No. 20-544

In the
# Supreme Court of the United States

ALASKA NATIVE VILLAGE CORPORATION ASSOCIATION, INC., et al.,

*Petitioners*,

JANET L. YELLEN, in her official capacity as Secretary of the Treasury,

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al.,

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF

Respondents insist that the statutory text decides this case, but they would render the single most prominent feature of the relevant text—Congress' express inclusion of ANCs in ISDEAA's definition of "Indian tribe"—wholly without effect. In fact, respondents' superfluity problem runs far deeper. By reading the subordinate "eligibility clause" to limit the definition to tribes recognized as sovereign by the Interior Secretary ("FRTs"), respondents would render well over half of the text—everything from "any Indian tribe" to the eligibility clause—superfluous. Congress knows how to limit a definition to FRTs, and when it does so it does not go to the trouble of expressly including ANCs. That Congress in 2020 chose to incorporate a definition that specifically included ANCs, rather than alternative definitions that omit ANCs and are clearly limited to FRTs, underscores respondents' textual problem.

Respondents' problems do not end with the text. They have no choice but to concede that the specific reference to ANCs was added to legislative language that already included the eligibility clause. They are thus left arguing that by adding ANCs Congress either accomplished nothing or provided only for the remote possibility that an ANC would someday become an FRT. Neither suggestion is plausible. Respondents likewise must concede that Congress reenacted the ISDEAA definition unchanged after administrative and judicial constructions confirmed ANCs' eligibility. And they have no adequate answer for the critical role ANCs have performed under ISDEAA and in Alaska Native life for decades.

The Utes (but not the Confederated Tribes) argue that ANCs lack the requisite "recognized governing body" to be "Tribal governments" under the CARES Act because the word "recognized" is a term-of-art criterion only FRTs can satisfy. That argument renders their principal argument superfluous, as Congress would not need to limit the tribal universe to FRTs twice, once in the eligibility clause and then again in requiring a "recognized governing body." In reality, ANCs are ISDEAA tribes with recognized governing bodies (their boards of directors). Ultimately, the Utes' argument only reinforces that Congress uses both "recognized" and "recognized as eligible" in their ordinary senses, not as terms of art limited to FRTs.

Finally, respondents have no meaningful response to the dire practical consequences of ousting ANCs from ISDEAA and the CARES Act. While they blithely insist that Alaska or Alaska's FRTs could step in, those entities beg to differ and are not capable of fulfilling the federal government's trust obligations to all Alaska Natives. Tens of thousands of Alaska Natives rely on ANCs for essential services, just as Congress intended in ANCSA and ISDEAA. Changing the rules at this late juncture would essentially punish Alaska Natives for Congress' deliberate decision to depart from the Lower-48 tribal model in ANCSA. There is no reason to embrace that inequitable and text-defying result.

## ARGUMENT

### I. ANCs Are "Indian Tribes" Under ISDEAA And The CARES Act.

1. Congress went out of its way to expressly include ANCs in ISDEAA, which defines an "Indian tribe" to mean:

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

25 U.S.C. §5304(e). Respondents acknowledge, as they must, that the definition's primary clause specifically includes ANCs. They nonetheless contend that the express inclusion of ANCs in the primary clause was entirely negated implicitly by the subordinate "which" or "eligibility" clause. That cannot be right. Any construction of ISDEAA under which every ANC categorically fails to qualify as an ISDEAA tribe would defy Congress' deliberate effort to add ANCs to the definition and would render at least nine words ("or regional or village corporation … or established pursuant to") utterly superfluous.

Fortunately, two available constructions ensure that Congress' express inclusion of ANCs was not without effect. First, under the most natural, ordinary-meaning reading of the text, ANCs satisfy ISDEAA's definition because both ANCs and their enrolled stakeholders were "recognized as eligible for

the special programs and services provided by the United States to Indians because of their status as Indians" through ANCSA, enacted just four years earlier and expressly cross-referenced in ISDEAA. ANCs.Br.27-28. This reading comports with ISDEAA's basic purpose; it was not a termination statute or otherwise designed to restrict *who* (*i.e.*, which Natives or Native groups) was eligible for special-federal-Indian programs. Instead, ISDEAA was designed to change *how* such programs were administered—allowing eligible Native entities to distribute funds directly to Natives, without federal intermediation. Second, even if the eligibility clause instead has a term-of-art meaning that imposes a condition (FRT-status) that no ANC can meet, then the clause should be read as simply inapplicable to ANCs—for "an ANC, which is a FRT," is a linguistic impossibility. ANCs.Br.29-30. Either construction gives effect to Congress' specific inclusion of ANCs. Congress either thought the ordinary meaning of ISDEAA's eligibility clause was no obstacle to ANC participation, or it viewed "recognized" as a term-of-art tethered to the traditional tribal model Congress rejected in ANCSA that was simply inapplicable to ANCs. Either construction is far preferable to respondents' reading, which renders Congress' express addition of ANCs without effect. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012) ("*Reading Law*") (preferring a construction that "ensures that a text's manifest purpose is furthered, not hindered").

