIEF FUND

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), H.R. 748, 116th Cong. (2d Sess. 2020), which Congress enacted to respond to the national crises caused by the COVID-19 pandemic. The Act contains relief for individuals, large corporations, small businesses, and the health care sector.

Title V of the CARES Act, Section 5001, amends the Social Security Act by creating the Coronavirus Relief Fund ("Section 601"). Title V, as set forth in Section 601(a)(1) is intended to provide relief for *governments*. Specifically, it appropriates \$150 billion from the U.S. Treasury

“for making payments to *States, Tribal governments, and units of local government.*” H.R. 748 § 601(a)(1) (emphasis added). For State and local governments, Title V provides payments based on population and adjustments for payments to smaller units of governments and limits funding to expenses related to the Coronavirus disease that “were not accounted for in the budget most recently approved as of the date of enactment of this section for the *State or government.*” *Id.* at 601(d)(1), (2) (emphasis added). Title V mandates that the Secretary of the United States Department of the Treasury (“Secretary”) “shall reserve . . . \$8,000,000,000 of such amount for making payments to *Tribal governments.*” *Id.* § 601(a)(2)(B) (emphasis added).

Title V defines “Tribal government” at Section 601(g)(5) as “the recognized governing body of an Indian Tribe.” Title V defines “Indian Tribe” as it is defined in the ISDEAA at 25 U.S.C. § 5304(e). The CARES Act entitles eligible Tribal governments to receive funds after submitting a certification to the Secretary demonstrating that the Tribal government will use the funds for expenditures incurred due to the public health emergency. H.R. 748 §§ 601(c)-(d). The CARES Act requires the Secretary to determine amounts distributed to Tribal governments “in consultation with the Secretary of the Interior and Indian Tribes.” *Id.* § 601(c)(7).

When Congress enacted the CARES Act, it included an \$8 billion set aside for Tribal governments and mandated the Secretary to consult with the Secretary of Interior and Tribes to determine the best distribution of the funds. During the consultation process, Tribes and inter-tribal organizations focused significant effort on ensuring proper implementation of the CARES Act so that Tribal governments in crisis receive the desperately needed funds set aside by Congress. To that end, Tribes and inter-tribal organizations participated in numerous emergency working groups as well as the consultation sessions with Treasury and the Department of the Interior (“Interior”) required by CARES Act Section 601(c)(7). In the many sessions that occurred in the

first days after enactment, both the Treasury Department and Interior were clear that *Tribal governments* were eligible for Coronavirus relief funds under the CARES Act. Consequently, consultations and comments were directed at the formula that Treasury might use to distribute the \$8 billion to Tribal governments. Decl. of Chairman Frazier, ¶ 2. At no time did any federal government official indicate that they interpreted Title V to include ANCs. *Id.*

That all changed on Thursday, April 9, 2020, when Tribal governments, including the Cheyenne River Sioux Tribe and the Rosebud Sioux Tribe, learned that the Alaska Congressional delegation and a group of ANCs had written to the Defendant, Secretary Mnuchin, to insist upon inclusion in the Tribal Coronavirus relief fund. *Id.* This development was a shock to the Tribes, as it was to the entire body of leaders and experts working on Tribal CARES Act issues, who never considered that the definition of “Tribal government” could possibly be interpreted to apply to ANCs, which include multi-billion-dollar, for-profit corporations.¹ *Id.*

Congress enacted the Alaska Native Claims Settlement Act in 1971. Pub. L. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629(h)). ANCSA extinguished Alaska Natives’ aboriginal land rights of use and occupancy in return for the payment of \$962.5 million, the conveyance of fee title in 44 million acres to newly-formed corporations, and the extinguishment of aboriginal title to all other lands. *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 524 (1998).

Importantly, ANCSA did not create Tribal entities as part of the settlement. Unlike Tribal corporations created under the Indian Reorganization Act, or Tribal law, the regional and village ANCs established by ANCSA are business entities chartered under the Alaska Corporations Code,

¹ Andrew Westney, *NCAI CEO Says ‘Blindsided’ in COVID-19 Funding Row*, LAW360 (Apr. 17, 2020, 8:57 PM EDT), https://www.law360.com/nativeamerican/articles/1264746/ncai-ceo-says-tribes-blindsided-in-covid-19-funding-row?nl_pk=1d7d3f4a-1611-4df6-8900-8fd0dea7a8f5&utm_source=newsletter&utm_medium=email&utm_campaign=nativeamerican.

subject to Alaska securities law, and largely treated as any private business would be. *See* 16 U.S.C. §§ 1606-1607. The corporations are owned and directed by shareholders, most—but not all—of whom are Alaska Natives. They are governed by shareholder-elected corporate boards of directors, operated by executives and employees, ***and are not Tribally controlled.*** *See id.* The land owned by the ANCs is held in fee simple title, and is not subject to the special status afforded to lands classified as “Indian Country.” *See Venetie*, 522 U.S. at 532.

