Nos. 20-543 & 20-544

IN THE

Supreme Court of the United States

JANET L. YELLEN,
SECRETARY OF THE TREASURY,
Petitioner,

v.

CONFEDERATED TRIBES OF THE
CHEHALIS RESERVATION, ET AL.,
Respondents.

ALASKA NATIVE VILLAGE CORPORATION
ASSOCIATION, INC., ET AL.,
Petitioners,

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

BRIEF FOR RESPONDENTS CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.

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QUESTION PRESENTED

Whether Alaska Native Corporations are "Indian Tribes" for purposes of Title V of the Coronavirus Aid, Relief, and Economic Security Act.

PARTIES TO THE PROCEEDING

In No. 20-543, petitioner is Janet L. Yellen in her official capacity as the Secretary of the Treasury.

In No. 20-544, petitioners are Ahtna, Inc.; Akiachak, Ltd.; the Alaska Native Village Corporation Association; the Association of ANCSA Regional Corporation Presidents/CEOs; Calista Corporation; Kwethluk, Inc.; Napaskiak, Inc.; Sea Lion Corporation; and St. Mary's Native Corporation.

Respondents are Akiak Native Community; Aleut Community of St. Paul Island; Arctic Village Council; Asa'carsarmiut Tribe; Cheyenne River Sioux Tribe; Confederated Tribes of the Chehalis Reservation; Elk Valley Rancheria, California; Houlton Band of Maliseet Indians; Native Village of Venetie Tribal Government; Navajo Nation; Nondalton Tribal Council; Pueblo of Picuris; Quinault Indian Nation; Rosebud Sioux Tribe; San Carlos Apache Tribe; Tulalip Tribes; and Ute Indian Tribe of the Uintah and Ouray Reservation.

This brief is filed on behalf of respondents Akiak Native Community; Aleut Community of St. Paul Island; Arctic Village Council; Asa'carsarmiut Tribe; Cheyenne River Sioux Tribe; Confederated Tribes of the Chehalis Reservation; Elk Valley Rancheria, California; Houlton Band of Maliseet Indians; Native Village of Venetie Tribal Government; Navajo Nation; Nondalton Tribal Council; Pueblo of Picuris; Quinault Indian Nation; Rosebud Sioux Tribe; San Carlos Apache Tribe; and Tulalip Tribes.

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v.

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

BRIEF FOR RESPONDENTS CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.

INTRODUCTION

The question presented is whether Alaska Native corporations (ANCs) qualify as "Indian tribes" under Title V of the Coronavirus Aid, Relief, and Economic

Security Act (CARES Act), making them eligible for funding designated for tribal governments to combat the COVID-19 pandemic. The statutory text provides a clear answer: an ANC must have federally recognized status to qualify as an "Indian tribe." As a unanimous panel of the D.C. Circuit concluded, no ANC has been federally recognized and thus no ANC qualifies for Title V funding. Petitioners' contrary position not only defies the plain text but also would have wide-ranging effects beyond the substantial monies at stake in this case, permitting entities other than recognized tribes to direct the federal government to engage with them in programs whose very purpose is to foster tribal self-government.

Title V of the CARES Act borrows the definition of "Indian tribe" from the Indian Self-Determination and Education Act of 1975 (ISDA), which ISDA defines 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 [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) (citation omitted) (emphasis added). As Judge Katsas, joined by Judges Henderson and Millett, wrote for the court of appeals, the italicized "recognition clause" plainly "modifies all of the nouns listed in the clauses that precede it." Pet. App. 11a-12a. While petitioners would have the restrictive force

of the clause skip over ANCs (and perhaps Native villages) and pertain only to the other groups identified, no known principle of grammar or ordinary usage warrants its selective application in this fashion. The Alaska Native entities are "include[d]" with those other groups and accordingly are subject to the same treatment.

That Congress added ANCs to the definition late in the ISDA legislative process confirms rather than alters this conclusion. The signal fact is that when Congress inserted ANCs, it placed them before the recognition clause and hence plainly subjected them to its reach. The ANCs posit that Congress may have done this out of editorial convenience, but one would search in vain for a decision from this Court holding that text should be disregarded on the supposition that Congress opted for convenience over clarity.

Equally plain is the conclusion—as the court of appeals further reasoned and the government agreed below—that the ANCs do not presently satisfy the recognition clause. Congress has not been mysterious as to its meaning. For over sixty years, Congress has explicitly declared tribes eligible for the special programs and services provided to Indians when according them federal recognition, and declared them no longer eligible when divesting them of that status. Congress has not so provided for ANCs in ANCSA or other statutory enactments, and it is indeed undisputed that no ANC is presently federally recognized. The court of appeals' decision was therefore correct, and its judgment should be affirmed.

Try as they might, petitioners cannot overcome the plain text. They argue that the recognition clause should not be applied to the ANCs because this would result in impermissible surplusage. Under their logic, Congress could never attach a statutory condition to named entities because failure of those entities to satisfy the condition at any point would render their identification in the statute superfluous. This does not comport with ordinary understanding. Only if it were impossible for Congress (or the Department of the Interior, if lawfully exercising delegated authority) to recognize ANCs would any superfluity issue arise. But neither the government nor the ANCs contend that Congress's power to recognize "distinctly Indian" entities does not extend to ANCs.

Nor is there basis for the suggestion that applying the recognition clause to the ANCs would be absurd because Congress would never have contemplated such recognition. As the court of appeals correctly detailed, Congress refrained from determining the political status of ANCs in ANCSA. That agnosticism persisted when Congress enacted ISDA only a few years later, and it accordingly made sense for Congress to authorize ISDA contracting by ANCs in the event that they were ultimately recognized—which is precisely what ISDA's text does. That decision made all the more sense given the unique statutory framework and history surrounding recognition decisions in Alaska.