Respondents cannot really deny the massive superfluity problem their reading creates, so they suggest (CT.Br.31) that superfluity is unavoidable

because ANCs would be captured by the catch-all phrase "other organized group or community." That is wrong. Ensuring a sui generis entity's specific inclusion produces clarity, not superfluity, and Congress could have reasonably worried that ANCs are neither groups nor communities. ANCSA itself distinguishes ANCs from "groups" and "communities."[1] This false-superfluity argument actually highlights respondents' very real superfluity problem, as they cannot explain why Congress wanted to "'remove[] any doubt' that [ANCs] fall within the definition's reference to 'other organized group[s] or communit[ies]," CT.Br.31, only to exclude each and every ANC via the eligibility clause.

Like the D.C. Circuit, respondents suggest that it was unsettled when ISDEAA was enacted whether ANCs were FRTs. But it was certainly settled by 2020, and respondents have no response to the wealth of historical evidence that even in 1975 the only confusion concerned the status of Native *villages*, not ANCs. ANCs.Br.33-35. Indeed, the principal evidence for their uncertainty-over-ANCs'-status theory disproves it. Respondents claim that, in 1976, two Senators "discuss[ed] the uncertainty regarding whether ANCs might qualify as tribes." Ute.Br.30; *see also* CT.Br.34-35. In fact, the "uncertainty" discussed had nothing to do with whether ANCs might be FRTs

[1] For example, ANCSA distinguishes in the disjunctive between "any Native *organizations*, or any tribe, band, or identifiable *group* of American Indians," 43 U.S.C. §1601(d) (emphasis added). ANCSA also defines "Native village" to include a "group" and "community," *id.* §1602(c), but omits those terms in reference to ANCs, *id.* §1602(g), (j).

(they clearly were not) or were ISDEAA "tribes" (they clearly were). The uncertainty concerned which ISDEAA "tribe"—the village, village ANC, or regional ANC—should get priority if they opted to "compete for [the same] Federal funds." 122 Cong. Rec. 29,480-81 (Sept. 9, 1976). That priority question arose only because *all three are eligible for funds as "Indian tribes" under ISDEAA*. Far from demonstrating confusion, that colloquy confirms that ANCs were ISDEAA tribes, but not FRTs, from the beginning.

Respondents are thus left contending that there is no superfluity problem because it is not "*impossible* for [ANCs] to achieve federal recognition." CT.Br.32. But Congress specifically added ANCs to legislative language that already included the eligibility clause not to account for the speculative possibility that some later Congress might convert ANCs into FRTs, but to "include [the] regional and village corporations established by [ANCSA]." H.R. Rep. No. 93-1600, at 14 (1974). The executive branch bill summary likewise flatly stated that "'Indian Tribe' is defined to include Alaska Native villages or Regional or Village Corporations under [ANCSA]," rather than being designed to account for remote future possibilities. AFN.Br.15 n.19 (citation omitted).

Respondents are studiously vague about what criteria for recognition would allow ANCs to become FRTs, and they do not seriously contend that ANCs could ever satisfy the traditional criteria identified by petitioners and the government, such as sovereign land ownership and history. *See* ANCs.Br.33-36; U.S.Br.39-43. To the extent that respondents suggest that Congress treats Alaska differently and Congress'

"plenary power over Indian affairs" is sweeping enough that it could simply recognize ANCs as eligible for special-federal-Indian programs without regard to the traditional criteria, CT.Br.32, 35-37, that is an apt description of what Congress did in ANCSA.

Finally, respondents' superfluity problem does not end with negating the nine words that expressly reference ANCs established pursuant to ANCSA. Under their view, ISDEAA's definition would have the exact same scope if it eliminated all 34 words between "any Indian tribe," and "which is recognized …." Such a definition, which would render over half the text without effect and have the subordinate eligibility clause do all the work, is manifestly not the definition Congress wrote and not what Congress plausibly intended when it specifically added ANCs to the definition.