Outside of, and unrelated to, the ANCs there are 229 federally recognized Tribal governments within the state of Alaska. *See* 84 Fed. Reg. at 5,466-67. These Tribes possess the full governmental authority and powers of any Tribal government and provide such governmental services to their Tribal members. *John v. Baker*, 982 P.2d 738, 750 (Alaska, 1999). The courts have repeatedly held that nothing within ANCSA ended or otherwise altered the sovereign status of the Alaska Native Tribes, nor did the ANCs supplant or replace the functions of the Alaska Native tribal governments, which are the traditional Tribal governmental structure for many Alaska Natives. *Alaska v. Native Vill. of Tanana*, 249 P. 3d 734, 739-44 (Alaska 2011) (summarizing case law on Tribal sovereignty in Alaska).

There are more than 230 individual ANCs, including twelve regional corporations and approximately 225 village corporations.² The twelve regional corporations are particularly powerful. They have over 138,000 shareholders and own scores of corporate subsidiaries, operating in all 50 states and countries across the globe.³ Their varied business holdings include

² ² *Alaska Native Corporations*, Res. Dev. Council, <https://www.akrdc.org/alaska-native-corporations> (last visited Apr. 21, 2020). A thirteenth regional corporation was also formed for non-resident Alaska Natives, but the current status of this corporation is unclear. *See, e.g., About the Alaska Native Claims Settlement Act*, ANCSA Reg'l Ass'n, <https://ancsaregional.com/about-ancsa/> (last visited Apr. 21, 2020) (noting that the thirteenth regional corporation was involuntarily dissolved by the State of Alaska in 2013).

³

See Res. Dev. Council, *supra* note 2; NANA Reg'l Corp., Inc., *Overview* (May 17, 2017), *available at*

construction, pipeline maintenance, real estate management, telecommunications, government and military contracting, environmental remediation, facilities maintenance, catering, camp services, venture capital, financial management, and aerospace engineering.⁴ In 2018 and 2019, the twelve regional corporations generated hundreds of millions of dollars of revenue each, with larger corporations generating as much as \$3.4 billion.⁵ Tribal governments, including the Cheyenne River Sioux Tribe and the Rosebud Sioux Tribe, are now forced to contend with the prospect of sharing a relatively small pot of emergency funds, subject to a statutory formula that only vaguely refers to “expenditures,” H.R. 748 § 601(d), with a group of for-profit corporations that generate billions of dollars of revenue each year and with untold “expenditures.” Decl. of Chairman Frazier, ¶ 2.

On Monday, April 13, 2020, Treasury released its one-page certification form, entitled the “Certification for Requested Tribal Data.” The Certification explicitly requests data from ANCs, seeking information on “[t]otal number of *Shareholders*,” “[t]otal number of land acres, [including those] *selected pursuant to the Alaska Native Claims Settlement Act*,” and stating explicitly that “‘Indian Tribe’ . . . [includes] *any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act*,” the definition of “Indian Tribe” contained in the ISDEAA.⁶

Although the Cheyenne River Sioux Tribe already submitted comments on the CARES Act Coronavirus relief fund on April 8, 2020, the Tribe submitted two supplemental letters on Monday,

https://www.nana.com/regional/shareholder-relations/Shareholder-Preference/files/2017_NRC_One_Sheet_OVR_0256_1024_Part1.pdf.

⁴ See Res. Dev. Council, *supra* note 2; *The 2019 Top 49ers*, Alaska Bus., <https://digital.akbizmag.com/issue/october-2019/the-2019-top-49ers/> (last visited Apr. 21, 2020).

⁵ See Res. Dev. Council, *supra* note 2.

⁶ See *Department of the Treasury Tribal ‘Certification’ Form*, Indianz.com (Apr. 13, 2020), available at <https://www.indianz.com/covid19/?p=2696> (emphasis added).

April 13, 2020, strenuously objecting to the illegal inclusion of ANCs in CARES Act relief as ANCs are not Tribal governments contemplated under the Act and because such inclusion would permit the double or triple counting of Alaska Natives to the detriment of poor Tribes in a crisis like the Cheyenne River Sioux Tribe. Decl. of Ducheneaux at ¶ 2,3 ex. A and B. Other Tribes, including the Inter-Tribal Council of the Five Civilized Tribes, likewise submitted letter objections to the Defendant, Secretary Mnuchin, noting the illegality of their inclusion under the CARES Act and the profound unfairness both of permitting rich, multinational for-profit corporations that are not owned, controlled, or directed by Tribes to take from the same pot as Tribal governments and of the resulting double and triple counting of Alaska Natives who are Tribal members, shareholders in their village ANC, and shareholders in their Regional ANC. Decl. of Ducheneaux at ¶ 4 Ex. C.

Neither Treasury nor Interior provided any answer to the Tribes' many objections to the illegal inclusion of ANCs in Tribal government Coronavirus funding. Decl. of Chairman Frazier, ¶ 2. Therefore, on April 13, 2020, the Great Plains Tribal Chairman's Association, of which Cheyenne River Sioux Tribal Chairman Harold Frazier is the Chair, and the Rosebud Sioux Tribe is a member, sent a letter to the Defendant, Secretary Mnuchin, and Secretary of Interior Bernhardt reiterating their objections to ANCs receiving CARES Act funding intended for tribal governments. Decl. of Ducheneaux at ¶ 5 Ex.D. By Thursday, April 16, 2020, the Cheyenne River Tribe was joined by every major tribal organization in the Lower 48 states⁷ in objecting to the inclusion of ANCs. Decl. of Ducheneaux at ¶ 6 Ex. E. They received no answer.

