ORAL ARGUMENT HAS BEEN SCHEDULED FOR SEPT. 11, 2020

Nos. 20-5204, 20-5205, 20-5209

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al.,

Plaintiffs-Appellees,

UTE TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, 20-CV-01070,

Plaintiff-Appellant

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF U.S. DEPARTMENT OF THE TREASURY,

Defendant-Appellee,

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

Intervenor-Defendant-Appellees

On Appeal from the United States District Court for the District of Columbia,
Nos. 1:20-cv-01002-APM, 1:20-cv-01059-APM, 1:20-cv-01070-APM

BRIEF FOR INTERVENOR-DEFENDANT-APPELLEES

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August 18, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*. The Parties and *Amici* are accurately stated in the Federal Government Appellee's Brief (Document #1857150).

B. Ruling Under Review. The ruling under review is accurately stated in the Federal Government Appellee's Brief (Document #1857150).

C. Related Cases. Counsel is aware of no related cases other than those listed in the Federal Government Appellee's Brief (Document #1857150).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), each Intervenor-Defendant-Appellee—Alaska Native Village Corporation Association; the Association of ANCSA Regional Corporations Presidents/CEOs; Ahtna, Inc.; Akiachak, Ltd.; Calista Corp; Kwethluk, Inc.; Napaskiak, Inc.; Sea Lion Corp.; and St. Mary's Native Corp.—certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes

Regulations

Other Authorities

GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
ANC	Alaska Native village corporation and/or Alaska Native regional corporation
ANCSA	Alaska Native Claims Settlement Act
BIA	Bureau of Indian Affairs
CARES Act	Coronavirus Aid, Relief, and Economic Security Act
ISDEAA	Indian Self-Determination and Education Assistance Act
List Act	Federally Recognized Indian Tribe List Act
NAHASDA	Native American Housing Assistance and Self-Determination Act

INTRODUCTION

Appellees and Appellants agree on at least one thing: The plain text decides this case. And the clearest aspect of the relevant text is that Alaska Native Corporations are expressly included in the statutory definition of "Indian tribes." Appellants insist that Congress contradicted that express textual inclusion of ANCs through the subtle stratagem of adding a subordinate eligibility clause that applies to, yet categorically excludes, all ANCs. That submission is deeply flawed. If the eligibility clause is given its ordinary meaning, then ANCs plainly satisfy it, as they are eligible to receive funds under numerous statutes that make benefits available only to Native peoples because of their status as Natives. Conversely, if the eligibility clause is given the term-of-art meaning Appellants favor and so refers only to tribes recognized under the List Act process, it has no application to ANCs whatsoever, as they were established by a separate act of Congress and need not be recognized under the List Act. Either way, the eligibility clause cannot be read to undo implicitly what Congress did expressly in including ANCs in the definition of "Indian tribes." Numerous contextual factors support that reading, including the sequence of the relevant statutes and the fact that Congress had numerous definitions to choose from—some of which expressly referenced the List Act or excluded ANCs—and instead chose an existing definition that expressly includes ANCs.

The Navajo Appellants, who concede that ANCs are "tribes," fare no better with their argument that ANCs and their governing boards do not qualify as "tribal governments." That argument faces the initial hurdle that the only role the statutory definition of "Indian tribes" plays in the statute is to inform the meaning of "tribal governments." Thus, an argument that ANCs are "tribes," but not "tribal governments," strains credulity. Moreover, ANCs inarguably have "recognized governing bodies" under the plain meaning of those undefined terms and have long been viewed as satisfying nearly identical statutory language.

Congress understood that Natives in both the lower 48 and Alaska were facing unique challenges from the current pandemic and so earmarked aid for them in the CARES Act to be disbursed promptly. Congress equally understood that Alaska and its Natives have a distinct history and thus distinct Native entities established under Alaska-specific statutes. Certain responsibilities typically undertaken by the tribe alone in the lower 48 are shouldered by ANCs in cooperation with tribes and other Native entities in Alaska. Congress knows how to include ANCs in programs designed to provide special benefits to Native peoples and did so in the definition it expressly incorporated into the CARES Act. That express inclusion of ANCs should be given effect, and the aid Congress intended to flow to ANCs should be freed without further delay.

STATEMENT OF THE CASE

A. ANCSA and ANCs

Congress has plenary power to regulate Indian affairs concerning Alaska Natives, just as it does vis-à-vis Native Americans in the lower 48. *See generally* U.S. Const. art. I, §8, cl. 3. But, given Alaska's unique history and geography, Congress has exercised that power distinctly in Alaska. Most notable, "[t]here was never an attempt in Alaska to isolate Indians on reservations," *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 51 (1962), as "Alaskans, both Native and non-Native, opposed creation of reservations on the grounds that reservations were socially divisive and tended to perpetuate a wardship rather than equality." *United States v. Atl. Richfield Co.*, 435 F.Supp. 1009, 1015 (D. Alaska 1977).

This nuanced approach to Alaska and its Native peoples culminated in the enactment of the Alaska Native Claims Settlement Act ("ANCSA"), Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§1601-24) pursuant to the Indian Commerce Clause. ANCSA was a revolutionary development in American Indian law. Rather than simply mimic the approach in the lower 48, Congress embraced a novel approach that reflected the unique history of Alaska Natives and their extensive land claims. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523-24 (1998). ANCSA mandated a "fair and just settlement" of all "claims by Natives of … Alaska," and required that the settlement be

completed "with maximum participation by Natives in decisions affecting their rights and property," and "without creating a reservation system." 43 U.S.C. §1601(a), (b). Eschewing reservations, however, did not mean the repudiation of distinct Native organizations designed to further the interests of Alaska Natives. ANCSA embraced an innovative approach and mandated the establishment of 12 "regional corporations" and more than 200 "village corporations" that would take title to transferred lands and, in the latter case, be centered in existing Native communities. *Id.* §§1606(a), (d), 1607(a).

These Alaska Native regional and village corporations (collectively, "ANCs") were established to be *Native* entities first and foremost, to serve important roles in the lives of Alaska Natives and to undertake some responsibilities more typically performed by the tribes alone in the lower 48. Whereas most corporations focus on maximizing shareholder value for a diverse and constantly changing group of shareholders, ANCs' missions not only are directed to the interests of their limited, relatively static, and almost entirely Native shareholders, but include a substantial social benefit component, which they further through the provision of healthcare services, cultural programs, elder care, job training, educational support, housing support, and more. *See, e.g.*, AR010q at 1 (Old Harbor Native Corporation's "mission" is "to preserve and protect the culture, values and traditions of its community, shareholders and descendants; and to work together to create economic

and educational opportunities while promoting self-determination and pride."). That is not happenstance; it is mandated by ANCSA, and aligns with Alaska Native values.