2. The most straightforward way to give effect to every word in the text and honor Congress' evident intent is to recognize that ANCs *satisfy* ISDEAA's eligibility clause. While respondents spill considerable ink insisting that the eligibility clause must apply to ANCs, they have little to say about why ANCs do not satisfy the clause if its words are given their ordinary meaning, given that Congress itself recognized that ANCs were eligible for special-federal-Indian programs when it established them in ANCSA.

Respondents suggest that the role of distributing special-federal-Indian benefits and serving the needs of Alaska Natives could be met by villages, which are FRTs. But even setting aside that small and often-remote villages are only one component of Alaska Native life and ill-suited to tackle regional problems,

*see infra* Part III; AFN.Amicus.6-7, 22-23; Delegation.Amicus.25-28, respondents ignore that ANCSA required the Interior Secretary to "enroll" all eligible Alaska Natives in a regional ANC, rather than in a village or FRT, *see* 43 U.S.C. §1604(b). That reflects the reality that, in both 1971 and 2020, tens of thousands of Alaska Natives were eligible for special-federal-Indian programs but not affiliated with any FRT.[2] And that is why even some respondents conceded below that "a significant number of [Alaska Natives] … would be left without services" if ANCs were ineligible to provide them. Dist.Ct.Dkt.76-2 at 15. Accordingly, if ANCs do not satisfy the eligibility clause by virtue of ANCSA and are ineligible to provide special-federal-Indian services to Alaska Natives, then ANCSA's promise that "Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans," 43 U.S.C. §1626(d), will have proven illusory.

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[2] There is no analog to this dynamic in the Lower 48. While Natives without FRT-affiliation exist in the Lower 48, they were not specifically directed to enroll in sui generis Native entities that Congress established in an avowed effort to avoid replicating the Lower-48 model. Congress has long been well aware of this Alaska-specific dynamic. In 1977, when memories of both ISDEAA and ANCSA were still fresh, the American Indian Policy Review Commission (AIPRC), composed of three Senators, three House members, and five Indian leaders, told Congress that "[t]o limit benefits of programs only to Natives who could apply through a conventional tribal organization might disqualify certain Alaska Natives, who no longer adhere to such organizations but who are organized currently in other forms, such as regional and village corporations under [ANCSA]." 1 AIPRC, *Final Report to 95th Cong., 1st Sess.*, 495 n.21 (Comm. Print. 1977).

In sum, the most natural reading of ISDEAA, and the reading that makes sense of the legislative chronology and honors Congress' evident intent, is the one the ANCs have advocated all along: ANCs satisfy the eligibility clause by virtue of ANCSA. Congress established ANCs in 1971 as unique Native entities designed to promote the welfare of Alaska Natives without replicating the Lower-48 tribal model. To that end, Congress required all Alaska Natives to enroll in an ANC, not in FRTs. Then, just four years later, when Congress was not trying to restrict eligibility for special-federal-Indian benefits, but only seeking to minimize the direct federal role in their distribution, Congress specifically included the "regional or village corporation[s] … established pursuant to [ANCSA]" among the Native entities eligible to supplant the federal role. Congress added the specific reference to ANCs to legislative language that already included the eligibility clause, but perceived no contradiction (or need to place ANCs and a duplicative cross-reference to ANCSA after the eligibility clause), for the straightforward reason that Congress recognized ANCs as eligible to provide special-federal-Indian benefits to Alaska Natives in ANCSA.

3. Unable to credibly deny that ANCs satisfy the ordinary meaning of the eligibility clause, respondents urge the Court to eschew ordinary English in favor of a term-of-art construction under which "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" is really longhand for "federally recognized tribe." *See* CT.Br.25. But there is no adequate basis for departing from ordinary meaning here. Not only are ordinary-meaning constructions generally

favored, *Reading Law* 69, but the eligibility clause evolved from ordinary, non-technical language that did not even use the word "recognized." *See* ANCs.Br.10, 44 n.7. Moreover, the final text asks whether Native entities are "recognized as eligible," not whether they are "eligible via recognition." That eligibility-not-recognition focus comports with both the express inclusion of ANCs and ISDEAA's overall goal of changing the mode of delivering benefits to eligible groups, rather than altering the universe of recognized tribes.