⁷ Affiliated Tribes of Northwest Indians, All Pueblo Council of Governors, USET Sovereignty Protection Fund, Association on American Indian Affairs, Great Plains Tribal Chairman's Association, National Congress of American Indians, Inter Tribal Association of Arizona, National Education Association, Midwest Alliance of Sovereign Tribes, National Indian Gaming Association, Rocky Mountain Tribal Leaders Council, Native American Finance Officers Association, and the Native American Rights Fund.

On Friday, April 16, 2020, the final day that Tribal Certifications could be uploaded to the Treasury portal, an internal document was leaked to the public that apparently shows all of the data contained in the Tribal Certifications submitted to the Tribal Treasury portal at that point. The Excel spreadsheet contains the name of the submitting entity, its population, land base, number of employees, and expenditures for the most recently completed year. Supplemental Decl. of Ducheneaux at ¶ 2 Ex. AA. News reports have indicated that the source of the leak was an unknown person from Interior. The information is non-public, sensitive information, the release of which has the potential to jeopardize Tribal government and economic development projects for years to come. The Cheyenne River Sioux Tribe and the Rosebud Sioux Tribe view the leak as a serious and potentially actionable breach of the Interior's trust responsibility.

Nevertheless, the leak demonstrates some harsh facts about the illegal inclusion of ANCs in the Tribal CARES Act calculus. The only guidance that the CARES Act itself provides for how Treasury should allocate the \$8 billion set aside for Tribal governments is that it must be "based on increased expenditures of each such Tribal government . . . relative to aggregate expenditures in the fiscal year 2019." H.R. 748 § 601(c)(7). Although Treasury has not provided any indication of its distribution formula, it must be presumed that the four data points requested in the Certification factor into distribution. In light of that fact, Tribes like the Cheyenne River Sioux Tribe and the Rosebud Sioux Tribe are at a profound disadvantage. In the leaked document, ANCs claimed a total population of 1,073,475, which represents 32.6% of the total population listed for all Tribal governments in the spreadsheet. ANCs claimed 65,292 employees, which represents 16.6% of the total population. ANCs claimed expenditures of \$15,526,338,693, which represents 11% of total expenditures. ANCs claimed a total land base of 40,650,473 acres, which represents a 45.2% of the total land base listed by all tribes in the spreadsheet.

By way of comparison, the Cheyenne River Sioux Tribe, one of the largest federally recognized tribes in population and land base in the nation, claimed a population of approximately 22,000, a land base of 2.8 million acres, nearly 900 employees, and expenditures of roughly \$112 million. The Rosebud Sioux Tribe has roughly 35,600 members, a land base of 1.26 million acres, 800 tribal employees, and similar expenditures. The Oglala Sioux Tribe has similar data to its sister Tribes.

The National Indian Gaming Association has estimated that ANCs could be entitled to up to *half* of the \$8 billion set aside if they are permitted to take from the appropriation set aside for Tribal governments.⁸

STANDARD FOR ISSUANCE OF TEMPORARY RESTRAINING ORDER

In considering a motion for a TRO, “the Court must consider whether the movant has met its burden of demonstrating that ‘(1) it has a substantial likelihood of succeeding on the merits; (2) it will suffer irreparable harm if the injunction is not granted; (3) other interested parties will not suffer substantial harm if the injunction is granted; and (4) the public interest would be furthered by the injunction.’” *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D.D.C. 2001) (internal citation omitted). The standards for a TRO are the same as for a preliminary injunction. *Id.*; *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D.D.C. 2003) (“The same standards apply for both temporary restraining orders and preliminary injunctions.”)

ARGUMENT

I. THE TRIBES ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIM THAT DISTRIBUTION OF CORONAVIRUS RELIEF FUNDS TO ALASKA NATIVE CORPORATIONS IS CONTRARY TO LAW

⁸ Delilah Friedler, *The COVID Relief Bill Set Aside \$8 Billion for Native Tribes. Corporations Could Get Half*, MOTHER JONES, <https://www.motherjones.com/coronavirus-updates/2020/04/the-covid-relief-bill-set-aside-8-billion-for-native-tribes-corporations-could-get-half/> (last accessed Apr. 21, 2020).

Defendant has premised the ANCs’ alleged entitlement to Title V Coronavirus relief funds on the CARES Act’s use of the definition of “Indian Tribe” from ISDEAA. 25 U.S.C. § 5304(e). As set forth in detail herein, whether an entity constitutes an “Indian Tribe” under ISDEAA is a multi-layered question with far-reaching implications. These are nuisances this Court need not address. Rather, this case rests on the operative definition of the entities entitled to receive Coronavirus relief funds under Title V, a narrow question. Those entities are “***Tribal government[s]***” as set forth in Section 601(g): “the ***recognized governing body*** of an Indian Tribe” (emphasis added). As set forth herein, it is beyond doubt that ANCs are not governments for purposes of the CARES Act.

A. Alaska Native Corporations Plainly Are Not “Tribal Governments” as Defined by the CARES Act or by Any Other Standard

In determining who is eligible to receive Coronavirus Relief Funds set aside for Indians under Title V of the CARES Act, the central question is whether the entity is a Tribal government: the “recognized governing body of an Indian Tribe.” H.R. 748 § 601(g). This seven-word clause is simpler and clearer than it seems. Applying the canon against surplusage—giving effect where possible to every word—this definition is comprised of three conjunctive parts. *See, e.g., Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998, 1003 (D.C. Cir. 2016). The entity must be “recognized”; it must be a “governing body” and it must govern an “Indian Tribe.” H.R. 748 § 601(g). If the entity is not “recognized” and it is not a “governing body,” then it does not matter what services it may be eligible to administer under ISDEAA, it is not eligible for Title V Coronavirus funds set aside for Tribal governments.