Petitioners further argue that agencies and courts have adopted their counter-textual interpretation and that Congress has ratified that adoption. But there has never existed an interpretation sufficiently consistent and well-settled as to justify the presumption

that Congress intended to write it into law without changing a word of the statute. Agency guidelines and practice have long treated federally recognized tribes as the repository of ISDA contracting authority in Alaska, and petitioners' examples of ANC involvement largely rest on separate statutory authorizations to deal with circumscribed situations. Multiple formally promulgated regulations—including from the agencies charged with administering ISDA, and the Department of the Treasury, charged with implementing the CARES Act—have likewise interpreted the "Indian tribe" definition as restricted to federally recognized tribes. Ratification provides no basis for departing from plain text, and neither does the run of other enactments, which carries a very different meaning than that presented by petitioners.

In the end, the ANCs retreat to overstated claims about consequences. Respondents—federally recognized tribes from both Alaska and the Lower 48 states—are of course keenly interested in the welfare of Alaska Natives. Both ISDA and the CARES Act provide funding for tribal governments to use in administering critical governmental programs and services for the benefit of their citizens. The 229 federally recognized tribes in Alaska are working tirelessly towards that end, and they are free to enlist the assistance of the ANCs as they do so. The ANCs, however, would arrogate the authority to direct governmental funding and programs to themselves. History is littered with claims, often advanced by the United States and at great cost to tribal citizens, that tribes would be best off if others exercised governmental authority on their behalf. Congress resoundingly rejected that approach when it ushered in a new era of

tribal self-determination in ISDA—a policy it has carried forward to this day and one that is well reflected in its definition of an Indian tribe. If policy or text are to change, it is for Congress to make the decision.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–27a[1]) is reported at 976 F.3d 15. The opinion of the district court (Pet. App. 28a–72a) is reported at 471 F. Supp. 3d 1. The district court's order denying a preliminary injunction (Pet. App. 84a–125a) is reported at 456 F. Supp. 3d 152.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2020. The petition for a writ of certiorari in No. 20-543 was filed on October 23, 2020. The petition in No. 20-544 was filed on October 21, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 801(a)(2) of Title 42 of the United States Code reserves funds for the "making [of] payments to Tribal governments."

Section 801(g)(5) of Title 42 of the United States Code provides:

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[1] Citations to "Pet. App." refer to the petition appendix in No. 20-543.

> The term "Tribal government" means the recognized governing body of an Indian Tribe.

Section 801(g)(1) of Title 42 of the United States Code provides:

> The term "Indian Tribe" has the meaning given that term in section 5304(e) of Title 25.

Section 5304(e) of Title 25 of the United States Code provides:

> "Indian tribe" or "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 the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601–1929h], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.]

STATEMENT

A. Background

1. In 1971, "to settle all land claims by Alaska Natives," Congress enacted the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688. *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523 (1998). Through ANCSA, Congress "authorized the transfer of $962.5 million in state and federal funds and approximately 44 million acres of Alaska

land" in fee to newly created village and regional entities. *Id.* at 524.

ANCSA required "Natives having a common heritage and sharing common interests" to form twelve regional for-profit corporations, which became known as the regional ANCs, corresponding to twelve existing regional nonprofit associations. See 43 U.S.C. 1606(a), (d). ANCSA also required the "Native residents of each Native village … [to] organize as a business for profit or nonprofit corporation," 43 U.S.C. 1607(a), to hold and manage the settlement benefits "on behalf of [the] village," 43 U.S.C. 1602(j). All of these village ANCs ultimately organized as for-profit entities. See Memorandum from Solicitor Sansonetti, Dep't of the Interior, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers* 50 n.225 (Jan. 11, 1993) (Sansonetti Op.), go.usa.gov/xs4DQ. Congress also named 215 "Native villages" in ANCSA, 43 U.S.C. 1610(b), 1615(a), sweeping in communities with state, federal, and traditional organizational structures. See Sansonetti Op. 74 n.203.

In all, ANCSA created over 200 new legal entities that overlapped with, but were distinct from, existing tribal groups, were organized along the same historical community lines, and were composed of the same individuals. Yet ANCSA did not define the nature of the federal government's political relationship with the existing or new entities. In the decades since, Interior has acknowledged 229 federally recognized Indian tribes in Alaska, almost all of which were listed as Native villages in ANCSA or are associated with those communities. See 86 Fed. Reg. 7554-01, 7557–

58 (Jan. 29, 2021). To date, no ANC has been federally recognized as an Indian tribe.[2]

At the time of ANCSA, the "[c]orporations were seen as vehicles to promote the health, education, social, and economic welfare," expectations that Interior later concluded were "appropriate for governments, not corporations." Dep't of the Interior, *ANCSA 1985 Study* ES-12 (June 29, 1984), https://bit.ly/2KtgGkd. Today, many ANCs are thriving corporate entities, with business ventures including oil and gas drilling, refining, and marketing; mining, timbering, and other resource development; military contracting; real estate; and construction, among others. See Government Accountability Office (GAO), GAO-13-121, *Regional Alaska Native Corporations: Status 40 Years After Establishment, and Future Considerations* 12–14 (Dec. 2012). "In fiscal year 2017, ANCs had a combined revenue of $9.1 billion." Pet. App. 89a. The twelve regional ANCs alone "have over 138,000 shareholders and employ more than 43,000 people worldwide." *Id*.