Under ANCSA, the *raison d'être* of an ANC is to manage lands and funds provided in exchange for the settlement of Native claims and to provide benefits to promote the health, education, and welfare of Natives. ANCSA required the incorporators of each regional corporation to be named by the then-existing Native association in the region, and requires that the management of each regional ANC going forward be vested in an elected board of directors comprised entirely of Native shareholders from the community. 43 U.S.C. §1606(d), (f); *see id.* §1602(b) (defining "Native" based on "Alaska Indian … Eskimo, or Aleut blood" or recognition by a "Native village or Native group"). And while it required the Native residents of each village to organize as a corporation to receive lands, *id.* §1607(a), ANCSA made clear that the fundamental, legislatively prescribed aim of these new Native entities was to "hold, invest, manage and/or distribute lands, property, funds, and other rights and assets *for and on behalf of a Native village*." *Id.* §1602(j) (emphasis added).

It should therefore come as no surprise that ANCs discharge many traditionally "tribal" functions that would typically be performed by tribes alone in the lower-48 reservation system. To be sure, ANCs often perform these roles

working shoulder-to-shoulder with other Native entities, which also discharge functions performed by lower-48 tribes. But ANCs also provide services on their own, and any understanding of Native organization and government in Alaska would be incomplete without an appreciation of the critical role ANCs play.

ANCs receive benefits under a host of federal statutes that provide special benefits to Native peoples because of their Native status, starting with ANCSA itself. For example, ANCs provide services through agreements under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§5301 *et seq.*), which Congress enacted "to help Indian tribes" nationwide "assume responsibility for aid programs that benefit their members." *Menominee Indian Tribe of Wisc. v. United States*, 136 S.Ct. 750, 753 (2016). As one might expect given their critical role in Alaska, ANCs are expressly included in ISDEAA's definition of the "Indian tribes" entitled to receive ISDEAA contracts and compacts, *see* 25 U.S.C. §5304(e), which by law are available only to Native peoples because of their status as such, *see id.* §§5321, 5322.

ISDEAA is by no means unique in that regard. Its definition of "Indian Tribe" has been incorporated into at least 60 federal statutes. *See, e.g.*, 25 U.S.C. §3104 note (Indian Tribal Energy Development and Self-Determination Act Amendments: defining "Indian tribe" to have the "meaning given the term in [ISDEAA]"); 12

U.S.C. §4702(12) (Community Development Banking and Financial Institutions Act); 20 U.S.C. §7011(6) (No Child Left Behind Act). Other federal statutes employ differently worded definitions that likewise expressly include ANCs among the "tribes" entitled to receive benefits earmarked for Natives. For instance, the Native American Housing Assistance and Self-Determination Act ("NAHASDA"), Pub. L. No. 104-330, 110 Stat. 4016 (1996), makes ANCs eligible for block grants by virtue of its expressly-ANC-inclusive definition of "federally recognized tribe" and ANCs' eligibility under ISDEAA. *See* 25 U.S.C. §4103(13)(B). Thus, numerous statutes expressly include ANCs among the tribes eligible for federal programs and services provided to Natives because of their status as such.

B. The CARES Act

Congress enacted the CARES Act in response to the public health and economic crises wrought by the COVID-19 pandemic. Title V "appropriate[s]" $150 billion of emergency-relief "payments to States, Tribal governments, and units of local government." 42 U.S.C. §801(a)(1). The statute "reserve[d]" $8 billion of that sum for "Tribal governments," *id.* §801(a)(2)(B), "to cover" costs they have incurred and will continue to "incur[] due to the public health emergency" in 2020, *id.* §801(d). In light of the exigent circumstances, Congress directed the Treasury Secretary ("Secretary") to disburse those funds within 30 days of the law's enactment, *i.e.*, by April 26, 2020. *Id.* §801(b)(1).

"Tribal government" is a defined term in the Act. The statute defines it to "mean[] the recognized governing body of an Indian Tribe," *id.* §801(g)(5), and it defines "'Indian Tribe'" to have "the meaning" it has "in section 5304(e) of title 25," *id.* §801(g)(1)—*i.e.*, in ISDEAA. That definition of "Indian tribe" operates solely to inform the scope of the "tribal government[s]" eligible for Title V funds. The expressly cross-referenced section 5304(e) defines "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),*** 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) (emphasis added).

Because Congress selected a definition of "Indian tribe" that expressly includes ANCs (and has long been understood to do so), ANCs fully expected to receive their share of allotted funds on or before April 26 to assist with their Native communities, and Treasury issued guidance on April 23 confirming ANCs' eligibility. *See* A141-45. But before the Secretary could disburse any funds to ANCs—which by then had already expended considerable resources in response to the crisis—three sets of tribes sued, challenging ANCs' entitlement to CARES Act funds. After hearing only from the plaintiffs and the Secretary as parties, but not ANCs, the district court entered a preliminary injunction prohibiting the Secretary from distributing funds to ANCs. A86-121. Once ANCs intervened, however, the

district court changed course and dissolved the injunction and granted judgment for the Secretary and the ANCs. A215-16. The district court granted an injunction pending appeal over the ANCs' objections. A217-22. Thus, as a net result of these proceedings, no ANC has received a penny under the CARES Act—despite Congress' and the Secretary's decisions to expressly include ANCs, and the district court's considered judgment that ANCs are eligible for Title V funds.

SUMMARY OF ARGUMENT

ANCs are entitled to receive CARES Act funding for the most obvious of reasons: Congress expressly included ANCs in the relevant definition of "Indian tribe." The express inclusion of "any Alaska Native … regional or village corporation as … established pursuant to ANCSA" should resolve this dispute. Appellants' contention that Congress undid this express inclusion of ANCs via a subordinate clause in the same definition is both implausible and wrong. ANCs plainly satisfy the ordinary meaning of ISDEAA's so-called eligibility clause, as they have long been recognized as eligible for special programs provided to Natives because of their Native status. And even if that clause were construed as a term-of-art reference to "recognition" under the List Act (even though the List Act postdates ISDEAA by decades and ISDEAA expressly cross-references ANCSA, but not the List Act), that would render the clause wholly inapplicable to ANCs—which are established under ANCSA, not recognized pursuant to the List Act.