1. Congress Plainly Limited Title V Funds to Entities That Perform Governmental Functions; Alaska Native Corporations Are Not Governments

If there is any doubt as to what Congress meant when it required Title V CARES Act funds set

aside for Indians to be distributed to “governing bod[ies],” Title V itself should easily resolve those doubts. By its plain terms, Congress enacted Title V of the CARES Act with the express purpose of appropriating much-needed funds in this global pandemic crisis for **governments**: (1) “the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana, and American Samoa;” (2) “count[ies], municipalit[ies], town[s], township[s], village[s], parish[es], borough[s], or other unit of general government below the State;” and (3) “Tribal governments.” H.R. 748 at §§ 601(g)(2), (4), (5). Were this Court to accept the premise that “Tribal governments” under Title V should include “governing bod[ies]” of for-profit corporations that are not controlled by Tribal governments, it would have to ignore the text of Title V as a whole and accept that Congress inserted an illogical exception into its otherwise consistent statutory scheme of providing funds to governments. Statutes may not be interpreted this way. Basic statutory construction requires that courts consider “the entire text [of a statute], in view of its structure and logical relation of its many parts.” *See Mont v. United States*, 139 S. Ct. 1826, 1833 (2019).

If any question exists based on the plain text of the statute that Congress intended “governing bodies” of Indian Tribes to be limited to actual Tribal governments and not-for-profit corporations that are not controlled by or directly benefit Tribes, Congress expressly signaled its intent. Lawmakers consistently telegraphed their intent that Title V of the CARES Act is intended for Tribal governments, not corporations. On March 25, 2020, Minority Leader Chuck Schumer explicitly commented on Title V, noting that this section included “resources for State, local, and Tribal governments that are carrying the weight of their overburdened health networks on their budgets.” He emphasized that Title V is intended to buoy **governments** who are spending more than ever to protect citizens while losing tax revenue. “So we must help our **local governments**,

and we will in this legislation. It will be distributed between both the *local governments, county governments*, and the *State*. In the end, *State and local governments* will now get \$150 billion, with \$8 billion set aside for *Tribal governments*.” 166 Cong. Rec. S2022-04, S2026-27 (daily ed. Mar. 25, 2020) (statement of Sen. Tom Udall distinguishing between corporations and governments and specifically referencing the “574 federally recognized Indian Tribes”); 166 Cong. Rec. S2022-04, 166 Cong. Rec. S2020 (Sen. Maria Cantwell stating “[i]t is so important that we give State and local government and Tribes the resources they need to be on the frontlines in fighting this disease,” then separately describing the separate titles of the CARES Act geared to assist corporate interests); 166 Cong. Rec. S2022-04, 166 Cong. Rec. S2022-04, S2025 (Sen. Cortez Masto stating “[w]e made sure that we also included our local, State, and Tribal communities. We set aside \$150 billion for our governments that are bearing the brunt of the costs for their local health care systems”); (Rep. Anna Eshoo stating that the Title V funds exist “to assist state, local, and tribal governments to maintain essential public services for their residents”); (Rep. Tom Reed stating “I want to echo the remarks of my colleagues about the need for the Secretaries of the Treasury and Interior to incorporate into their analysis the unexpected costs of paying employees’ wages and salaries along with the costs of maintaining facilities during closures of tribal government offices and enterprises.”).

Finally, in an April 1, 2020, letter from Senators Martha McSally and Steve Daines to Defendant and the Secretary of the Interior, they explain:

Indian Country faces among the nation’s most dire of circumstances. Congress understands this and that is why Title V of the CARES Act amends the Social Security Act to create a Coronavirus Relief Fund and reserves \$8 billion within the Fund for payments to *Tribal governments* to use for expenditures incurred due to the COVID-19 public health emergency. For many tribes, revenue from tribally-owned businesses provides the vast majority of operating revenue for *government services* such as health care, law enforcement, and public safety programs. The pandemic has forced many of these enterprises to close or drastically reduce

operations, decimating the funding source tribes use to provide the very **government services** necessary to respond to the crisis. We must ensure tribal-state parity – that **tribal governments** are eligible for all the same support and relief we give to **state governments**, on the same terms – and to tailor our implementation guidance to the unique posture of Indian Country. Emphatically, Congress’ intent in the CARES Act was to get relief dollars into the hands – and accountable discretion – of **state, local, and tribal governments** best positioned to determine how to devote those dollars to meet the needs of their citizens.

Decl. of Ducheneaux Ex. C, Pg. 5. (emphasis added).

Congress did not equivocate. The congressional record does not include any debate or consideration of whether, in addition to Tribal governments, CARES Act funds set aside for tribal governments impliedly should be made available for non-governmental, for-profit corporations—ANCs. Had Congress so intended, it would have appeared in the record. More importantly, had Congress so intended, it could have said so in the Bill, but it did not. The most fundamental canon of construction is that “Congress said what it meant.” *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Congress said Title V funds may be distributed to “governing bodies” of Indian Tribes, and that is what it meant.