2. In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act to enable "Indian tribes [to] assume responsibility for [the governmental] aid programs that benefit their members," *Menominee Indian Tribe of Wis.* v. *United States*, 136 S. Ct. 750, 753 (2016). In what amounted to a sea

[2] While federally recognized tribes in Alaska and the Lower 48 states share the same status and authorities by virtue of their government-to-government relationship with the United States, the government has often referred to Alaska tribes as "villages" in official documents. This brief uses the latter term when necessary in context.

change in federal Indian policy, Congress authorized any "Indian tribe" to enter into "self-determination contracts" (and, through later amendments, "self-governance compacts") with Interior and the Department of Health and Human Services (HHS). Pursuant to these agreements, Indian tribes assume responsibility for the special governmental programs and services that the federal government would otherwise ostensibly provide, including health care, education, social services, and law enforcement. *Id.*; see 25 U.S.C. 5321(a)(1), 5364, 5384. Congress thereby sought "to support[] and assist[] Indian tribes in the development of strong and stable tribal governments." 25 U.S.C. 5302(b).

ISDA defines the "Indian tribe[s]" covered by the statute as follows:

> [A]ny 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) (citation omitted). And it vests these tribes with substantial authority. Both Interior and HHS must enter into self-determination contracts upon a tribe's request, with declination allowed only in limited circumstances. See 25 U.S.C. 5321(a)–(b); 25 C.F.R. 900.22. Any contract benefitting more than one Indian tribe must first be approved by each such tribe. See 25 U.S.C. 5304(*l*). An Indian tribe may also designate a "tribal organization"—which

includes Indian corporations "sanctioned, or chartered" by a tribe—to enter a self-determination contract on its behalf. See 25 U.S.C. 5321(a)(1), 5304(*l*); 25 C.F.R. 900.8(b)(1).

3. In March 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281. Title V of the CARES Act authorizes a coronavirus relief fund to assist state, local, and tribal governments in protecting their communities during the COVID-19 pandemic. Congress appropriated $150 billion for "States, Tribal governments, and units of local government" to cover unbudgeted governmental expenditures necessitated by the public health emergency. 42 U.S.C. 801(a)(1), (d).

Of that sum, $8 billion is reserved for "Tribal governments." 42 U.S.C. 801(a)(2)(B). Title V defines a "Tribal government" as "the recognized governing body of an Indian Tribe" and in turn defines an "Indian Tribe" by reference to the definition in ISDA. 42 U.S.C. 801(g)(1), (5); 25 U.S.C. 5304(e). The Secretary of the Treasury has indicated that approximately $533 million in Title V tribal funding remains available for disbursement upon the resolution of this litigation. See Brief for Appellees, *Shawnee Tribe* v. *Mnuchin*, No. 20-5286 (D.C. Cir. Oct. 26, 2020).

B. Facts and Procedural History

1. Respondents are a group of seventeen federally recognized Indian tribes from Alaska and the Lower 48 states that have taken extraordinary measures to protect the health and welfare of their citizens during the pandemic, including enforcing stay-at-home

orders; establishing acute health-care and testing facilities; hiring additional first responders; and providing emergency food, medicine, and utilities. They have done so while their governmental revenues have collapsed. C.A. App. 33–34, 37, 40–41.

2. a. After a Treasury Department form suggested that ANCs would receive Title V funds, C.A. App. 133, respondents filed suit under the Administrative Procedure Act, challenging Treasury's decision to make funds available to ANCs and seeking preliminary injunctive relief. Treasury then sought Interior's view regarding the eligibility of ANCs; Interior responded the next day that ANCs were eligible, making no mention of the recognition clause. J.A. 49–52. Treasury promptly issued a statement announcing that it "concur[red] in that conclusion." C.A. App. 144; see J.A. 53–54.

The district court preliminarily enjoined the Secretary from distributing Title V funds to ANCs. Pet. App. 84a–125a. Declaring that it could not "ignore the clear grammatical construct of the [ISDA] definition," *id.* 112a, the court determined that the recognition clause applied to ANCs and required them to be federally recognized in order to qualify as an "Indian tribe." The government agreed that no ANC had been so recognized, and the court accordingly found that no ANC qualified for Title V funding. *Id.* 108a–110a (citation omitted).

b. The district court subsequently entered summary judgment for petitioners. Pet. App. 28a–72a. Although it reiterated that "[t]he [recognition] clause plainly modifies each of the nouns that precedes it,

including ANCs," *id.* 44a, the court "look[ed] beyond the statute's grammatical structure," *id.* 45a, and gave the definition what it confessed to be an "unnatural reading," *id.* 52a—that the recognition clause applies to all entities listed in the definition except ANCs. The court justified that "strange result," *id.*, based on the rule against superfluities, legislative history, and *Skidmore* deference, *id.* 46a. It accordingly determined that all 200 ANCs are "Indian tribes" eligible for Title V payments, but enjoined Treasury from dispersing Title V funds to ANCs pending appeal. *Id.* 77a–83a.

3. A unanimous panel of the court of appeals reversed. *Id.* 1a–27a.

a. The court of appeals concluded that the "text and structure" of ISDA's "Indian tribe" definition "make[s] clear" that the recognition clause "modifies all of the nouns listed in the clauses that precede it," including ANCs. *Id.* 11a–12a. And "through its usage of 'including,'" the court continued, the definition "operates to equate" Alaska Native villages and corporations with "the five preceding nouns" ("Indian tribe, band, nation, or other organized group or community"). *Id.* 12a. The court added that "it is not grammatically possible for the recognition clause to modify *all* of [those] five nouns," "*plus* the first noun" in the next clause ("village"), "but *not* the one noun in the preceding two clauses that is its most immediate antecedent ('corporation')." *Id.*

The court of appeals next determined that, as the government agreed, ANCs do not satisfy the terms of the recognition clause. *Id.* 13a–18a. The court

explained that Congress has long used the language of the recognition clause to connote federally recognized status. *Id.* 14a–16a. Because no ANC presently enjoys that status, the court concluded that no ANC qualifies as an "Indian tribe" eligible for Title V funding. *Id.* 17a–18a, 25a.