ANCs likewise qualify as "tribal governments" under the CARES Act. Indeed, the ANC-inclusive definition of "Indian tribe" serves only to define the scope of "Tribal governments" eligible for funding. Thus, the argument that ANCs are the former, but not the latter, fares no better than an argument that a statute that defines "States" to include the District of Columbia and provides aid to "State governments" excludes the District because it is not a state government. Moreover, ANCs' boards of directors plainly satisfy the ordinary meaning of "recognized governing bodies," and always have been treated as such under ISDEAA.

Congress' express decision to include ANCs among the Native entities eligible for CARES Act funding makes perfect sense given the role they play in the lives of Alaska Natives both generally and in dealing with the pandemic in particular. ANCs are distinctly Native entities established by Congress to play important roles in providing for the health and welfare of Alaska Natives and in the federal government's discharge of its fiduciary responsibilities to Alaska Natives. True to those roles, ANCs provide critical support for Alaska Natives, including in responding to the current pandemic, often working hand in glove with Native villages or other Native entities, but often acting alone. Moreover, a ruling that ANCs are ousted from ISDEAA's definition of tribes despite their express inclusion would have dire consequences extending well beyond the current crisis. Some 60 federal statutes incorporate ISDEAA's definition, and excluding ANCs from all

those programs would upset decades of practice and risk upsetting the entire infrastructure of Alaska Native life, which involves close cooperation among all Native entities, including ANCs.

ARGUMENT

I. The Plain Text Of The CARES Act Expressly Includes ANCs As "Indian Tribes" And "Tribal Governments" Authorized To Receive CARES Act Funds.

As Appellants acknowledge, statutory interpretation must "begin, as always, with the text of the statute." *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 173 (2009). And when the text is clear, the inquiry "ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S.Ct. 617, 631 (2018). Given that "we're all textualists now," Elena Kagan, *The Scalia Lecture* 8:28 (Nov. 17, 2015), https://bit.ly/3kYKpPO, this should be a straightforward case. Congress expressly included ANCs in the statutory definition of "Indian tribe," and that express decision must be given effect.

Title V of the CARES Act defines "Tribal government" as "the recognized governing body of an Indian Tribe," 42 U.S.C. §801(g)(5), and defines "Indian Tribe" to "ha[ve] the meaning" it has under ISDEAA, *id.* §801(g)(1). ISDEAA in turn defines "Indian tribe" to "includ[e] any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA], 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). That express "inclu[sion]" of ANCs resolves this case. Indeed, any reading of that definition that would categorically exclude ANCs would directly contradict Congress' express inclusion of ANCs.

That conclusion is reinforced by the reality that Congress had several existing definitions from which to choose—some which expressly include ANCs and some which just as unambiguously *exclude* them. "There is no universally recognized legal definition of the phrase ['Indian tribe'], and no single federal statute defining it for all purposes." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272 (9th Cir. 2004). Some federal statutes' definitions of "Indian tribe" turn on whether a specified agency has formally recognized an entity. *See, e.g.*, 25 U.S.C. §5130(2). Others include Alaska Native *villages*, but not Alaska Native *corporations*. *See, e.g.*, 20 U.S.C. §4402(5); 25 U.S.C. §1903(8); 34 U.S.C. §10389(3). And a few expressly exclude ANCs altogether. *See, e.g.*, 25 U.S.C. §3501(4)(B) ("For [specified purposes], the term 'Indian Tribe' does not include any Native Corporation.").

Congress therefore could have incorporated a definition of "Indian Tribe" that expressly includes ANCs, or one that expressly excludes them. It chose the former, and that decision must be given effect. Any construction of the CARES Act, such as Appellants', that excludes ANCs thus would contradict Congress' clear textual choice. It also would disregard the "general[] presum[ption] that Congress acts

intentionally and purposely in the disparate inclusion or exclusion" of particular statutory language. *Russello v. United States*, 464 U.S. 16, 23 (1983). Applying those principles, the Supreme Court has honored Congress' decision to expressly include States in the definition of "person" in some statutes but not others, *see, e.g.*, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783 (2000); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), and Congress' decision to expressly include agents in the definition of "employer" in Title VII of the Education Amendments of 1972 but not Title IX, *see Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998). As these and other cases make clear, when Congress defines a term to expressly include certain entities, that decision must be given effect, full stop.

Any other conclusion would violate the anti-superfluity canon—"the idea that 'every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.'" *Nielsen v. Preap*, 139 S.Ct. 954, 969 (2019) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012)). That canon has particular force when an alternative construction of the statute would render expressly inclusive language superfluous. *See, e.g.*, *Burgess v. United States*, 553 U.S. 124, 132 (2008) (rejecting construction that would nullify "the express inclusion of foreign offenses in §802(44)'s definition of 'felony drug

offense'"). That is precisely what reading the CARES Act to exclude ANCs would do: It would wholly negate Congress' selection of a definition that expressly includes ANCs.

And because Congress expressly included ANCs within the CARES Act's definition of "Indian Tribe," it is equally plain that the governing bodies of ANCs qualify as "tribal governments" entitled to receive Title V Act funding. After all, the CARES Act definition of "Indian Tribe" serves only to inform the meaning of "tribal government." If the statute defined the term for multiple purposes, there might be an argument that "tribal government" excluded some of the "tribes" that were included for other statutory purposes. But in the CARES Act the definition of "Tribes" and the provision of aid to "tribal governments" are joined at the hip. Thus, the notion that Congress would expressly include ANCs as tribes, but simultaneously render them ineligible for CARES Act funding because they are not "tribal governments," is a non-starter. It is a fundamental principle that courts are "to make sense rather than nonsense" out of federal statutes. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991). When Congress defines one term (like "Indian Tribe") solely for the purpose of informing the scope of a closely related term (like "tribal government"), the terms have to be interpreted coherently and consistently. *See Burgess*, 553 U.S. at 130-31. If Congress expressly defined a "State" to include the District of Columbia for the sole and specific purpose of identifying "State

governments" entitled to funding, no one would argue that the District qualifies as the former but not the latter and thus is entitled to no funding. The argument is equally absurd when it comes to the ANCs; having been expressly included in the CARES Act definition of "Indian Tribe," ANCs and their governing bodies are plainly "tribal governments" entitled to Title V funds.