Finally, to interpret Title V to apply to ANCs would produce absurd and unjust results as it would permit ANCs to draw Title V funds based upon the double and even triple counting of their people. Within Alaska, ANCs exist, both in form and function, completely separate from the 229 federally recognized Alaska Native Tribal governments. As the leaked spreadsheet demonstrates, regional and village ANCs are competing for funding with federally recognized Tribal governments, both in Alaska and the Lower-48 states. Subsequently, double or triple counting will, in fact, occur if the Defendant accepts any Alaska Tribe, village ANC, and regional ANC applications that overlap, a likely result.

Congress limited Title V to governments for a reason. Provisions for both large corporations and small businesses are included in other sections of the CARES Act. Title IV is aimed at

protecting large corporate interests, and Title I includes protections for small businesses. ANCs participate heavily in Small Business Administration section 8(a) contracting⁹, and there is no reason that they should not be eligible for corporate-focused relief. To interpret Title V to permit an entity to draw funds set aside for Tribal governments while also permitting them to draw funds set aside for a corporation would be absurd and unjust.

On their face, ANCs are non-Tribal, for-profit corporations, not governments pursuant to the plain meaning of Title V. Failing to meet that part of the definitions, ANCs cannot meet Title V's definition of "Tribal government" under Section 601(g). As set forth in further detail below, not only are ANCs not governing bodies, they are not *recognized* governing bodies consistent with principles of federal Indian law.

2. Alaska Native Corporations Are Not Recognized Governing Bodies Under Principles of Federal Indian Law

When it enacted the Federally Recognized Tribe List Act, 25 U.S.C. § 479a, Congress did so with the profound purpose of establishing a method to conclusively identify groups of Indians that the United States legally recognizes as governments with which the United States enjoys a formal political relationship—a government-to-government relationship. H.R. Rep. 103-781, at 3-4 (1993). The Tribe List Act did not create federal recognition. It simply cataloged it. In so doing, Congress explicated its meaning: “[*R*]ecognized,” the term at issue here, “is more than a simple adjective; it is a legal term of art.” *Id.* (emphasis added). Recognition is “a formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a ‘domestic dependent nation,’ and imposes on the government a fiduciary trust relationship to the tribe and its members.” *Id.* Recognition “institutionalizes the tribe’s quasi-

⁹ See *Members—Partners*, Native Am. Contractors Ass’n, <https://www.nativecontractors.org/members--partners-list.html> (last visited Apr. 21, 2020).

sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary.” *Id.* As Congress stated so powerfully, “unequivocal federal recognition of tribal status is a prerequisite to receiving the services provided by the Department of Interior’s Bureau of Indian Affairs, and establishes tribal status for all federal purposes.” *Id.*

Inclusion on the Secretary of Interior’s annual list of federally recognized tribes pursuant to the Tribe List Act is a powerful and, perhaps definitive, indicator of whether that legal relationship exists, which the Ninth Circuit recently affirmed in *Frank’s Landing Indian Community. v. National Indian Gaming Commission*, 918 F.3d 610, 616 (9th Cir. 2019). Examining the phrase “**recognized** as eligible by the Secretary” as set forth in the Indian Gaming Regulatory Act, the Court explained that “[o]n its face, this phrase means that the *Secretary* must recognize an Indian tribe as eligible for special programs and services. And, . . . the significance of Secretarial recognition . . . means that a tribe is federally recognized and that it appears on the Secretary’s annual list.” *Id.* (emphasis added). ANCs do not appear on the list and have not at any time since its enactment.

However, to the extent this Court may require authority outside the Secretary’s list, it is plain that neither the courts, nor the federal government, nor the ANCs themselves, recognize ANCs as governing bodies. The Supreme Court commented upon ANCs’ status in *Alaska v. Native Village of Venetie Tribal Government*, in which it held that ANC lands are not Indian lands as defined under federal law. 522 U.S. at 523-24. As ANCSA extinguished all aboriginal land claims and required the establishment of state-chartered, for-profit corporations, the Court ruled that ANC lands are not Indian lands because they “are neither validly set apart for the use of the Indians as such, nor are they under the superintendence of the Federal Government.” *Id.* at 532. Lower courts have been more explicit, holding that ANCs, as opposed to Alaska Native tribal

governments, are not “governing bodies.” *E.g.*, *Seldovia Native Ass’n v. Lujan*, 904 F.2d 1335, 1350 (9th Cir. 1990) (“Unlike the Native Alaskan Villages in *Native Village of Noatak v. Hoffman*[, 896 F.2d 1157 (9th Cir. 1990)] [the Village Corporation] is not a governmental unit with a local governing board organized under the Indian Reorganization Act . . . [hence it] is not a governing body [and] does not meet the basic criteria of an Indian tribe.”); *Pearson v. Chugach Gov’t Servs., Inc.*, 669 F. Supp. 2d 467, 469, n.4 (D. Del. 2009) (“ANCs are not federally recognized as a ‘tribe’ when they play no role in tribal governance [T]he Court can find no evidence to suggest[] that they are governing bodies.”).