After carefully examining the historical record, the court of appeals rejected petitioners' contention that adherence to ISDA's plain language would result in superfluity. The court noted that, "when Congress enacted ISDA in 1975, it was substantially uncertain whether the federal government would recognize Native villages, Native corporations, both kinds of entities, or neither." *Id.* 22a–23a. "By including both villages and corporations," the court explained, "Congress ensured that any Native entities recognized by Interior or later legislation would qualify as Indian tribes." *Id.* 23a.

The court of appeals also rejected the government's reliance on an "internal agency memorandum" written by an Assistant Solicitor of the Interior in 1976, which concluded that ANCs should be deemed exempt from the recognition clause. *Id.* 23a–24a; see J.A. 44. The Assistant Solicitor opined that the inclusion of ANCs in the "Indian tribe" definition would be "superfluous" if the recognition clause applied to them because ANCs "ha[d] not heretofore been recognized as eligible for [Bureau of Indian Affairs] programs and services." J.A. 45. The court noted that this interpretation "has never been formally expressed" and that the memorandum "did not address any of the textual or historical considerations" the court had considered. Pet. App. 23a. The court further noted that

the interpretation "appear[ed] inconsistent with a binding regulation adopted by the Department of the Treasury, the agency before the [c]ourt." *Id.* (citing 12 C.F.R. 1805.104).

b. Judge Henderson concurred. In her view, the exclusion of ANCs from Title V funding was "an unfortunate and unintended consequence of high-stakes, time-sensitive legislative drafting." *Id.* 26a. But she "join[ed her] colleagues in full," reasoning that it was "not th[e] court's job to soften Congress' chosen words." *Id.* 26a-27a (quotation marks and ellipsis omitted).

4. The court of appeals subsequently suspended any potential lapse of Congress's CARES Act appropriation "until seven days after final action by this Court or the Supreme Court." *Id.* 73a–74a. Petitioners filed a petition for certiorari, which this Court granted.

SUMMARY OF ARGUMENT

The statutory text decides this case. As the D.C. Circuit correctly concluded, ANCs do not qualify as "Indian Tribes" under Title V of the CARES Act.

I. A. The CARES Act incorporates ISDA's "Indian tribe" definition, and ISDA's plain text provides that an Indian group must be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" to qualify as an "Indian tribe." Under an ordinary reading of the statute, this limiting clause applies to all listed entities, including ANCs.

Petitioners' contention that ANCs are exempt from the recognition requirement and automatically qualify as "Indian tribes" merely because they are enumerated produces grammatical incoherence. The drafting history confirms the natural reading: Congress deliberately placed ANCs before, not after, the recognition clause.

B. As the court of appeals held, and as the government agreed below, no ANC currently satisfies the recognition clause because no ANC is currently federally recognized. Numerous statutes, both before and after ISDA's enactment, demonstrate that Congress has long used formal recognition as the mechanism for conferring eligibility for the special federal programs and services provided to Indians. Petitioners' contention, advanced here for the first time, that ANCs satisfy the recognition clause by virtue of ANCSA is bereft of textual or historical support.

II. A. Petitioners claim that the decision below renders the listing of ANCs in the "Indian tribe" definition superfluous. But the disjunctive listing of numerous Indian groups allows the universe of "Indian tribes" to expand and contract over time based on recognition decisions, and petitioners concede that ANCs are not categorically barred from being federally recognized. Nor is applying the recognition clause to ANCs absurd—the statutes and unique history of recognition in Alaska demonstrate that it was entirely plausible that ANCs might obtain that status.

B. Petitioners next invoke the prior-construction canon, arguing that Congress ratified their preferred

construction by reenacting the "Indian tribe" definition in 1988. But the prior-construction canon does not apply here because ISDA's language is plain, and the informal agency memorandum on which petitioners rely was soon eclipsed by agency interpretations and practice consistent with the text. Nor was there any "settled" judicial interpretation for Congress to have ratified, and naturally there is no evidence that Congress was ever aware of any such interpretation. Petitioners' claim that ratification occurred through the CARES Act fares no better. ISDA's full text and numerous agency regulations confirm that only federally recognized tribes qualify as "Indian tribes."

C. Other statutes that borrow ISDA's definition lend no support to petitioners' construction. That Congress has forever precluded ANCs from participating as tribes in statutory schemes pertaining to their businesses does not suggest that Congress presupposes them to be tribes. And petitioners' statutory narrative fails to account for statutes using the ISDA definition that plainly do not apply to ANCs or that were amended to specifically include ANCs, regardless of their recognized status.

III. Finally, affirming the court of appeals' decision will not impair the provision of services to Alaska Natives. ANCs do not hold any ISDA contracts themselves, and a separate statute provides for the statewide delivery of health-care services to Alaska Natives (and for the role of one regional ANC in that process). The government's obligation to provide services to Natives, moreover, exists independent of ISDA. On the other hand, ruling for ANCs would have sweeping consequences, allowing them to

arrogate for themselves tribal governmental authority under ISDA and myriad other statutes to the detriment of federally recognized tribes. If that step is to be sanctioned, it is for Congress, not this Court, to do so. The judgment of the court of appeals should be affirmed.

ARGUMENT

I. ANCs Are Not 'Indian Tribes' Under ISDA and the CARES Act.

The question presented is whether Alaska Native corporations qualify as "Indian Tribes" for purposes of Title V of the CARES Act. As the court of appeals correctly held, the statutory language demonstrates that the answer to that question is no. Title V defines the phrase "Indian Tribe" by reference to ISDA's definition of that phrase, and ISDA's definition plainly requires an ANC to be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" in order to receive funding. No ANC presently satisfies that requirement.