Undeterred, respondents read the eligibility clause as an implicit cross-reference to the formal sovereign recognition process that would exclude ANCs, defeat Congress' evident intent in specifically adding them to the ISDEAA definition, and render 34 words in that definition superfluous. That would be a heavy lift even if eligibility for special-federal-Indian programs and recognition of FRT-status were one and the same. But they are in fact separate (albeit related) concepts that Congress generally addresses separately. And while FRT-status and eligibility for special-federal-Indian benefits often go hand-in-hand in the Lower 48, Congress consciously departed from that model in ANCSA by establishing entities eligible for special-federal-Indian programs but not formally recognized as sovereigns.

The Indian Gaming Regulatory Act (IGRA), which ties gaming to sovereignty over reservation land, provides an example of Congress treating FRT-status and special-federal-Indian-program eligibility separately. IGRA defines "Indian tribe" as any "tribe, band, nation, or other organized group or community

of Indians which … is recognized as eligible *by the Secretary* for the special programs and services provided by the United States to Indians because of their status as Indians, and … is *recognized as possessing powers of self-government*." 25 U.S.C. §2703(5) (emphases added). If ISDEAA's eligibility clause alone were synonymous with "formal recognition," then all the italicized words would be superfluous. *See also, e.g.*, *id.* §1301(1) (defining "tribe" for Indian-Civil-Rights-Act purposes as group "recognized as possessing powers of self-government"). Other statutes limit the tribal universe to FRTs, not by focusing on eligibility for special-federal-Indian programs, but by express cross-reference to the List Act or recognition "by the Secretary." *See, e.g.*, 12 U.S.C. §5481; 25 U.S.C. §§164, 1903(8), 2703(5), 2719(b)(1)(B), 3653(3), 4302(5)(B), 5130(2), 5131(a), 5136(a). As all those statutes reflect, eligibility and recognition are not co-extensive, and when Congress wants to confine a tribal definition to FRTs, it says so directly, not by expressly including ANCs and referencing eligibility.[3]

Respondents' term-of-art theory has even more trouble explaining NAHASDA, which respondents largely ignore. NAHASDA defines "federally recognized tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians,

[3] Even the termination and restoration statutes that respondents and the D.C. Circuit invoked typically discussed recognition and eligibility for special-federal-Indian benefits separately. *See*, *e.g.*, Pub. L. No. 95-281, §1(a), (c), 92 Stat. 246, 246 (1978). The loss of special-federal-Indian benefits was an acknowledged *consequence* of termination, but not the *means* by which recognition was withdrawn.

including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA], that is recognized as eligible for [special-federal-Indian programs] pursuant to [ISDEAA]." 25 U.S.C. §4103(13)(B). Nothing about that definition makes sense under respondents' term-of-art construction. NAHASDA was passed one year after the List Act, so if Congress wanted to limit eligibility to List-Act tribes, a simple List-Act cross-reference would do. Instead, the definition cross-references both ANCSA and ISDEAA, and features the same ANC-inclusive language as ISDEAA. Moreover, NAHASDA fortifies the conclusion that, at least in 1996, Congress understood ANCs to be "recognized as eligible" for special-federal-Indian programs "pursuant to [ISDEAA]." *Id.* Respondents have no answer to any of that, or to the reality that NAHASDA is one of the many "laws under which ANCs have been awarded grants" for years. U.S.Br.18; *see FY 2020 Final IHBG Funding*, HUD, https://bit.ly/3rYBY9C (last accessed Apr. 9, 2021) (detailing extensive NAHASDA grants directly to ANCs).

Similarly, respondents have no satisfactory answer for statutes, like CERCLA and ITEDSDA, that use ISDEAA's definition, eligibility clause and all, but specifically *exclude* ANCs for at least some purposes. *See* 42 U.S.C. §9601(36); 25 U.S.C. §3501(4)(B); ANCs.Br.38-41. Their only response is to claim that Congress must have wanted to establish a permanent bulwark against any ANC that might one day become an FRT. CT.Br.50. That is doubly nonsensical. Congress legislates in the present tense, not to guard against remote and speculative future possibilities,

like a sui generis, non-sovereign Native entity being converted into an FRT. But if that remote possibility somehow came to pass, respondents offer no theory why CERCLA would then purposefully exclude that newly metamorphosed FRT. The actual explanation is far more straightforward: The expressly-ANC-inclusive ISDEAA definition has always included ANCs, despite its eligibility clause. Thus, when Congress borrowed that definition in CERCLA and wanted to exclude ANCs, it had to do so expressly. The eligibility clause did not already do that work.