The courts’ treatment of ANCs is consistent with the broader federal view. For example, the Federal Emergency Management Agency’s regulations governing public assistance availability define “Indian Tribal government” as “any federally recognized ***governing body*** of an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Tribe List Act of 1994, 25 U.S.C. 479a [sic]. ***This does not include Alaska Native corporations, the ownership of which is vested in private individuals.***” 44 C.F.R. § 206.201(h) (emphasis added). It is also consistent with the ANCs’ view of themselves. The ANCSA Regional Association explains ANCs’ non-governmental status on its website, conceding that they are operated under “a for-profit model with land title under corporate ownership” that does not enjoy either sovereignty or a government-to-government relationship with the United States.¹⁰ The Arctic Slope Regional Corporation likewise disclaimed a governing function in official Comments to the Internal Revenue Service concerning the General Welfare Exclusion, noting that “tribal entities, ***not [the Arctic Slope Regional Corporation], are the entities recognized by the Department of Interior as having governmental***

¹⁰ See ANCSA REG’L ASS’N, *supra* note 2.

functions. In other words, a governing body of Alaska Natives would constitute an Indian tribal government, but an Alaska Native Corporation would not because it does not exercise governmental functions.” Notice 2012-75 DYSON, 2013 WL 3096205, at *2 (May 31, 2013) (emphasis added).

Cohen’s Handbook of Federal Indian Law, the treatise roundly considered to be the Bible of federal Indian law, has summarized it succinctly: “Tribal governments as opposed to regional and village corporations, are the only Native entities that possess inherent powers of self-government, and that can develop autonomous membership rules The Native regional and village corporations are chartered under state law to perform proprietary, not governmental functions.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 4.07[3][d], 353 (Nell Jessup Newton ed., 2012 ed. Supp. 2019).

ANCs are not Tribal governments under any federal legal interpretation and plainly do not meet the definition of “Tribal government” in Section 601(g).

B. ANCSA Corporations are *Treated* as “Indian Tribes” under the ISDEAA for Very Limited Purposes but Are Not Recognized as Tribal or Governmental in Nature

As previously discussed, the CARES Act defines Tribal governments as “the *recognized* governing body of an Indian Tribe.” H.R. 748 § 601(g) (emphasis added). The CARES Act then defines “Indian Tribe,” using the ISDEAA. ISDEAA defines an “Indian Tribe” as

any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [sic], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

25 U.S.C. § 5304(e). In order to be awarded Title V funds, entities must: (1) be an Indian Tribe as defined under ISDEAA; and (2) have a Tribal government with a *recognized* governing body.

By focusing only on the ISDEAA definition of an “Indian Tribe” and ignoring the requirement

that such a Tribe be governed by a “*recognized* governing body,” Treasury intends to divert critical CARES Act funds away from federally recognized Indian tribes and towards state-chartered, for-profit corporations that are not governed or otherwise controlled by Tribes.

ANCs are not included in ISDEAA’s definition of Indian Tribe in recognition of their status as Tribal governments. Instead, ANCs are included in ISDEAA’s definition of “Indian Tribe” only as a stop-gap to ensure critical services are provided to Alaska Natives in regions where there are no actual Tribal governments, or where Tribal governments choose to compact with them to provide services under ISDEAA.

The IHS’s guidance setting forth the order of preference for what entities it will contract services with under ISDEAA establishes a hierarchy, whereby Tribal governments are given precedence over ANCs:

For the purposes of contracting under Pub. L. 93–638, the Alaska Area will recognize as the village governing body the following entities in order of precedence:

If there is an Indian Reorganization Act (IRA) Council, and it provides governmental functions for the village, it will be recognized.

If there is no IRA Council, or it does not provide governmental functions, then the traditional village council will be recognized.

If there is no IRA Council and no traditional village council, then the village profit corporation will be recognized.

If there is no IRA Council, no traditional village council, and no village profit corporation, then the regional profit corporation will be recognized for that particular village.

Alaska Area Guidelines for Tribal Clearances for Indian Self-Determination Contracts in 1981, 46 Fed. Reg. 27, 178, 27, 179 (May 18, 1981) (“Guidelines”). The Guidelines make clear that an ANC is considered an “Indian Tribe” only as a last resort; that is if there is no tribal government in the area with which to contract services. This is a critical stop-gap because it allows ISDEAA

funds, such as healthcare dollars, to go to urban centers where there is not a singular controlling tribal government that represents all Alaska Natives in that city. There are a significant number of urban Indians that would be left without services without this provision. However, this stop-gap does not transform ANCs into recognized governing bodies.

Ukpeagvik Inupiat Corporation v. U.S. Department of Health & Human Services illustrates that ANCs lack governmental status and are superseded by federally recognized Tribes under ISDEAA. No. 3:13-CV-00073-TMB, 2013 WL 12119576 (D. Alaska May 20, 2013). In 1995, the Ukpeagvik Inupiat Corporation (“UIC”) obtained six resolutions authorizing it to provide certain non-medical support services to the hospital in Utqiagvik, Alaska (then known as Barrow) on behalf of six communities. *Id.* at *1. The resolutions were from three tribal councils and three village corporations. *Id.* In 2013, six tribal councils representing the same communities passed resolutions directing that the dollars to which they are entitled under ISDEAA to be transferred from UIC to the Arctic Slope Native Association (“ASNA”), a tribal nonprofit health and social services organization. *Id.* IHS subsequently transferred the ISDEAA funds at issue to ASNA, and UIC filed suit against the Department of Health and Human Services (“DHSS”) seeking injunctive relief. *Id.*

The court denied UIC’s motion for a preliminary injunction, giving weight to DHSS’s explanation that because each Tribe that provided a resolution was a federally-recognized Tribe, pursuant to the Guidelines, DHHS must defer to resolutions from the Tribes’ governing bodies, rather than resolutions of village corporations, like the resolutions UIC initially obtained in 1995. *Id.* at *2. Because DHHS received resolutions from the six federally recognized Tribes, DHHS was “compelled to comply with the requests of the Tribes” and transfer their ISDEAA funding to ASNA and that it had no authority to deny the transfer because “the Tribes had spoken.” *Id.* at *1-

2.