A. An ANC Qualifies as an 'Indian Tribe' Under ISDA Only If It Satisfies the Recognition Clause.

1. Statutory interpretation "begins with the text," *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016), and courts "must give effect to the clear meaning of statutes as written," *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (quotation marks omitted). Where the statutory text is "unambiguous,"

the "judicial inquiry is complete." *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1177 (2020) (quotation marks omitted). That is the case here.

ISDA defines an "Indian tribe" as:

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), 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).

Broken down into its constituent elements, the definition consists of a noun phrase containing three grammatical parts:

> i. A disjunctive list of parallel nouns describing different types of Indian groups, including a catch-all term ("any Indian tribe, band, nation, or other organized group or community");
>
> ii. An adjectival prepositional phrase that refers disjunctively to Alaska Native villages and corporations ("including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA]"); and
>
> iii. A relative clause that concerns recognition by the federal government ("which is recognized as eligible for the special programs and services

provided by the United States to Indians because of their status as Indians").

2. As the court of appeals correctly concluded, the "text and structure" of the ISDA definition "make clear" that the final recognition clause "modifies all of the nouns listed in the clauses that precede it," including ANCs. Pet. App. 11a–12a.

a. It is undisputed that the recognition clause applies to the initial list of Indian groups and thus limits the set of entities qualifying as "Indian tribes." See Gov't Br. 43. The definition introduces the listing with the term "any," which is "most naturally read" to mean an "Indian tribe, band, nation, or other organized group or community" "of whatever kind." See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 220 (2008). The disjunctive phrasing of the list signifies "alternatives"—different types of groups covered by the definition. See *United States* v. *Woods*, 571 U.S. 31, 45–46 (2013). On its own, then, the listing is broad, sweeping in any kind of organized group of Indians. If Congress had stopped there, a broad array of Indian groups would qualify as "Indian tribes."

But Congress did not stop there. It included the recognition clause, a relative clause requiring its antecedents to be recognized as eligible for "the special programs and services" the government provides to Indians. And because the list of Indian groups is a "single, integrated list," the recognition clause applies to each of the items in it. *Jama* v. *ICE*, 543 U.S. 335, 344 n.4 (2005); see also Pet. App. 12a (discussing how the series-qualifier canon confirms this construction). The recognition clause accordingly does substantial

work in the definition: It establishes the condition under which an otherwise broad array of Indian groups qualify for tribal status.

b. ANCs, like the other listed entities, must satisfy the recognition clause in order to qualify as "Indian tribes." They are listed in the Alaska prepositional phrase, which begins with the term "including." As the court of appeals explained, "through its usage of 'including,'" the phrase "operates to equate" Alaska Native villages and corporations with the items in the list of Indian groups. Pet. App. 12a.

The ordinary meaning of "to include" is to "'contain' or 'comprise as part of a whole.'" *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89 (2001) (citation omitted). "Including" thus ordinarily indicates an "illustrative application" of the language that precedes it. *Fed. Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); see also *Chickasaw Nation*, 534 U.S. at 89. Here, the language preceding the Alaska prepositional phrase is the list of Indian groups (which includes any "other organized group or community"). The text therefore indicates that Alaska Native villages and ANC are examples of entities covered by the initial listing. And as explained above, all parties agree that *those* groups must satisfy the recognition clause in order to qualify as "Indian tribes." See *supra* p. 20.

The nonrestrictive nature of the Alaska prepositional phrase reinforces that reading. See William Strunk Jr. & E.B. White, The Elements of Style 3–4 (2d ed. 1972) (Strunk & White). Such a phrase is typically surrounded by commas because it is

parenthetical to the rest of the sentence—that is, it provides "relevant" information, but "the main clause would still have meaning without it." Wilson Follett, Modern American Usage 405 (12th prtg. 1984); see also Strunk & White 3–4. The Alaska phrase fits that description. It provides additional information about the universe of Indian groups without modifying the overall meaning of the sentence.[3]

To be sure, "including" can sometimes function as a word of "extension or enlargement." *Am. Sur. Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). But that is of no moment: Even in those circumstances, the use of "including" signifies that the items being added to the definition "should receive the same treatment" as the items previously identified. *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1658 (2017); see also *United States* v. *Schooner Betsey & Charlotte*, 8 U.S. (4 Cranch) 443, 452 (1808).

Accordingly, whether "including" operates illustratively (in keeping with normal usage) or additively here, the result is that ANCs are treated as "Indian tribe[s], band[s], nation[s], or other organized group[s] or communit[ies]." And because any of those groups must satisfy the recognition clause to qualify as an "Indian tribe," the same is true for ANCs.

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[3] The original version of ISDA did not include a comma between the Alaska prepositional phrase and the recognition clause, making petitioners' argument that Congress in 1975 did not intend to subject ANCs to the clause even more farfetched. See Act of Jan. 4, 1975, Pub. L. No. 93-638, §4(b), 88 Stat. 2203, 2204. Congress added the comma in 1990 as a "technical correction[]." S. Rep. No. 101-226, at 10 (1990); see Act of May 24, 1990, Pub. L. No. 101-301, § 2(a)(1), 104 Stat. 206.

c. Petitioners' contrary arguments are unconvincing. Petitioners contend that ANCs must automatically qualify as "Indian tribes" because the ISDA definition expressly references them. Gov't Br. 19–20; ANC Br. 25–26. But that argument ignores the recognition clause. The definition, after all, expressly lists other types of Indian groups, yet there is no dispute that the clause applies to them. In suggesting that the clause nevertheless skips over the ANCs, petitioners are choosing which words to qualify "based only on what best serves [their] argument." *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund,* 138 S. Ct. 1061, 1077 (2018).

