No. 20-543

In the Supreme Court of the United States

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY,
PETITIONER

v.

CONFEDERATED TRIBES OF THE CHEHALIS
RESERVATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The court of appeals erred in determining that Alaska Native regional and village corporations (ANCs) "do not satisfy the * * * definition" of "'Indian tribe'" in the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 5301 *et seq*. Pet. App. 11a (citation omitted). That determination squarely conflicts with both the federal government's longstanding construction of ISDA and the Ninth Circuit's decision in *Cook Inlet Native Association* v. *Bowen*, 810 F.2d 1471 (1987)—as the D.C. Circuit itself recognized below, notwithstanding respondents' claim that no "legitimate circuit conflict" exists. Confederated Tribes Br. in Opp. 22; see Pet. App. 24a. By holding that ANCs do not meet the ISDA definition of "Indian tribe" as incorporated into the CARES Act, 42 U.S.C. 801(g)(1), the court of appeals rendered ANCs ineligible to receive

hundreds of millions of dollars in coronavirus relief funds during the ongoing public-health and financial crises caused by the COVID-19 pandemic. That erroneous decision warrants this Court's review.

A. The Question Presented Warrants Review

1. Respondents principally contend that further review is unwarranted because "[t]his is a CARES Act case," while the Ninth Circuit's decision in *Cook Inlet Native Association* was an ISDA dispute. Confederated Tribes Br. in Opp. 2; see Ute Indian Tribe Br. in Opp. 12-14; Cheyenne River Sioux Tribe Br. in Opp. 2-3. That putative distinction, however, made no difference to the reasoning of the decision below, which hinged on the question whether ANCs qualify as Indian tribes under ISDA itself. The Ninth and D.C. Circuits have adopted conflicting positions on that important question of statutory interpretation, which has potential implications for any statute that incorporates or parallels the ISDA definition of "Indian tribe."

In *Cook Inlet Native Association*, the Ninth Circuit was "asked to determine the meaning of 'Indian tribe' contained in" ISDA. 810 F.2d at 1472. The question was thus one of statutory interpretation, which did not turn on any "narrow agency practice" (Confederated Tribes Br. in Opp. 17) specific to the contractual arrangements at issue there. The statutory question arose in a dispute between an ANC and another non-ANC organization, each of which asserted a right to enter into ISDA contracts. 810 F.2d at 1472-1473. The non-ANC challenger raised essentially the same argument that the D.C. Circuit accepted in this case—namely, that ANCs do not satisfy the ISDA definition because they "cannot meet the eligibility requirement,"

id. at 1473, *i.e.*, the recognition clause of ISDA's definition of "Indian tribe."

The Ninth Circuit rejected that argument as a textual matter, explaining that reading the recognition clause to exclude ANCs would violate the principle that a "statute should not be interpreted to render one part inoperative," and would "illogically construe[] the language to mandate a result in one clause, only to preclude that result in the next clause." *Cook Inlet Native Ass'n*, 810 F.2d at 1474; see *id.* at 1476 ("[T]he plain language of the statute allows business corporations created under the Settlement Act to be recognized as tribes."). The court further explained that the Department of the Interior had relied on those same "customary rules of construction" in a 1976 memorandum interpreting the ISDA definition to include ANCs. *Id.* at 1474; see Pet. 5-6, 17-18. And the court found that Interior's interpretation, which was also adopted by the Indian Health Service (IHS) in 1977, was consistent with both the drafting history of ISDA and a contemporaneous report by the American Indian Policy Review Commission. 810 F.2d at 1474-1476; see Pet. 26-27. The Ninth Circuit later reconfirmed that the ANC at issue in *Cook Inlet Native Association* was an Indian tribe for ISDA purposes. See *Cook Inlet Treaty Tribes* v. *Shalala*, 166 F.3d 986, 988 (1999).