4. In all events, if the eligibility clause really had some term-of-art meaning limited to the formal sovereign-recognition process characteristic of the traditional Lower-48 tribal model and a complete mismatch for congressionally established ANCs, that would just compel the conclusion that the general eligibility clause does not apply to the specifically included ANCs. *See Reading Law* 183-84 (specific provisions trump general ones to avoid apparent contradictions). As this Court just reiterated, while the series-modifier canon can be a useful interpretive tool, it yields when it would produce "a 'linguistically impossible' or contextually implausible outcome." *Facebook, Inc. v. Duguid*, No. 19-511, slip op. 9 (Apr. 1, 2021) (quoting *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1141 (2018)). Although petitioners invoked *Encino* and emphasized that an "ANC, which is an FRT," is just such a linguistic impossibility, ANCs.Br.29-30, respondents ignore *Encino* and the limits of the series-modifier canon.

Respondents briefly and bravely insist that everything that precedes the eligibility clause

constitutes a "single, integrated list" that must interact with the eligibility clause identically, CT.Br.20, but that is inaccurate and ahistorical. They elsewhere admit that the definition contains a "list of parallel nouns describing different types of Indian groups," separate and distinct from the later-added "phrase that refers … to Alaska Native … corporations." CT.Br.19. In fact, ISDEAA's definition includes a general list, an expressly inclusive sub-list, and a restrictive modifying clause that, if interpreted one way, would categorically exclude most of the expressly included items. That is an unusual structure, but any fair effort to give that text meaning should avoid a reading that excludes items on the sub-list, especially when they were added after the restrictive modifying clause was in place. *See Reading Law* 63. Even respondents do not suggest that a caretaker instructed "to feed the cats, dogs, and goldfish, which are barking," ANCs.Br.45, should leave the cats and goldfish unfed. The humane inference that the un-barking cats and goldfish should not be left to starve would be inescapable if they were a late addition to a note that previously addressed only barking dogs.

The plausibility of reading the eligibility clause as simply inapplicable to ANCs if it is a term-of-art reference to a process that would exclude ANCs is strengthened by the relative specificity of the reference to ANCs. The other nouns in the broader list are general terms in far greater need of a restrictive modifier. The universe of "band[s], nation[s], or other organized group[s] or communit[ies]" is open-ended and virtually limitless. By contrast, the universe of "regional [and] village corporation[s] … established

pursuant to [ANCSA]" is closed and self-defined. There are, for example, exactly 12 regional ANCs and no need for a restrictive modifier to limit the universe of eligible ANCs. And since all ANCs were equally eligible for special-federal-Indian benefits under ANCSA, all ANCs were sensibly included in ISDEAA and made eligible to distribute those benefits themselves rather than relying on federal intermediaries. Accordingly, reading the eligibility clause to modify all the general open-ended nouns, but not the specific, self-contained reference to ANCs, would leave every word in the statute with work to do. Certainly that reading has far more to recommend it than one that allows the eligibility clause to render Congress' express inclusion of ANCs meaningless.

5. Even if there were some uncertainty as to whether ANCs initially satisfied ISDEAA's definition, all doubts would have been eliminated by subsequent enactments passed after ANCs' status as ISDEAA tribes was settled by administrative practice and judicial construction. ANCs have participated in ISDEAA as "tribes" with the executive's blessing since ISDEAA's inception, and their participation was sufficiently open and notorious that it drew a challenge that was firmly rejected in *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471 (9th Cir. 1987). *Bowen* embraced the executive's longstanding position that ANCs were ISDEAA tribes and settled the issue in the home circuit of every ANC. Congress reenacted ISDEAA's definitional section the next year. It modified several definitions, but reenacted ISDEAA's definition of "Indian tribe" untouched. That is exactly the kind of reenactment credited even by ratification-argument skeptics. *See*, *e.g.*, *Reading Law* 322-26.

The 1988 ISDEAA reenactment hardly stands alone. That same year, Congress amended ANCSA to underscore that "Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans," "[n]otwithstanding any other provision of law," 43 U.S.C. §1626(d), knowing full well that ANCs were the only mechanism to fulfill that promise for tens of thousands Alaska Natives enrolled in ANCs, but with no FRT-affiliation. Then, in subsequent years, Congress enacted statutes like NAHASDA, ITEDSDA, and Section 325 that presuppose the ANCs' status as ISDEAA "tribes."