Nor does the phrase "defined in or established pursuant to [ANCSA]" act as a talisman to ward off the restrictive force of the recognition clause. Indeed, since ISDA's passage, over 200 Alaska Native villages have had their status thoroughly vetted by Interior before appearing on the list of tribes recognized as eligible for special Indian programs and services, see *infra* p. 35, notwithstanding the fact that, like ANCs, they are "defined in or established pursuant to [ANCSA]."

Petitioners' resort to legislative history fares no better. See Gov't Br. 22–23; ANC Br. 26. The bill that became ISDA originally defined the phrase "Indian tribe" as "any Indian tribe … or other organized group or community, including any Alaska Native community as defined in [ANCSA], for which the Federal Government provides special programs and services because of its Indian identity," S. 1017, §4(b), 93d Cong. (1st Sess. 1973); the final clause was then

revised to its current form. S. Rep. No. 93-682, at 2 (1974). After that, the term "Alaska Native community" (one not used in ANCSA) was replaced with "any Alaska Native village" by the Senate, S. Rep. No. 93-762, at 2 (1974), and ANCs were inserted by the House, H.R. Rep. No. 93-1600, at 2 (1974).

The single most important fact in this drafting history is that when Congress added ANCs to the Alaska prepositional phrase, it placed them before the recognition clause. If Congress had not desired that result, it could easily have listed ANCs *after* the clause—as the ANCs forthrightly admit. Br. 27. The ANCs suggest that Congress perhaps placed them where it did out of editorial convenience, see *id.*, but there is no warrant for such speculation. The House Report that petitioners cite simply says that when Congress added ANCs, it did so to "include" them in the definition—not to treat them differently from other groups. See H.R. Rep. No. 93-1600, at 14. And the only relevant hearing colloquy lends no support to their claim. See *ISDA: Hearings Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs on S. 1017 and Related Bills*, 93d Cong. 118-119 (1974) (explaining that "[t]he profitmaking corporations do not deal in human services" and recommending the addition of regional nonprofit corporations, one of which was "federally recognized as a tribe").

Petitioners ultimately are left in the impossible position of ascribing to Congress great intentionality in adding ANCs to the ISDA definition, but great carelessness as to where it did so. The better inference is that Congress meant what it said: namely,

that ANCs must satisfy the recognition clause to qualify as "Indian tribes."

B. No ANC Presently Satisfies the Recognition Clause.

At every stage of this litigation until now, the government has argued that the recognition clause refers to an entity's status as a federally recognized tribe and that no ANC presently satisfies this condition. Br. 47. The court of appeals correctly reached the same conclusions.

1. Federal recognition is a "formal political act" establishing a government-to-government relationship between the recognized tribe and the United States. *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (citation omitted). Congress possesses the authority to recognize Indian tribes pursuant to its "plenary power" under the Indian Commerce Clause. *United States* v. *Lara*, 541 U.S. 193, 200 (2004) (citation omitted). Congress, the Executive Branch, and the courts have long equated formal recognition with eligibility for the special federal programs and services provided to Indians. *Miwok Tribe*, 515 F.3d at 1263.

For at least six decades, Congress has utilized recognition as the mechanism by which it (or Interior exercising delegated authority) accords or divests an Indian group of such eligibility. From 1954 to 1968, Congress terminated federal recognition of over one hundred tribes. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 3 Am. Indian L. Rev. 139, 151 (1977). As the court of appeals

explained, the termination statutes provided "[b]y rote formula" that tribes and their members would "not be entitled to any of the special services performed by the United States for Indians because of their status as Indians." Pet. App. 14a (quoting Act of Sept. 21, 1959, Pub. L. No. 86-322, §5, 73 Stat. 592, 593 (Catawba)); see also, *e.g.*, Act of Aug. 23, 1954, Pub. L. No. 83-627, §2, 68 Stat. 768, 769 (Alabama-Coushatta); Act of Aug. 18, 1958, Pub. L. No. 85-671, §10(b), 72 Stat. 619, 621 (41 California rancherias); Act of Sep. 5, 1962, Pub. L. No. 87-629, §10, 76 Stat. 429, 431 (Ponca); Act of Apr. 12, 1968, Pub. L. No. 90-287, 82 Stat. 93, 93 (Ysleta del Sur).

When federal policy shifted in the 1970s, Congress similarly provided in statutes restoring recognition to tribes that it was reinstating their eligibility for the "programs and services provided by the United States to Indians because of their status as Indians." Indian Tribal Restoration Act, Pub. L. No. 95-281, §4, 92 Stat. 246, 247 (1978) (Modoc, Wyandotte, Peoria, and Ottawa); see also, *e.g.*, Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770, 770 (1973). Other restoration statutes used similar language, reinstating tribal eligibility for "all Federal services and benefits furnished to federally recognized Indian tribes." Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, §3(a), 91 Stat. 1415, 1415 (1977); see, *e.g.*, Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, §3(a), 94 Stat. 317, 317 (1980).

Congress has continued to use federal recognition to this day—including just months before the CARES Act—to render tribes eligible for the full panoply of federal programs and services provided to Indians,

often extending recognition principally for that purpose. See, *e.g.*, National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, §2870(d)(1), 133 Stat. 1198, 1908 (2019) (providing that upon recognition of the Little Shell Tribe of Chippewa Indians of Montana, "each member shall be eligible for all services and benefits provided by the United States to Indians and federally recognized Indian tribes"); Act of Sept. 18, 1978, Pub. L. No. 95-375, §1(a), 92 Stat. 712, 712 (Pascua Yaqui); H.R. Rep. No. 97-858, at 4, 6 (1982) (citing the "desperate[]" and "urgent" need for "federal health, housing, and other social services available to … members of federally-recognized tribes" as the primary reason for recognition in the Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269 (1983)).