The Ninth Circuit's decision in *Cook Inlet Native Association* squarely conflicts with the reasoning of the decision below, as the D.C. Circuit acknowledged when it "decline[d] to follow" the decision. Pet. App. 24a. The D.C. Circuit reasoned that "ANCs do not satisfy the ISDA definition," *id.* at 11a, because, in its view, the recognition clause applies to ANCs as a textual matter, see *id.* at 11a-13a, and refers to formal recognition for

government-to-government relations, see *id.* at 13a-18a, which no ANC has ever received. The court also declined to follow the same Interior Department memorandum that the Ninth Circuit had found persuasive in *Cook Inlet Native Association*. *Id.* at 23a-24a. The decision thus turned on ISDA—not the CARES Act, which the court did not cite a single time in its operative reasoning, see *id.* at 11a-23a. And contrary to respondents' suggestion (Ute Indian Tribe Br. in Opp. 13), nothing in the decision below suggests that a future panel of the D.C. Circuit would be free to revisit the panel's erroneous determination that, "because ANCs are not federally recognized" in the formal sense, "they are not Indian tribes under ISDA." Pet. App. 18a.

Respondents' assertion (Confederated Tribes Br. in Opp. 17) that the specific contract dispute at issue in *Cook Inlet Native Association* could not arise again, in light of a 1997 statute, does not diminish the need for further review. The question presented here has potential implications for any federal statute that, like the CARES Act, incorporates or parallels the ISDA definition. Moreover, the 1997 law invoked by respondents presupposes and thus confirms that ANCs qualify as Indian tribes under the ISDA definition. See Pet. 22-23.

2. The fact that this case concerns the ISDA definition of "Indian tribe" as incorporated into the CARES Act, 42 U.S.C. 801(g)(1), only underscores the need for further review. The decision below renders ANCs statutorily ineligible to receive hundreds of millions of dollars of coronavirus relief funds, to the detriment of the many Alaska Natives who benefit from or are served by ANCs. Echoing the court of appeals, respondents contend that the harmful consequences of the decision below will be mitigated to some extent because the

CARES Act also makes funds available to "the states and cities where [Alaska Natives] live." Confederated Tribes Br. in Opp. 38; cf. Pet. App. 25a. But the State of Alaska strenuously disputes that contention and urges this Court to grant review. See Alaska Amicus Br. 5 (stating that the State is not "financially or administratively capable of suddenly providing the programs and services ANCs and other 'Indian tribes' have long provided," and that the CARES Act "set aside a portion of the $8 billion earmarked for Indian tribes for this very purpose").

Indeed, with the exception of other tribes competing for the same pool of funds, all of the relevant stakeholders urge the Court to grant review—including the ANC intervenor-defendants, see Pet. at 17-36, *Alaska Native Village Corp. Ass'n* v. *Confederated Tribes of the Chehalis Reservation*, No. 20-544 (Oct. 21, 2020); the Alaska Federation of Natives (AFN), a statewide organization which represents the interests of both ANCs and Alaska Native villages, see AFN Amicus Br. 1-3; the State of Alaska, which describes the result reached below as "stunning" and "egregious," Alaska Amicus Br. 1; and Alaska's congressional delegation, see Sen. Murkowski et al. Amici Br. 1-5.

3. The question whether ANCs qualify as Indian tribes under the ISDA definition, as incorporated into the CARES Act, is squarely presented in this case. Respondents assert that this case is an unsuitable vehicle because "[n]o ISDA-based record was developed below." Confederated Tribes Br. in Opp. 19. But whether ANCs satisfy the relevant definition of "Indian tribe" is a "legal question," as the court of appeals recognized, Pet. App. 10a—not a factual question requiring an "ISDA-based record."

B. The Decision Below Is Incorrect

Further review is also warranted because the decision below is incorrect. The court of appeals effectively read ANCs out of ISDA's definition of "Indian tribe," despite the express inclusion of ANCs in the definition's Alaska-specific clause—a reference that would be a dead letter if ANCs were simultaneously excluded by the adjacent recognition clause. See Pet. 13-17. No sound principle of textual interpretation requires reading the ISDA definition as self-defeating. That counterintuitive result would be inconsistent with decades of settled understandings and with the multiple post-ISDA statutes that contemplate—in the statutory text—that ANCs qualify as Indian tribes under the ISDA definition.

1. As explained in the government's petition for a writ of certiorari (at 24-25), the court of appeals interpreted the recognition clause to require formal recognition for government-to-government relations. If the recognition clause is understood in that formal sense, then it cannot be applied to ANCs without violating the "surplusage canon—the presumption that each word Congress uses is there for a reason." *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1659 (2017); see, *e.g.*, *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (invoking the "cardinal principle of statutory construction that [a court] must 'give effect, if possible, to every clause and word of a statute'") (citation omitted). ANCs are not sovereign political communities but rather business corporations, established pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.* No ANC can meet the recognition clause as in-

terpreted by the court of appeals, thus rendering a nullity Congress's specific addition of ANCs to the ISDA definition during the drafting process.