Respondents try to sow confusion over whether and to what extent ANCs actually enter into ISDEAA contracts. But ANC ISDEAA contracts formed the backdrop of *Bowen* and other federal cases, such as *Ukpeagvik Inupiat Corp. v. DHHS*, 2013 WL 12119576, at *1 (D. Alaska 2013) (ANC contract with IHS under ISDEAA). Perhaps not surprisingly then, in district court, "[a]ll parties, even the Confederated Tribe Plaintiffs, concede[d] that ANCs may enter into ISDEAA contracts." U.S.Pet.App.65. Respondents now try to walk that back, insisting that an ANC can enter into an ISDEAA contract "*only on behalf of a recognized village* … not in an ANC's own right." CT.Br.41. But that is demonstrably false—ANCs are ISDEAA "tribes" that, just like FRTs, can enter into contracts on their own behalf, and they play a critical role in areas where there is no FRT. Even respondents' own sources refute their claim. Their principal authority is a 1981 IHS guidance document establishing an "order of precedence" among Alaska Native entities serving the same region "[f]or the purposes of contracting under [ISDEAA]." 46 Fed.

Reg. 27,178, 27,179 (May 18, 1981). But as with the Senate colloquy discussed earlier, this discussion of priority (or "order of precedence") among eligible Native entities presupposes that multiple entities, *including ANCs*, are independently eligible to enter ISDEAA contracts—as ANCs have been doing for decades.

To the extent respondents fault the ANCs for the absence of more ISDEAA contracts in the record, Ute.Br.7, that elevates chutzpah to an art form. This challenge was brought by respondents, some of whom not only opposed the ANCs' intervention, but tried to block the ANCs from introducing *any* evidence at all for fear it would slow down the progress of their highly expedited APA challenge to the executive's decision to award relief funds to ANCs.

Respondents attempt to muddy the waters by suggesting that ANCs contract under ISDEAA only as "tribal organizations" pursuant to FRT authorization. Not so. ANCs contract on their own accord and, just like FRTs, can designate "tribal organizations" to execute ISDEAA contracts on their behalf; that was the backdrop of *Bowen*. ANCs need no one's authorization when not serving other ISDEAA tribes and provide critical services in areas without FRTs. At the same time, all ISDEAA "tribes"—ANCs and FRTs alike—operate in the shadow of ISDEAA's requirement that any entity (whether ANC, FRT, or separate tribal organization) performing services for multiple ISDEAA tribes must obtain authorization from all of them. *See* 25 U.S.C. §5304(*l*). It is that requirement, and not any inability to enter ISDEAA contracts on their own, that explains why regional

ANCs provide some services to members of FRTs within their regions with the authorization of those FRTs. ANCs themselves have submitted scores of authorizing resolutions pursuant to §5304(*l*)—every one of which would have been unnecessary if ANCs are not ISDEAA tribes. *See, e.g.*, Dist.Ct.Dkt.86-1 (attaching several ISDEAA authorizing resolutions submitted by Chugach Alaska Corporation).

Section 5304(*l*) also fully explains why Congress enacted Section 325 and why that statute reinforces ANCs' status as ISDEAA tribes. When CIRI assumed the federal government's responsibilities at specific Anchorage health facilities serving Natives from throughout Alaska, Congress relieved CIRI of the need to submit "any further authorizing resolutions from any other Alaska Native Region, village corporation, Indian Reorganization Act council, or tribe," Pub. L. No. 105-83, §325(d), 111 Stat. 1543, 1598 (1997)—in other words, without complying with §5304(*l*). There would have been no need to relieve CIRI of the burden of obtaining authorizing resolutions *from other ANCs* if ANCs were not ISDEAA "tribes" in the first place. *See* ANCs.Cert.Reply.4-5; CIRI.Amicus.29-31. Moreover, §325(d) governs only the specific facilities at issue there, and thus does not explain CIRI's myriad other ISDEAA contracts. Indeed, CIRI's compact pre-dated §325(d) by three years, and CIRI had been contracting under ISDEAA for more than a decade. *See* CIRI.Amicus.16-18; Dist.Ct.Dkt.78-2, Ex.2.[4]

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[4] Respondents fare no better attempting to dismiss ANCs' contracts with BLM as owing to separate statutory authority. *See* CT.Br.45 n.8. Ahtna, Inc.'s 2010 survey contract with BLM

In short, the federal government's treatment of ANCs as ISDEAA "tribes" has been neither "anomalous" nor sporadic. CT.Br.41. It has been a fundamental reality of Alaska Natives' daily life for more than 45 years, and it has been ratified by Congress at every turn. To accept respondents' position thus would require this Court to conclude that executive after executive persisted in issuing *ultra vires* ISDEAA contracts and NAHASDA grants to ANCs, while Congress after Congress persisted in enacting statutes that are somewhere between superfluous and nonsensical. The far more logical explanation for the decades of consistent congressional, executive, and judicial treatment of ANCs as ISDEAA "tribes" is that all three branches of the federal government are right about the meaning of ISDEAA, and respondents and the court below are mistaken.