In the Federally Recognized Indian Tribe List Act of 1994 (List Act), Pub. L. No. 103-454, 108 Stat. 4791, Congress required the Secretary to publish an annual 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." 25 U.S.C. 5131(a). As the court of appeals observed, Congress "equate[d] federal recognition of Indian tribes with eligibility" for special Indian programs and services, Pet. App. 16a, tracking the language of the recognition clause throughout the Act, 25 U.S.C. 5130 note (congressional findings (6)–(8)). No ANC appears on Interior's most recent list. See 86 Fed. Reg. 7,554-01.

The Executive Branch has likewise understood formal recognition to serve as the cornerstone of eligibility for federal Indian programs and services.

Interior regulations implementing ISDA interpreted the recognition clause as referring to groups that are "federally recognized." *E.g.*, 25 C.F.R. 273.106, 275.2(f), 276.2(i) (in effect from 1975 to present). And its regulations governing the recognition process have also stated for decades that federal recognition is a prerequisite to eligibility for "the special programs and services provided by the United States to Indians because of their status as Indians." 25 C.F.R. 83.2; see 25 C.F.R. 54.2 (1979). The same principle applies to Alaska Native groups. 85 Fed. Reg. 37-01, 46 (Jan. 2, 2020) (proposed 25 C.F.R. 82.2).

2. In the face of this longstanding understanding that eligibility for special Indian programs and services is grounded in federal recognition, the ANCs argue that ANCSA rendered them eligible for such programs. Br. 27–28. But as the above history demonstrates, Congress has long established (or abrogated) tribal eligibility for programs and services in the plainest terms, and ANCSA contains no provisions to that effect. Instead, as the ANCs themselves declare, "ANCSA broke sharply from the usual mold," Br. 6. Congress provided ANCs with lands in fee simple and settlement funds rather than general eligibility for federal Indian programs and services.

Indeed, the government has never taken the position that ANCSA recognized ANCs as eligible for Indian programs generally. In 1972, the year after ANCSA's passage, Interior identified all Indian groups for which the Bureau of Indian Affairs (BIA) recognized a "definite responsibility" to provide federal services. Interior named 218 groups in Alaska, and none was an ANC. BIA, *American Indians and*

Their Federal Relationship Preface, 2–6 (1972), https://tinyurl.com/nn7ayunc. Four years later, the Assistant Solicitor for Indian Affairs stated that ANCs "have not heretofore been recognized as eligible" for Indian programs and services generally, but instead only for the specific benefits "provided for by the terms of [ANCSA]." J.A. 45. Even now, the government categorically states that it "has never recognized ANCs in the sense of making them eligible for the full range of federal services and benefits available to Indian tribes." Br. 48.

Contrary to its position below, the government now argues that "if the recognition clause is read to apply to ANCs, then Congress must be understood to have deemed ANCs" to satisfy it in ISDA. *Id.* 47. The only evidence proffered is that Congress referenced ANCs in the "Indian tribe" definition. The claim, in other words, simply recycles the counter-textual contention that the recognition clause does not apply to ANCs. And it cannot be squared with the language of the clause, which does not speak in ISDA-specific terms but rather requires eligibility for the programs generally available to tribes—eligibility that the government has conceded the ANCs do not presently possess.

If the recognition clause means something other than federally recognized status, then it must have that same meaning for every other group listed in the definition. See *Clark* v. *Martinez*, 543 U.S. 371, 378–80 (2005). No accepted principle of statutory interpretation supports privileging one group over all others by exempting it from the requirement. And that is true regardless of whether treating ANCs as Indian

tribes would be "consistent" with the underlying policies of ANCSA and ISDA as characterized by the government. See Br. 20–21, 47–48. Policy arguments cannot overcome plain text. See, *e.g.*, *Sandoz Inc.* v. *Amgen Inc.*, 137 S. Ct. 1664, 1678 (2017).

3. While the Solicitor General takes no position on "the precise meaning of the recognition clause," Br. 48, Congress has for many decades, and that straightforward meaning should govern here. As the court of appeals correctly concluded, the only "special programs and services" available to Indians because of their "status as Indians" to which the recognition clause could "plausibly" refer are the "panoply of benefits and services to which recognized tribes are entitled." Pet. App. 17a (quotation marks omitted). Here, it is undisputed that no ANC is federally recognized. See Gov't Br. 39, 48; ANC Br. 19–20, 30, 32. The court of appeals therefore correctly held that no ANC qualifies as an "Indian tribe" under the CARES Act. Pet. App. 25a.

II. Petitioners' Efforts to Avoid the Plain Language Interpretation of the 'Indian Tribe' Definition Are Unavailing.

A. The Plain-Text Interpretation of ISDA Does Not Create a Superfluity Problem.

Contrary to petitioners' contention, the plain-text interpretation of ISDA's "Indian tribe" definition does not render the listing of ANCs superfluous. Gov't Br. 37-43; ANC Br. 31-36. Nor, as petitioners suggest, does it produce an absurd result.

1. The rule against superfluities provides that courts should "give effect, if possible, to every word Congress used" in a statute. *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 138 S. Ct. 617, 632 (2018) (citation omitted). But it is not "absolute," *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013), and provides "only a clue" about the proper interpretation of a statute, *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). Importantly, the Court does not use the rule "[to] produce an interpretation that … would conflict with the intent embodied in the statute Congress wrote." *Chickasaw Nation*, 534 U.S. at 94.

As an initial matter, the rule has little applicability here because the Alaska prepositional phrase is already best read as redundant. Cf. *Rimini St.*, 139 S. Ct. at 881 ("Sometimes the better overall reading of the statute contains some redundancy."). As explained, the word "including" introduces examples of a previously listed item, and examples are redundant by nature. See *Chickasaw Nation*, 534 U.S. at 89. And redundancy of that sort is common and often helpful—by naming ANCs, Congress "remove[d] any doubt," *Ali*, 552 U.S. at 226, that they fall within the definition's reference to "other organized group[s] or communit[ies]." See Sansonetti Op. 101–106 (discussing questions surrounding whether ANCSA was termination legislation).