In sum, this case begins and ends with the statutory text. Congress selected a definition of "Indian Tribe" that expressly "includ[es] any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA]." 25 U.S.C. §5304(e); *see* 42 U.S.C. §801(g)(1). In doing so, Congress resolved the question here: ANCs are eligible for CARES Act funds.

II. Plaintiffs' Interpretation Conflicts With Text, History, Common Sense, Longstanding Congressional Usage, And Decades Of Federal Practice.

Despite Congress' conscious choice to incorporate a definition of "Indian tribe" that expressly includes ANCs, Appellants offer two contradictory theories for how Congress managed to subtly and implicitly contradict what it did overtly and expressly. The Confederated Tribes Appellants insist that even though the ISDEAA definition expressly sweeps in ANCs *en haec verba*, a subordinate clause in that definition categorically sweeps out every ANC by implicitly requiring recognition via a different statutory process not enacted until some two decades after ISDEAA. The Navajo Appellants, by contrast, insist that even though ANCs qualify as "tribes," they are not "tribal governments" because they lack "recognized governing bodies."

Neither argument is correct, let alone sufficiently compelling to overcome Congress' express inclusion of ANCs.

A. ISDEAA's Eligibility Clause Does Not Oust ANCs Expressly Included in the Definition of Indian Tribes.

ISDEAA defines "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 [ANCSA]**, *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) (bold and italics added). According to Appellants, the italicized language in ISDEAA's definition defeats the obvious import of the bolded language. Put differently, they contend that in the same breath that Congress *expressly* defined "Indian tribe" to "*includ*[*e*] any Alaska Native … regional or village corporation … established pursuant to [ANCSA]," Congress *implicitly* excluded all ANCs because ANCs are not "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

If the eligibility clause is given a straightforward reading consistent with its ordinary meaning, ANCs plainly satisfy its terms. ANCs are "recognized as eligible," and are in fact eligible, "for the special programs and services provided by the United States to Indians because of their status as Indians" under numerous federal statutes, starting with ANCSA, which was enacted pursuant to the Indian

Commerce Clause. For example, ANCs hold numerous contracts pursuant to ISDEAA and participate in scores of other federal programs and services open to Indians because of their status as Indians.[1] *See, e.g.*, A208 ("All parties, even the Confederated Tribe Plaintiffs, concede that ANCs may enter into ISDEAA contracts."). For one of those statutory programs, NAHASDA, Congress treats ANCs as "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians *pursuant to* [*ISDEAA*]." 25 U.S.C. §4103(13)(B) (emphasis added). This Court too has recognized that ANCs qualify for special programs reserved for Native peoples. *See, e.g.*, *Am. Fed'n of Gov't Emps., AFL-CIO v. United States* ("*AFGE*"), 330 F.3d 513, 516 (D.C. Cir. 2003); *cf. Kenai Peninsula Borough v. Cook Inlet Region, Inc.*, 807 P.2d 487, 496-97 (Alaska 1991) (applying canon of construction favoring tribes to ANCs).

Plaintiffs nonetheless argue that ANCs are not "recognized as eligible" for the programs in which they in fact participate, because "recognized as eligible" is a term-of-art phrase that always refers to the recognition process under an entirely

[1] Given that ISDEAA expressly defines "Indian tribe" inclusively to encompass Alaska Natives and ANCs, the subsequent references in the eligibility clause to "Indians" must also be understood to reach a broad class of Natives. Thus, Congress was plainly referencing eligibility to participate in special benefits set aside for Native or indigenous peoples because of their Native or indigenous status.

different statute enacted decades after ISDEAA—namely, the Federally Recognized Indian Tribe List Act (the "List Act"), Pub. L. No. 103-454, 108 Stat. 4791 (1994). That argument is wrong, but also self-defeating. If the eligibility clause really references a separate statutory process that is inapplicable to ANCs—which at the time of ISDEAA were recently established pursuant to a different statutory scheme (*i.e.*, ANCSA)—then the eligibility clause would be best read to be wholly inapplicable to ANCs and useful only for distinguishing among tribes potentially eligible for List Act recognition (a process that looks to, *inter alia*, a tribe's historical pedigree). The Ninth Circuit and the federal government have long interpreted the eligibility clause in precisely that manner, and the district court ultimately embraced that reading. But whether the eligibility clause is interpreted as readily satisfied by ANCs or as simply inapplicable to ANCs established under ANCSA, either reading is far superior to a reading that defeats Congress' clear intent to include ANCs in the definition of "Indian tribe."

1. ISDEAA's eligibility clause does not silently incorporate the List Act's requirements for recognition.

Appellants' effort to read ISDEAA as silently cross-referencing the List Act and its recognition process suffers from multiple problems, starting with the differences in the statutory text. As a side-by-side comparison makes clear, not only does ISDEAA expressly *include* ANCs in its definition of "Indian tribe[s]" while the

List Act omits them, but the statutes' respective eligibility clauses have important textual differences.

ISDEAA (25 U.S.C. §5304(e))	**List Act (25 U.S.C. §§5130(2), 5131(a))**
"Indian tribe" means 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 [ANCSA], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.]	The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe. The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

The most relevant textual difference between the two statutes is the bolded language that is present in ISDEAA and absent from the List Act. This critical difference alone precludes any effort to read the statutes *in pari materia* or as coextensive. But the textual differences do not stop there. ISDEAA's eligibility clause is an open-ended subordinate clause of a definition that expressly includes ANCs. It does not specify recognition by any particular government official. The List Act's recognition provision, by contrast, is a standalone sentence directed specifically to the Interior Secretary that envisions a distinct process for memorializing entities the Secretary "acknowledges to exist as an Indian tribe." In short, the two provisions serve different functions in two very different statutes, only one of which expressly includes ANCs.

It therefore makes no difference that ANCs are omitted from the list published pursuant to the List Act—which is likely why the BIA has gone out of its way to emphasize that ANCs' omission "does not affect the continued eligibility of the entities for contracts and services." 58 Fed. Reg. 54364, 54366 (Oct. 21, 1993); *accord*, *e.g.*, 60 Fed. Reg. 9250-51 (Feb. 16, 1995). Nor is there any indication that Congress, in enacting the List Act, intended to alter ANCs' longstanding eligibility for and participation in Indian programs and services under ANCSA, ISDEAA, and other special programs for Natives. While ISDEAA expressly cross-references ANCSA, the List Act cross-references neither ISDEAA nor ANCSA.