## II. ANCs Have "Tribal Governments" Under The CARES Act.

The Utes alone argue that ANCs lack the requisite "Tribal governments" under Title V of the CARES Act because they have no "recognized governing body." Ute.Br.10; *see* 42 U.S.C. §801(g)(5). That argument renders respondents' principal argument superfluous (or worse), as Congress would

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is illustrative. It begins: "This agreement, denoted a Self-Determination Agreement, is entered into by [BLM], for and on behalf of the United States pursuant to title I of [ISDEAA]…." BLM Agreement L10AV20006, ¶1.1, https://bit.ly/3g1wuZc (last accessed Apr. 9, 2021); *accord, e.g.*, BLM Agreement NAA050019, ¶1.1, https://bit.ly/39Sm8ab (last accessed Apr. 9, 2021) (same for 2005 Chugach-BLM agreement).

not have needed to limit "Tribal governments" to FRTs if ISDEAA's eligibility clause already did that work. Moreover, given that Title V defines "Indian Tribe" by reference to ISDEAA solely for purposes of informing the scope of the "Tribal governments" eligible for Title V funding, it would be nonsensical for Congress to first pick a "Tribe" definition that expressly mentions ANCs (and is the "gold standard" for including ANCs in statutes, Delegation.Amicus.22), only to exclude ANCs through the subtle stratagem of referring to a "recognized governing body." No one would argue that a statute that defined "State" to include the District of Columbia solely to inform which "State governments" qualify for aid actually excludes the District because it lacks a "State government." The Utes nonetheless insist that ANCs are "Indian Tribes" but lack "Tribal governments."

The Utes do not dispute that ANCs are governed by boards of directors, *see* ANCs.Br.47-48, or that those boards constitute ANCs' "recognized governing bod[ies]" under any ordinary understanding of that phrase. Nor could they: The ordinary meaning of "governing body" is "group of (esp. corporate) officers or persons having ultimate control," Governing Body, *Black's Law Dictionary* (11th ed. 2019), and the lead example in *Black's* is "the board of directors … of XYZ, Inc.," *id.* Instead, respondents contend that the bare word "recognized" is a "term of art" that, when "used in Indian law," always means "recognition of the tribe as a separate sovereign." Ute.Br.13, 16, 24. That is demonstrably incorrect.

Countless provisions in Title 25 (entitled "Indians") use "recognized" consistent with its

ordinary meaning, not as a term-of-art referring to sovereignty or FRTs. To take just one example, 25 U.S.C. §309 uses "recognized" four times, but not one has anything to do with sovereignty. Such ordinary-meaning uses of "recognized" are common throughout Title 25. *See, e.g.*, *id.* §4352(3) (defining "Native Hawaiian organization" as one, *inter alia*, "recognized for having expertise in Native Hawaiian culture and heritage"). Nor does the phrase "recognized governing body of an Indian tribe" carry a term-of-art meaning limited to FRTs. To the contrary, that phrase comes verbatim from ISDEAA, and ANC boards of directors have always been understood as "recognized governing bodies" for ISDEAA purposes, *see* ANCs.Br.48-49 (citing 1977 BIA guidelines)—a point that even some respondents have conceded, *see* U.S.Pet.App.65-66.

Remarkably, the Utes claim that courts "uniformly" hold that ANCs' "boards of directors are not recognized governing bodies of Indian Tribes." Ute.Br.22. In reality, no court has *ever* held that an ANC board is not a "recognized governing body of an Indian tribe" under ISDEAA or any other statute expressly including ANCs in its definition of "Indian tribe." Instead, the cited cases reach only the unremarkable conclusion that an ANC's board does not qualify if the ANC itself is *not* included in a statute's definition. *See, e.g., Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335 (9th Cir. 1990) (ANC board does not qualify under 28 U.S.C. §1362, which applies only to List-Act tribes).

Such decisions reinforce that Congress sometimes employs ANC-inclusive definitions like ISDEAA's and

sometimes uses narrow definitions limited to FRTs, but there is no precedent for an approach that includes ANCs as "Tribes" only to exclude them as "Tribal governments." The Utes' failed effort to make the CARES Act the first such statute underscores that terms like "recognized" and "recognized as eligible" are not terms of art with a single meaning throughout federal Indian law. Instead, they are words with ordinary meanings that are entirely compatible with the single clearest feature of ISDEAA's text and legislative evolution—namely, the specific inclusion of the ANCs established pursuant to ANCSA.