The court of appeals sought to avoid that surplusage problem by speculating that, when Congress enacted ISDA, Congress might have been uncertain whether ANCs would be formally recognized in the future. See Pet. App. 18a-23a. Respondents repeat that assertion (Confederated Tribes Br. in Opp. 26-27), but fail to address—let alone rebut—the extensive evidence set forth in the government's petition that ANCs were uniformly understood before and after ISDA as business entities that cannot qualify for recognition as tribes in the formal, political sense. See Pet. 25-28. Like the court of appeals, the evidence of purported uncertainty that respondents identify all pertains to the status of Alaska Native villages, not ANCs. See *ibid.*; accord Alaska Amicus Br. 7, 9 (explaining that an ANC "could never be a tribe * * * in the sense of a separate polity," and that the only lingering uncertainty after ANCSA was "whether Alaska's landless tribes (i.e., villages) would be acknowledged as governmental sovereigns," not whether ANCs would be).

Respondents suggest (Confederated Tribes Br. in Opp. 26) that the inclusion of ANCs is not mere surplusage because ANCs "retain the potential" to be formally recognized in the future. Respondents do not explain how Congress could recognize a private business corporation, established pursuant to a federal statute and incorporated under state law, for sovereign-to-sovereign relations. And respondents do not dispute that ANCs cannot meet Interior's current or historical standards for acknowledgement. Any remote possibility of future

"congressional action" (*ibid.*) fails to explain why Congress *already* acted to insert ANCs into the ISDA definition decades ago.[1]

Alternatively, if the recognition clause is interpreted to refer not to being formally recognized by the federal government for government-to-government relations, but rather to having the requisite status under federal law with respect to delivering programs and services to promote the welfare of Indians, then Congress's decision to include ANCs in an Alaska-specific clause in the ISDA definition of "Indian tribe" demonstrates that *Congress itself* has already determined that ANCs have that status. Pet. 14, 30-31. ANCs were specifically established, and Alaska Native villages were specifically defined, in ANCSA, as the ISDA definition of "Indian tribe" recites. 25 U.S.C. 5304(e). And together, ANCs and Alaska Native villages were to perform a role in Alaska parallel to that of federally recognized tribes elsewhere in the United States. Congress therefore "includ[ed]" them together in a special Alaska clause in the ISDA definition. *Ibid.*

Thus, however the definition is viewed, the court of appeals erred in reading ANCs out of the ISDA and CARES Act definitions of "Indian tribe."

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[1] The legislative history cited by respondents (Confederated Tribes Br. in Opp. 27-29) is not to the contrary. Respondents observe (*ibid.*) that a draft of what would become ISDA's definition of "Indian tribe" contained a version of the recognition clause *before* legislators inserted the express reference to ANCs in the Alaska-specific clause. But that sequence of events only underscores that legislators did not anticipate that the recognition clause would operate to exclude all ANCs from qualifying to enter into ISDA contracts; otherwise, the deliberate insertion of ANCs into the definition would have been pointless. See Pet. 16.

2. The decision below is also inconsistent with decades of settled understandings of the ISDA definition of "Indian tribe," which Congress ratified when it reenacted the definition without change in 1988. Pet. 17-20. When Congress enacted the CARES Act in 2020 and incorporated into it "the meaning given" to the term "Indian Tribe" in ISDA, 42 U.S.C. 801(g)(1), the meaning given to that term had encompassed ANCs for decades. The court of appeals failed to account for that history.[2]

For their part, respondents try to reduce the numerous instances of statutory, administrative, and judicial confirmation of that interpretation to "a lone appellate decision." Confederated Tribes Br. in Opp. 32. But that Ninth Circuit decision, *Cook Inlet Native Association*, *supra*, conclusively settled the status of ANCs for ISDA purposes for the circuit in which every ANC is located. And *Cook Inlet Native Association* hardly stands alone. Congress incorporated the ISDA definition into the CARES Act against the backdrop of not just that decision but also a consistent, longstanding, and public administrative interpretation—tracing to Interior's 1976 memorandum and reiterated multiple times in the ensuing decades. Pet. 17-18; cf. *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 436-438 (1986). And after