The differences between ISDEAA and the List Act are highlighted by considering the text of a third statute, NAHASDA, which has its own distinctly worded eligibility clause. NAHASDA provides in relevant part:

> The term "federally recognized tribe" means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA], that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians pursuant to [ISDEAA].

25 U.S.C. §4103(13)(B). NAHASDA expressly includes ANCs within its definition of "federally recognized tribe" and then includes a subordinate eligibility clause that mirrors ISDEAA's eligibility clause until the end when it expressly cross-references ISDEAA. NAHASDA's express inclusion of ANCs in its definition of "federally recognized tribe" does not make ANCs federally recognized tribes for all purposes,

but it does caution against a reading of "recognition" or "recognized" as terms of art that necessarily exclude ANCs or refer only to recognition under the List Act. Moreover, by employing an eligibility clause that expressly references ISDEAA (but not the List Act enacted two years earlier), NAHASDA makes crystal clear that Congress knows how to cross-reference other statutes when it wants to. And by expressly referencing ISDEAA in its eligibility clause, NAHASDA reinforces that ISDEAA's similarly worded eligibility clause is not necessarily or inherently a reference to List-Act recognition. Rather, both ISDEAA and NAHASDA expressly include ANCs and feature eligibility clauses that ANCs readily satisfy. Indeed, by the time Congress enacted NAHASDA, ANCs had been treated as eligible for ISDEAA contracts for decades.

The second major problem with Appellants' effort to read ISDEAA as implicitly cross-referencing the List Act is one of timing. The List Act was enacted *nearly 20 years after ISDEAA*. Thus, for its first two decades of existence, ISDEAA's eligibility clause could not possibly refer to the List Act and its recognition process. Moreover, ISDEAA's drafting history reinforces the conclusion that reading the eligibility clause to *exclude* the very ANCs that ISDEAA expressly *includes* would be nonsensical. The initial draft of what is now §5304(e) "included the eligibility clause but did not mention [ANCs]"; the language including ANCs was added later "by amendment." *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d

1471, 1474-75 (9th Cir. 1987). Thus, the drafters of ISDEAA went to the trouble of adding ANCs to a definition that already featured the eligibility clause. Reading the eligibility clause to nullify that addition would render Congress' deliberate action a fool's errand, and would flout the principle that the best indication of Congress' intent is a change in the text itself. *See Milner v. Dep't of Navy*, 562 U.S. 562, 574-75 (2011).

In short, ANCs *are* "recognized as eligible" under ISDEAA for federal "programs and services provided … to Indians because of their status as Indians," and nothing in the List Act changes that.

2. If ISDEAA's eligibility clause is a term-of-art reference to the List Act, then it is simply inapplicable to ANCs.

Even if ISDEAA's eligibility clause were interpreted as a term-of-art reference to the List Act, that would not oust ANCs from a statutory definition that expressly includes them. Instead, it would simply mean—consistent with the longstanding positions of the federal government and the Ninth Circuit—that the ISDEAA eligibility clause is inapplicable to ANCs, as it would invoke a process that has no relevance to entities established pursuant to a 1971 Act of Congress.

From the beginning, federal agencies have uniformly treated ANCs as "Indian tribes" under ISDEAA. In 1976, in the immediate wake of ISDEAA's enactment, the BIA confronted and rejected the argument that ISDEAA's eligibility clause rendered ANCs ineligible. In what is now known as the Soller Memo, the BIA

explained: "Since both regional and village corporations find express mention in the definition, customary rules of statutory construction" instructed "that they should be regarded as Indian tribes for purposes of application of this Act." A137. The BIA was "troubled" by the fact that, as of May 1976, ANCs "ha[d] not [yet] been recognized as eligible [by the BIA] for BIA programs and services" beyond those "provided for by the terms of [ANCSA]." A138. To ensure that ANCs' "express mention" was not implicitly nullified by operation of the eligibility clause, Soller concluded that the BIA would interpret ISDEAA's eligibility clause as modifying only the phrase "any Indian tribe, band nation, or other organized group or community," not the phrase "Alaska Native … regional or village corporation," lest the eligibility clause impliedly nullify what Congress had explicitly included. A137-38.

The Ninth Circuit upheld that interpretation in *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471 (9th Cir. 1987), concluding that because "the plain language of [ISDEAA] allows business corporations created under [ANCSA] to be recognized as tribes," the BIA's decision to treat ANCs as eligible for all ISDEAA programs was reasonable in light of Congress' expressed intent. *Id.* at 1476. The court went on to observe that just as ISDEAA "was promulgated to insure maximum Indian participation in and control over the programs and services for Indians," "the corporations formed pursuant to [ANCSA] also were established to provide

maximum participation by Natives in decisions affecting their rights and property." *Id.* (citing 25 U.S.C. §450a (transferred to §5302); 43 U.S.C. §1601)).

The Ninth Circuit has reaffirmed *Bowen* since the 1994 enactment of the List Act, *see, e.g.*, *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 988-90 (9th Cir. 1999), and its conclusion has been followed by numerous other courts—including this one. *See, e.g.*, *AFGE*, 330 F.3d at 516 (recognizing that ANCs are "Indian tribes" that "qualified for special treatment under §8014(3) of the FY 2000 appropriations act," which was available only to Indians).

This reading makes perfect sense. If the eligibility clause really is a term-of-art reference to the List Act recognition process, then it plainly has no application to ANCs, which were "established" under a different federal statute (*i.e.*, ANCSA) and are not subject to "recognition" under the List Act. The List Act recognition process is designed to draw distinctions among tribes based on their historical treatment by the federal government and to "restore recognition to tribes that previously have been terminated." Pub. L. No. 103-454, §103(5), 108 Stat. 4791 (1994). Hence, one of the principal factors the Secretary considers under the List Act is whether the group has maintained "authority over its members as an autonomous entity *from 1900 until the present*." 25 C.F.R. §83.11(c) (emphasis added). That may be a perfectly sensible criterion for restoring federal recognition or determining whether a state-recognized tribe qualifies for federal recognition. *See, e.g.*, *Wyandot Nation*

of Kansas v. United States, 858 F.3d 1392 (Fed. Cir. 2017). But as to ANCs, a distinct type of Native entity established in 1971 under a federal statute (ANCSA) applying a novel approach to Native rights and land claims, applying the List Act criteria is just a non sequitur. ANCs are sufficiently novel and *sui generis* that Congress' decision to expressly include them in ISDEAA's definition settles the matter, and confirms that a subordinate clause cannot override Congress' specific and explicit judgment concerning ANCs.