## III. Ousting ANCs From ISDEAA And The CARES Act Would Have Devastating Consequences For Alaska And Its Natives.

Congress' decision to treat ANCs as "Indian tribes" in ISDEAA and the CARES Act reflects the reality on the ground in Alaska. "It is not an overstatement that nearly all of Alaska's indigenous people, urban and rural, rely on ANCs[.]" Delegation.Amicus.25.

Respondents and their amici insist that any disruption caused by ousting ANCs from ISDEAA would be minimal because the State or FRTs could fill the breach. That assertion ignores both the nature of ISDEAA and the on-the-ground reality in Alaska. As to the former, respondents gloss over that ISDEAA is the means through which *the federal government* fulfills *its* trust responsibilities to Native peoples. ANCs play a critical role in distributing tens of millions of dollars in special-federal-Indian benefits annually. If ANCs are ineligible, then the federal government, not the State, would be obligated to fill

the void, even though it lacks the infrastructure to resume a direct role after 45 years of self-determination. *See* CIRI.Amicus.5, 24 (noting IHS provides no direct health services in Alaska). The idea that Alaska could fill the gap is flawed legally and factually. ISDEAA does not contemplate the provision of special-federal-Indian services by States, and Alaska has made clear that it is not "financially or administratively capable of … supplying the programs and services that ANCs have long provided." Alaska.Amicus.5.[5]

Nor could FRTs in Alaska fill the void. There are thousands of Alaska Natives with no FRT-affiliation, and thousands more that live in densely populated areas far removed from their home villages. For them, it is ANCs or nothing. Cutting off ANC participation in ISDEAA and NAHASDA could leave them literally out in the cold. *See* CIRI.Amicus.19-26; AHA.Amicus.19-21.

Moreover, while FRTs are numerous in Alaska, they are typically small and remote from where many Alaska Natives live, work, and obtain health care. Alaska's 229 FRTs account for 40% of all FRTs, but

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[5] Respondents repeat their suggestion that ANCs should not receive Title V funds because "tens of millions" in PPP loans "went to ANCs." Ute.Br.1. They neglect to mention that Lower-48 FRTs and their subsidiaries received *hundreds of millions of dollars* in PPP loans, largely for Indian casinos. *See* ANCs.Cert.Reply.12 (debunking this PPP argument); ProPublica, *Approved Loans for New Mexico Organizations*, https://bit.ly/3sOSSZv ($11M to Sandia's casino/resort; $6M to Navajo Nation's gaming enterprises); *see also SBA Allows Tribal Casinos to Apply to Newly Replenished Paycheck Protection Program*, Nat'l L. Rev. (Apr. 27, 2020), https://bit.ly/39zi12M.

*just 2.5%* of all enrolled Native Americans. *See* Tina Norris et al., *The American Indian and Alaska Native Population: 2010*, Census.gov (Jan. 2012), https://bit.ly/3sNvnQG; *Tribal Population*, CDC, https://bit.ly/3fz3W9q (last accessed Apr. 9, 2021). While the average Lower-48 FRT has over 8,000 enrolled members (and the infrastructure to match), the average FRT in Alaska has 325—and some have fewer than 12. *See* Norris, *supra*. As the Alaska Federation of Natives, which includes 165 of Alaska's 229 FRTs among its members, has explained, in "contrast to Lower 48 FRTs, which operate gaming and other businesses and manage substantial land reservations," "most Alaska FRTs have little capacity." AFN.Amicus.6.

None of that is an accident. Congress consciously departed from the Lower-48 model in ANCSA, in part because of Alaska's unique geography and in part out of dissatisfaction with the Lower-48 reservation-based model. To expect Alaska FRTs to look like and operate like Lower-48 FRTs, and to ignore the important and unique role ANCs play in Alaska, is to ignore history and defy Congress' promise that its unique approach to Alaska Natives would not deprive them of an equal share of special-federal-Indian benefits. *See* 43 U.S.C. §1626(d). Congress kept that promise in 1975 by specifically including ANCs in ISDEAA's tribal definition, and again in 2020 by employing that ANC-inclusive definition in lieu of alternatives that were obviously limited to FRTs. There is no reason for this Court to break that promise by adopting a construction that ignores Congress' evident intent in ANCSA, ISDEAA, and the CARES Act.

## CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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