The courts have consistently interpreted the ISDEAA definition and order of precedence.¹¹ The governing bodies of federally recognized Tribes are given first priority for ISDEAA funds, and when present, control the distribution of those funds. Only if a tribal government does not exist for a specific area, or if it compacts its ISDEAA services with an ANC, does an ANC receive ISDEAA funds? While the inclusion of ANCs in the ISDEAA definition of “Indian Tribe” creates a critical stop-gap to ensure that Alaska Natives living in areas without a tribal government still receive critical services such as healthcare, it does not support what Treasury seeks to do here: confer governmental status upon ANCs, allowing them to compete with Tribal governments for scarce funding exclusively set aside for sovereign governing bodies.

II. THE TRIBES WILL BE IRREPARABLY HARMED IN THE ABSENCE OF AN INJUNCTION

The present controversy seemingly focuses on the mere bureaucratic shuffling around of money—both the payment of money to unentitled parties and the deprivation of money to parties so entitled. Courts in this Circuit have been clear that payment of money does not cause irreparable harm, especially when an illegal payment can easily be corrected. *E.g., Lubow v. U.S. Dep’t of State*, 934 F. Supp. 2d 311 (D.D.C., 2013). Put differently, as the Circuit Court has explained, “economic loss does not, *in and of itself*, constitute irreparable harm.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis added). In this jurisdiction, the mere monetary loss will only constitute irreparable harm “where the loss threatens the very existence of the movant’s business.” *Id.* (citation omitted).

Mere monetary loss, however, is not the harm alleged here. The concerns of Tribal

¹¹ *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471 (9th Cir. 1987).

governments are not, by their nature, financial. Absent sufficient funding under Title V, the Tribes will be unable to protect their people from the threat of the Coronavirus, either from actual disease or the collateral effects of the crisis. Losing access to critical care, especially medical care, is unquestionably irreparable harm in this jurisdiction and others. In *Risteen v. Youth for Understanding*, the court held that loss of health insurance benefits constituted irreparable harm where the plaintiff required critical medical attention. 245 F. Supp. 2d. 1, 16 (D.D.C. 2002); *see also Commc'ns Workers of Am., Dist. 1, AFL-CIO v. NYNEX Corp.*, 898 F.2d 887, 891 (2d Cir. 1990) (finding threat of termination of medical benefits to constitute irreparable harm); *United Steelworkers of Am. v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir. 1987) (finding loss of insurance benefits to constitute irreparable harm); *Whelan v. Colgan*, 602 F.2d 1060, 1062 (2d Cir. 1979).

While the loss of health insurance benefits is comparable here, in fact, the Tribes' position is much graver. The COVID-19 pandemic has created a unique set of irreparable harm circumstances that are already appearing in courts across the United States. For example, the United States District Court for the Northern District of California granted injunctive relief for four detained migrants and ordered their release from the Mesa Verde ICE Processing Facility and Yuba County Jail because they were at high risk of severe illness or death if they contracted COVID-19, and had no way to limit their exposure through social distancing or protective equipment such as masks while in custody. *Ortuño v. Jennings*, No. 20-cv-02064-MMC, 2020 WL 1701724, at *3-5 (N.D. Cal. Apr. 4, 2020). Three of the released detainees have treatment-resistant Diabetes, insulin-dependent Diabetes, or Asthma, while the fourth is an eighty-two-year-old man with a history of hypertension, polycystic kidney disease, and severe malnutrition. *Id.* at *3. The Court found that none of these four high-risk petitioners could

meaningfully if in any manner, adhere to the advice of the country's health officials, including those at the CDC, have repeatedly given to all persons in the United States

as to how to avoid becoming infected with COVID-19, specifically, to engage at all times in social distancing, to use protective equipment such as masks, gloves, or other coverings when in close contact with others, and to frequently wash or otherwise sanitize one's hands.

Id. at *4. Despite any perceived flight risk, the Court found that “under the highly unusual circumstances presented, i.e., a global pandemic of the type not seen in recent memory, the public interest . . . in promoting public health is served by efforts to contain the further spread of COVID-19, particularly in detention centers, which typically are staffed” by local community members. *Id.*

The effect of the Defendant's illegal appropriation of money away from the Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe, and the Oglala Sioux Tribe threatens imminent bodily and existential harm to the tens of thousands of tribal members now living on both reservations. There are simply not enough beds, not enough ventilators, not enough medical staff, and not enough food for the Tribes to handle even a small outbreak without dire consequences. The only IHS facility on the Cheyenne River Reservation is located in Eagle Butte, which can be up to 90 miles away from some parts of the reservation. Decl. of Chairman Frazier, ¶ 9. Even if the sick can make it to the IHS facility, it only has “8 inpatient beds, six ventilators, two negative pressure rooms, inadequate staff, and *zero respiratory therapists* to care for our 10,000 reservation residents.” *Id.* at ¶ 9 (emphasis in original). The closest facility for treating acute COVID-19 patients is a 175-mile, three-hour drive away. *Id.* There is no universe in which the Cheyenne River Sioux Tribe has the medical resources to treat more than six acute COVID-19 patients with their existing medical infrastructure. Additional personnel and supplies will help, but continued funding and improvement of their border control programs are imperative in order to ensure the *literal survival of the Tribes*.