In arguing for a contrary construction, Plaintiffs contend that the "series-qualifier canon" requires each of the terms that precede the eligibility clause, including ANCs, to be read as qualified by that final clause. CT.Br.15-16. But "as with any canon of statutory interpretation," the "so-called series-qualifier principle" "'is not an absolute and can assuredly be overcome by other indicia of meaning.'" *Lockhart v. United States*, 136 S.Ct. 958, 963, 965 (2016) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). An instruction "to feed the goldfish, cats, and dogs, which are barking," does not require the goldfish and cats to go hungry just because they are incapable of barking. Instead, the subordinate clause modifies only the terms it can sensibly modify, distinguishing among dogs, but not categorically excluding goldfish and cats. Indeed, courts have noted that "the series-qualifier canon … is perhaps more prone than most to have its effect nullified by other canons," such as the anti-superfluity canon. *Jordan v. Maxim Healthcare Servs.*,

Inc., 950 F.3d 724, 745 (10th Cir. 2020) (quoting Scalia & Garner, *Reading Law*, at 161-63). So too here. The series-qualifier canon is no match for Congress' clearly expressed intent to include ANCs in ISDEAA.

That is particularly true given that, in the process of drafting ISDEAA's definition of "Indian tribe," the drafters added ANCs to legislative text that already included the eligibility clause. *See supra*. Unless that express addition was entirely nugatory, Congress must have understood either that ANCs satisfy that clause or that the clause has no application to ANCs. Appellants assert that in 1975 when Congress first enacted ISDEAA, it might have been unsure whether some ANCs could qualify for federal recognition as tribes. That seems implausible given the distinct nature of ANCs (which from the beginning have been recognized as eligible to participate in special Native programs, but as distinct Native entities rather than traditional federally recognized tribes). But in all events it wholly fails to explain why Congress continues to use the ISDEAA definition in statutes unambiguously designed to channel funds to ANCs. For example, in 2018, Congress amended the Tribal Forest Protection Act to establish "a biomass demonstration project for federally recognized Indian tribes *and Alaska Native corporations* to promote biomass energy production." Indian Tribal Energy Development and Self-Determination Act Amendments, Pub. L. No. 115-325, §202(a), 132 Stat. 4445, 4459 (2018) (codified at 25 U.S.C. §3104 note) (emphasis added). To effectuate that amendment, Congress

defined "the term 'Indian tribe'" to "ha[ve] the meaning given the term in [ISDEAA]." *Id.* §202(c)(1)(B). The only way to give effect to the stated purpose of this very recent, post-List-Act statute is to read ANCs as constituting "Indian tribes" within the meaning of ISDEAA.

In sum, it is not critical whether Congress believed that ANCs satisfied the eligibility clause or that the clause simply did not apply to them. Either view honors Congress' decision to include ANCs and makes sense out of the drafting chronology. If Congress enacted a statute providing funds to "any county, city, municipality, including the District of Columbia, which serves as seat of state government," no one could credibly argue that the District is ineligible because it lacks a state government, especially if the District was a late addition to statutory text that already included the seat-of-state-government clause. One could argue that the local D.C. government constitutes a "state government" for purposes of the statute, or one could conclude that the "which" clause is simply inapplicable to the District because of its express inclusion. But no one would conclude that the series-qualifier canon was powerful enough to oust the District from the statute and contradict Congress' will. The same logic governs here.

B. ANCs Are Recognized Governing Bodies.

The Navajo Appellants conceded below and do not contest here that ANCs satisfy ISDEAA's definition of "Indian tribe," but they insist nonetheless that ANCs

are not "Tribal government[s]" under the CARES Act because they lack a "recognized governing body." While ANCs are governed by a board of directors that constitutes their "recognized governing body" under any ordinary understanding of the phrase, Appellants insist that "the recognized governing body of an Indian Tribe," 42 U.S.C. §801(g)(5), is a term-of-art phrase reserved for those forms of Tribal government that are "on the same plane as[] states, territories, and units of local government." Navajo.Br.20. That argument makes no sense. When the CARES Act refers to "the recognized governing body of an Indian Tribe," it plainly refers to the recognized governing body of an "Indian Tribe" *as defined in this Act*. And if ANCs are tribes under that definition and have governing bodies, then it makes no sense to exclude them. After all, the only role the statutory definition of "Indian Tribe" plays in Title V is to inform the scope of "Tribal government." Thus, the argument that ANCs are the former, but lack the latter, strains credulity.

Nothing in the statutory text supports that nonsensical result. While the CARES Act expressly defines the terms "Indian Tribe" and "Tribal government," 42 U.S.C. §801(g)(1), (5), it does not define the terms "recognized" or "governing body." The ordinary meaning of those terms therefore controls. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1140 (2018); *Burgess*, 553 U.S. at 130. The contemporary, 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); *see Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566-67 (2012) (consulting dictionaries, including *Black's*, to determine ordinary meaning). And the principal example *Black's* provides is "the board of directors … of XYZ, Inc." Thus, ANCs plainly have "governing bodies."

Appellants' argument therefore boils down to the word "recognized." But when used to modify a term like "governing body," "recognized" simply serves to distinguish the entity or individuals authorized to govern an organization from a dissident group or faction with designs on taking over. *See, e.g.*, *Teamsters Local Union No. 2000 v. Hoffa*, 284 F.Supp.2d 684, 699 (E.D. Mich. 2003) (resolving dispute over whether union's rank-and-file members "recognized" certain parties as the union's "governing body"). Here, there is no dispute that each ANC's respective governing body (*i.e.*, its board of directors) is recognized as such by shareholders, state law, and federal law, *see* 43 U.S.C. §1606(f). That ordinary meaning should control, especially when the alternative is to allow an undefined phrase—"recognized governing body"—to oust ANCs from the CARES Act and trump Congress' express decision to include ANCs within the statutory definition of tribes for purposes of ISDEAA and the CARES Act.