[2] The most recent coronavirus relief legislation continues that pattern. In that statute, which the President signed into law on December 27, 2020, Congress defined the eligible grantees for a particular housing assistance program to include Indian tribes as defined in 25 U.S.C. 4103, which contains language defining "federally recognized tribe" that substantially parallels the ISDA definition of "Indian tribe," see 25 U.S.C. 4103(13)(B). Consolidated Appropriations Act, 2021, Pub. L. No. 116-__, Div. N, Tit. V, Subtit. A, § 501(k)(2)(C) (H.R. 133). Congress then added that, "[f]or the avoidance of doubt, the term Indian tribe shall include Alaska native corporations established pursuant to [ANCSA]." *Ibid.*

Cook Inlet Native Association, the Ninth Circuit reconfirmed that ANCs qualify as Indian tribes for ISDA purposes in a 1999 decision. See p. 3, *supra*; see also Pet. App. 67a n.15 (additional district-court authority).

The IHS contracting guidelines cited by respondents do not suggest that IHS (or Interior) has ever wavered from the view that ANCs may qualify as Indian tribes for ISDA purposes. See Confederated Tribes Br. in Opp. 9, 33. To the contrary, the guidelines treat ANCs as eligible to authorize a tribal organization to enter into an ISDA contract—a function that only the governing body of an "Indian tribe" may perform under ISDA. See 25 U.S.C. 5304(j) and (*l*); 46 Fed. Reg. 27,178, 27,179 (May 18, 1981) (listing "village profit corporation[s]" and "regional profit corporation[s]" as entities eligible to authorize ISDA contracts); *Douglas Indian Ass'n* v. *Juneau Area Dir.*, 27 IBIA 292, 293 (1995) (same).[3]

The other regulations cited by respondents (Confederated Tribes Br. in Opp. 10-11) also do not support the decision below, nor do they undermine the longstanding interpretation by the Interior Department and IHS. Most merely repeat the substance of the ISDA definition, followed by a cross-reference to the list of formally recognized tribes: "See annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services." 2 C.F.R. 200.1; see 2 C.F.R.

[3] As the district court explained, ANCs have been treated as "hav[ing] a 'recognized governing body' for purposes" of ISDA contracting. Pet. App. 68a (quoting 25 U.S.C. 5304(*l*)). Respondents therefore err in suggesting that ANCs lack a "recognized governing body" for CARES Act purposes, 42 U.S.C. 801(g)(5). See Cheyenne River Sioux Tribe Br. in Opp. 21-25; Ute Indian Tribe Br. in Opp. 9-12. The court of appeals did not address that contention, and the district court correctly rejected it. Pet. App. 63a-72a.

200.54, 1108.225; 45 C.F.R. 75.2. Those regulations do not purport to exclude ANCs from the ISDA definition, and the Interior Department has separately made clear that ANCs are eligible to enter into ISDA contracts even though they are not included on the annual list of formally recognized tribes. See Pet. 27.

Respondents' reliance on a Treasury regulation implementing an unrelated community-banking program, 12 C.F.R. 1805.104, is similarly misplaced. In light of Interior's expertise as the "agency in charge of Indian affairs," Pet. App. 58a (district court), the CARES Act directs Treasury to consult with Interior before making payments to Indian tribes, 42 U.S.C. 801(c)(7). Treasury did so here; after Interior confirmed its view that ANCs are eligible to be treated as Indian tribes under the ISDA definition, Treasury determined that ANCs are likewise eligible to be treated as Indian tribes for purposes of these CARES Act relief payments. Pet. 8. The court of appeals erred in setting aside that determination.

3. Finally, the court of appeals failed to consider the multiple post-ISDA statutes that presuppose in their text that ANCs meet the ISDA definition of "Indian tribe." Pet. 21-23. Respondents speculate (Confederated Tribes Br. in Opp. 35) that Congress expressly carved out ANCs from the ISDA definition in other contexts in order to make clear that, in the exceedingly unlikely event that the federal government were to formally recognize ANCs for sovereign-to-sovereign dealings in the future, ANCs would nonetheless remain ineligible to be treated as Indian tribes in those other contexts. But the far simpler and correct explanation is that Congress has long understood the ISDA definition

to include, not exclude, ANCs. When Congress incorporated into the CARES Act the "meaning given" to the term "Indian Tribe" under ISDA, 42 U.S.C. 801(g)(1), it made ANCs eligible to receive vital coronavirus relief funds. The decision below contradicts that statutory text, frustrates its purpose, and warrants further review.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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