The typical Tribal member living on the reservation faces the same social distancing and lack

of access to supply issues that the plaintiffs in *Ortuño* faced. The average number of residents per home on the Cheyenne River Sioux Reservation is between five and seven people, typically in close quarters, which makes isolating the sick difficult if not impossible. Decl. of Chairman Frazier, ¶ 13. The number of people in these homes means that the rate of infection would be significantly higher on the reservation than elsewhere, with four to six exposed per average household with one sick person. *Id.* The homeless population faces the same difficulties they do anywhere: lack of access to hygiene and sanitation, in addition to shelter life, makes it difficult for the homeless to protect themselves, despite the best efforts of shelter employees. *Id.*; Decl. of Jessica Four Bear, ¶ 10. Additionally, the vast majority of the reservation is rural, so there are few community centers to set up as either isolation wards or safety shelters. Decl. of Chairman Frazier, ¶ 11. School is continuing through paper homework packets because sufficient equipment and internet access are not available to enough schools to make online learning possible, which means that teachers and students must gather and exchange potentially contaminated papers with each other. Decl. of Jessica Four Bear, ¶ 8. Even if online learning were possible, school lunch handout programs would still need to continue weekly meal handouts as many children rely on the school nutrition services to avoid going hungry. *Id.* at ¶ 7. Similarly, hunger vulnerability means residents travel from across the reservation to access the emergency food pantry set up by the Command Center. Decl. of David Nelson, ¶ 4. Because of the cumulative effects of multigenerational poverty, Tribal members are as vulnerable as detainees due to crowded living conditions, hunger, and pre-existing medical conditions. Members of both the Rosebud Sioux Tribe and the Oglala Sioux Tribe are similarly situated and vulnerable.

The Tribes desperately need the funds they are entitled to by Title V of the CARES Act. Based upon ANCs land base, population, employees, and 2019 expenditures, they are poised to receive

an appallingly large share of \$8 billion to which they are not entitled. The Cheyenne River Sioux Tribe and the Rosebud Sioux Tribe are already suffering. Without these funds, they will be devastated and unquestionably irreparably harmed.

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST FAVOR AN INJUNCTION

The balance of harms and the public interest weigh significantly in favor of the Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe, and the Oglala Sioux Tribe as Congress has not authorized the Secretary to disburse Title V funds to ANCs. Under the preliminary-injunction test, the balance of harms and public interest merge when the federal government is an opposing party. *Jubilant DraxImage Inc. v. U.S. Int’l Trade Comm’n*, 396 F. Supp. 3d 113, 120 (D.D.C. 2019). The reason for merging the balance of harms and public interest when the federal government is an opposing party is that the “governments’ interest is the public interest.” *Pursuing Am.’s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). The Secretary’s harm and the public interest are the same because the Secretary’s illegal distribution of Title V CARES Act funds to ANCs harms the public interest of complying with the statutory directives of Congress.

As common-sense dictates, it is well established that “there is generally no public interest in the perpetuation of unlawful agency action.” *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016); *Greatness*, 831 F.3d at 511-12; *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). The public interest does not favor the perpetuation of unlawful agency action, hence “there is a substantial public interest ‘in having governmental agencies abide by the federal laws that govern their existence and operations.’” *League*, 838 F.3d at 12 (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)).

Here, the relevant statutory text is straightforward in that the Secretary is to disburse Title

V CARES Act funds only to Tribal governments, not ANCs, and an injunction preventing the unlawful disbursement of such funds to ANCs is in the public and the Secretary's interest. *See League*, 838 F.3d at 10-14. Issuance of the injunction is in the Secretary's interest because an injunction will ensure that the statutory directive is appropriately enforced, and Tribal governments receive all the funding they need to respond to the COVID-19 crisis adequately. Any insufficient or untimely distribution of Title V CARES Act funds to Tribal governments will compound the already catastrophic impacts of COVID-19 in Indian Country. If a preliminary injunction is not issued, Tribal governments will not be able to properly respond to the severe health, safety, and financial crises currently afflicting their communities. Congress understood the severity of the issues facing these communities when it clearly drafted Title V of the CARES Act to apply only to Tribal governments, and so should this Court. As such, to any extent that the Secretary faces a burden, that burden on the Secretary is not so great that it outweighs the strong public interest in ensuring that unlawful agency decision-making does not prevent Tribal governments from receiving all of the stabilization funds allocated to them—*and only them*—by Title V of the CARES Act.

CONCLUSION

As set forth in detail herein, the Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe, and the Oglala Sioux Tribe respectfully urge this Court to grant their motions for a temporary restraining order and for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Nicole Ducheneaux

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