The Navajo Appellants insist that, in the context of statutes involving Indians, "recognized" is always a term of art that refers to recognition by the Interior Secretary pursuant to the List Act. But that argument fares no better here—indeed,

worse—than the same argument in the context of the eligibility clause. In the context of statutes that are focused on distributing aid to Native peoples, including Alaska Natives, and that expressly include ANCs in the definition of tribes, limiting the term "recognized" to List Act recognition is a non sequitur for reasons already discussed. Moreover, the notion that Congress uses "recognized" as a term of art limited to List Act recognition whenever it legislates on Indian matters is demonstrably untrue. Indeed, Congress does not even use the term "federally recognized tribe" uniformly to refer to the List Act or to exclude ANCs, as demonstrated by NAHASDA, which expressly includes ANCs in its definition of "federally recognized tribe." *See* 25 U.S.C. §4103(13)(B).

Finally, the broader statutory context reinforces that Congress did not use "recognized governing body" in a narrow term-of-art sense. The CARES Act borrows the phrase "recognized governing body of an Indian Tribe" directly from ISDEAA, with only minor differences. Whereas ISDEAA uses the phrase (replacing "an" with "any") to help define the "tribal organizations" eligible to contract with the United States for services and programs under ISDEAA, *see* 25 U.S.C. §5304(*l*); *see also id.* §5321(a)(1), the CARES Act uses the phrase to define the "tribal governments" eligible for federal emergency-relief funds. It is clear that ISDEAA is using "recognized governing body" in its ordinary meaning, not as a term-of-art reference to tribal governments recognized pursuant to the List Act, not only because

the List Act did not exist when ISDEAA was enacted, but also because ISDEAA is using the phrase to define "tribal organization" and the boards of directors of ANCs have long been understood to constitute "tribal organizations" under ISDEAA. *See, e.g.*, BIA, *Village Self-Determination Workbook, No. 1* (Nov. 1977), https://tinyurl.com/yc2sftzo (clarifying when an ANC's board of directors "will be recognized" as the "village governing body for purposes of making self-determination decisions").

The Navajo Appellants concede, as they must, that ANCs have long received ISDEAA contracts, especially when no other tribal entity is available to serve an Alaska Native community. They insist, however, that ANCs are eligible for ISDEAA contracts and compacts only because they "fall under [ISDEAA's] *second* category of 'tribal organization.'" Navajo.Br.10-11. That is demonstrably wrong. ISDEAA's second category is limited to "legally established organization[s] of Indians which [are] controlled, sanctioned, or chartered by such governing body." 25 U.S.C. §5304(*l*). And "ANCs are not 'controlled, sanctioned, or chartered' by the governing body of an Indian Tribe." A209. Rather, under the express terms of ISDEAA, an ANC *is* an Indian Tribe. *See* 25 U.S.C. §5304(e). ANCs thus are "eligible for contracting under [ISDEAA's] first definition of 'tribal organization'—'the recognized governing body of any Indian tribe.'" A210. Moreover, as a matter of priority (rather than eligibility) for ISDEAA contracts, ANCs generally receive

ISDEAA contracts precisely when there is no other tribe to provide the service or to sanction or charter an ANC to provide the service. Thus, ANCs' boards of directors are indisputably "recognized governing bod[ies]" of "tribal organizations" for purposes of ISDEAA, and just as readily constitute "recognized governing bod[ies]" under the CARES Act.

Moving even further afield from the text, Plaintiffs boldly claim that "federal courts … universal[ly]" have held that ANC boards of directors "are not" "recognized governing bodies." Navajo.Br.2. But Plaintiffs fail to cite even one case that reached that conclusion in the context of a statute with the phrase "the recognized governing body of an Indian tribe," let alone a statute that also expressly includes ANCs in its definition of "Indian tribe." That is because there is none. Instead, every case they cite (at 2-4) either deals with issues of sovereignty or arises in the context of statutes that do not expressly include ANCs. That is unsurprising. Congress knows how to write statutes that because of their particular purpose (*e.g.*, addressing jurisdiction over sovereigns) are limited to federally recognized tribes within the meaning of the List Act, and how to write to statutes that because of a different focus (*e.g.*, efficiently providing benefits to all Natives) extend to ANCs, often, as here, explicitly. *See* AFN.Dist.Ct.Br.8-18. Plaintiffs' effort to collapse that well-functioning dichotomy and cite cases involving the former to artificially limit the scope of the latter should be rejected. Congress knew what it was doing when it

expressly and straightforwardly included ANCs in ISDEAA and when it explicitly incorporated ISDEAA's terms into the CARES Act. It did not inadvertently contradict that judgment and oust ANCs through a reference to "recognized governing bodies" or any other subtle stratagem.

C. Plaintiffs' Atextual Interpretation Makes No Sense Given the Reality on the Ground in Alaska.

With nothing else left in their quiver, Plaintiffs protest that the CARES Act "place[s] Tribal governments alongside, and on the same plane as, states, territories, and units of local government," Navajo.Br.20, and "[w]hatever else might be said about ANCs, they are not governments," CT.Br.19. But the proper scope of Title V of the CARES Act is dictated by its text, and particularly its definitions, not by an effort to divine its broader purpose and label it as assisting sovereign governments. For example, there is no need to speculate here about the sovereign status of local governments or whether the District of Columbia is fully sovereign. The CARES Act obviates the need for such speculation and settles questions of eligibility by expressly defining the term "State" to include, *inter alia*, "the District of Columbia," 42 U.S.C. §801(g)(4), and defining "unit of local government" expansively to encompass "a county, municipality, town, township, village, parish, borough, or other unit of general government below the State level with a population that exceeds 500,000," *id.* §801(g)(2). Trying to oust any of these expressly included entities

because they are insufficiently sovereign or are organized as corporations (as many municipal governments are) is a fundamentally misdirected enterprise.

In any event, Congress' decision to include ANCs among the entities receiving funds to compensate for pandemic-related expenditures for the kind of basic services provided by governments makes perfect sense in light of the real-world problems facing Alaska Natives and the role ANCs play in ameliorating them. Regional ANCs have long played a critical role in infrastructure construction (which is of paramount importance given the harsh conditions facing many Alaska Natives) and in providing other public works projects for their communities. *See, e.g.*, Dist.Ct.Dkt.13-2 ¶4; Dist.Ct.Dkt.45-3 ¶7; Dist.Ct.Dkt.45-7 ¶8. They also provide direct services and benefits to the many Alaska Natives who lack a tribal affiliation. *See, e.g.*, Dist.Ct.Dkt.45-5 ¶¶2-3; Dist.Ct.Dkt.45-22 ¶9. And village-level ANCs likewise provide essential services to their communities, including *primary* essential services such as housing assistance, access to groceries, fuel, and internet. *See, e.g.*, Dist.Ct.Dkt.45-20 ¶4; Dist.Ct.Dkt.46-6 ¶6.

ANCs' direct role in furnishing basic services and coordinating efforts to address the unique challenges Alaska Natives face in light of the pandemic is not a random act of corporate generosity. By statute, the ANCs' prime directive is to further "the real economic and social needs of [Alaska] Natives" and facilitate "maximum participation by Natives in decisions affecting their rights and property."

43 U.S.C. §1601(b). As a result, Congress has provided that "all Federal agencies" must "consult with Alaska Native corporations on the same basis as Indian Tribes." 84 Fed. Reg. 56940 (Oct. 24, 2019). Thus, while ANCs may not all be "governments" in Appellants' conception of the term, their inclusion in Title V makes perfect sense given that they perform a number of functions for their People that one would most naturally describe as governmental—and are certainly not typical of for-profit businesses. The point is not just that ANCs have entered into numerous self-governance agreements (which are available only because of their status as Indian tribes under ISDEAA), although that fact is certainly important to understand the full picture of ANCs' roles. The point is that ANCs and their organizations are often the principal purveyors of vital governmental services for Alaska Natives, and that, despite the presence of federally recognized tribes, the role of front-line provider often falls to ANCs when crises strike. Thus, the logic of expressly including ANCs in the CARES Act is as clear as the text, which is ultimately what controls.

III. Adopting Plaintiffs' Interpretation Would Have Disastrous Short-Term Consequences And Potentially Even More Disastrous Long-Term Effects.

Plaintiffs' arguments not only are fundamentally inconsistent with the text and Congress' manifest intent, but would have disastrous consequences across a wide range of federal statutes and programs. Tens of thousands of Alaska Natives are not enrolled in a federally recognized tribe. The federal government has long recognized

this fact of life in Alaska, and what it means: "To 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]." U.S. Am. Ind. Policy Review Commission, Final Report 495 n.21, May 17, 1977. That basic reality has not changed. That is why *even some of the Plaintiffs in this case* admitted in their briefing below that "a significant number of [Alaska Natives] … would be left without services" if ANCs are unable to provide them (because, say, they were excluded from receiving federal relief funds). Sioux/Ute.MSJ.15.

Even in ordinary times, the need for ANCs to provide critical services is great. Many Native villages are unconnected by roads to the rest of Alaska (ANC.MSJ.18); many have inadequate health care services (*see, e.g.*, Dist.Ct.Dkt.45-15 ¶3); many must endure harsh Arctic or subarctic weather conditions (Dist.Ct.Dkt.45-21 ¶3); and many have no access to running water or sanitation *at all* (ANC.MSJ.19). But the need for such services is more acute now than ever. Many Alaska Natives have lost their main transportation artery (Dist.Ct.Dkt.45-2 ¶4; Dist.Ct.Dkt.45-11 ¶¶3-5; Dist.Ct.Dkt.46-3 ¶4), and have seen scarcities and prices skyrocket due to the bankruptcy of a regional airline on which they rely for the delivery of basic services like medicine (Dist.Ct.Dkt.46-2 ¶¶3-4; Dkt.Ct.Dkt.46-3 ¶5; Dist.Ct.Dkt.46-6 ¶4).

Depriving ANCs of CARES Act funds not only would be contrary to the text and basic purpose of the statute, but would deprive thousands of Alaska Natives of desperately needed assistance at the exact moment they need it most.

And the problems do not end there. As the Confederated Tribes Appellants recognize, their statutory argument is not limited to the CARES Act, but is primarily an argument about *ISDEAA's* "Indian tribe" definition. Thus, their theory endangers not just desperately needed funding for the current pandemic, but the ANCs' eligibility under ISDEAA and the over 60 federal statutes that incorporate ISDEAA's "Indian tribe" definition. *See supra* pp.6-7. Accepting their argument would therefore threaten ANCs' basic ability to continue to contract with the federal government—as well as Congress' efforts to provide federal assistance to Alaska Natives—and would fundamentally disrupt Congress' chosen model for discharging its fiduciary duties to Alaska Natives.

For instance, NAHASDA expressly includes ANCs among the tribal entities eligible for housing assistance, but it links their participation to eligibility under ISDEAA. *See* 25 U.S.C. §4103(13)(B). Concluding that ANCs are not "Indian tribes" eligible for services and programs under ISDEAA—despite their express inclusion in both statutes—thus would render ANCs ineligible for Native American housing assistance funds they have received for decades (just when Americans nationwide are struggling to make rent). And that is just NAHASDA. ANCs

participate in Indian-specific programs and receive Indian-specific services under a host of statutes that employ ISDEAA's definition.

Their longstanding participation in scores of federal programs reflects not only Congress' express inclusion of ANCs in the statutory text and the federal government's settled view, but the reality that, for some programs, ANCs are precisely the correct entity to receive federal funding. Cutting ANCs out from eligibility would frustrate Congress' will as reflected not just in the CARES Act and ISDEAA, but in dozens of statutes, starting with ANCSA. After all, Congress went out of its way to make clear in ANCSA 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). ANCSA went on to establish ANCs as a critical mechanism for serving the ongoing needs of Alaska Natives, and ISDEAA and dozens of other statutes expressly made funds available to the "regional or village corporation[s] as defined in or established pursuant to [ANCSA]." Those congressional decisions need to be honored by giving the text its plain meaning, affirming the decision below and lifting the injunction pending appeal so that much needed funds can flow to ANCs to help Alaska Natives.

CONCLUSION

For the reasons set forth above, this Court should affirm, and thereby permit the Secretary to disburse to ANCs the CARES Act funds to which they are entitled.

Respectfully submitted,

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August 18, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), Circuit Rule 32(e), and this Court's order of July 21, 2020, because it contains 9,088 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

August 18, 2020

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Paul D. Clement