2. The plain-text interpretation does not render the listing of ANCs superfluous. ISDA states that "any" entity from the listed categories qualifies as an "Indian tribe" if it satisfies the recognition clause. 25 U.S.C. 5304(e). "'Any' commonly refers to indefinite or unknown quantities," *In re HomeBanc Mortgage*

Corp., 945 F.3d 801, 814 (3d Cir. 2019), cert. denied, 141 S. Ct. 249 (2020); it allows for the possibility that an entity from each category exists as an "Indian tribe" at any particular time but does not demand that one does. See, *e.g.*, *Any*, Black's Law Dictionary 120 (4th ed. 1951); see also *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (explaining that "any" refers to "one or some indiscriminately" but that Congress may add language "limiting the breadth of that word"). And as noted, the definition's disjunctive listing of entities signifies alternatives. See *supra* p. 20.

The "Indian tribe" definition is thus broad and flexible: It allows many types of Indian and Alaska Native groups to qualify whenever a particular group satisfies the recognition clause. That flexibility enables the universe of "Indian tribes" to expand and contract based on new recognition decisions. See, *e.g.*, Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Pub. L. No. 115-121, 132 Stat. 40 (recognizing six tribes and establishing eligibility for special programs and services).

Accordingly, the listing of ANCs would be superfluous only if it were *impossible* for them to achieve federal recognition. But Congress (or Interior, if lawfully exercising delegated authority) can recognize ANCs based on its plenary power over Indian affairs. See *Lara*, 541 U.S. at 200; ANCSA Amendments of 1987, Pub. L. No. 100-241, §2(9), 101 Stat. 1788, 1789 (situating ANCSA within that power). Tribal recognition is the "special duty" of the "political departments," *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865), and recognition determinations are not to be disturbed unless the government

"arbitrarily" grants tribal status to a group that is not "distinctly Indian," *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913).

Petitioners admit, as they must, that Congress can recognize ANCs. Gov't Br. 39; ANC Br. 7 ("ANCS are distinctly native entities"). Indeed, in 1996, Congress considered a bill providing that Cook Inlet Region, Inc. (CIRI), a regional ANC, "shall be deemed to be an Indian tribal entity for the purpose of federal programs for which Indians are eligible because of their status as Indians[,]" and mandating that BIA "specifically include [CIRI] on any list that designates federally recognized Indian tribes[.]" H.R. 3662, §121(a)-(b), 104th Cong. (2d Sess. 1996). What petitioners ask the Court to accomplish now for all 200 ANCs is exactly what Congress considered and rejected for CIRI alone in 1996.[4]

Because Congress has the authority to recognize ANCs, their listing is not superfluous, regardless of whether any ANCs are currently recognized.

3. In the absence of superfluity, petitioners' argument is best understood as asking the Court to depart

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[4] Petitioners suggest that the List Act "excludes" ANCs from federal recognition because ANCs are not specifically named in the Act. See Gov't Br. 34; ANC Br. 39. But ANCs are no more excluded from recognition than are rancherias or colonies—Indian groups that likewise go unnamed but appear on Interior's list of recognized tribes. See 25 U.S.C. 5130(2). The List Act, moreover, does not create a recognition "process." ANC Br. 39. Rather, recognition occurs by virtue of congressional, executive, or judicial action, with Interior cataloging the results and government departments and agencies using that list to determine eligibility for programs and services. See 25 U.S.C. 5130 note.

from the plain text because it would lead to an absurd result. See, *e.g.*, *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). But petitioners' claim that historic sovereign status is common to all federally recognized tribes, Gov't Br. 42–43; ANC Br. 33–35—such that it would have been absurd to subject ANCs to the recognition clause—runs counter to the statutes and agency practice surrounding recognition in Alaska.

a. ANCSA did not address whether the ANCs or Native villages named in the Act might qualify as federally recognized Indian tribes, and that question remained unresolved three years later when Congress enacted ISDA. ISDA's "Indian tribe" definition itself makes the point. It lists both villages and village corporations, but the same individuals constituted both entities, wearing different hats as citizens and shareholders. See 43 U.S.C. 1607(a). And, as the Assistant Solicitor for Indian Affairs recognized in 1976, some villages "no longer ha[d] a governmental identity apart from the corporate structure," J.A. 47. It was logical that only one of those entities might ultimately be recognized. As the court of appeals explained, "[b]y including both villages and corporations [in the ISDA definition], Congress ensured that any Native entities recognized by Interior or later legislation would qualify as Indian tribes." Pet. App. 23a.

In the year following ISDA's enactment, Alaska Senator Ted Stevens proposed to resolve the recognition status of Alaska Native groups by allowing "the people" to decide "which entity or entities in [each ANCSA] region are recognized tribes," rather than having that decision come "from Congress or … the

executive branch." 122 Cong. Rec. 29,480 (Sept. 9, 1976). While Senator Henry Jackson agreed that it was unclear "at this time which entity is the proper one" under the "Indian tribe" definition, *id.*, Congress did not act then, nor did it do so in later amendments to ANCSA or ISDA. See, *e.g.*, S. Rep. No. 100-201, at 23 (1987).

In 1993, Interior acknowledged more than 200 Alaska Native entities as federally recognized Indian tribes. 58 Fed. Reg. 54,365, 54,368–69 (Oct. 21, 1993). Most of these groups were listed as Native villages in ANCSA or are associated with those communities. Although Interior did not recognize any ANCs at that time, nothing diminishes the authority of Congress (or Interior, if lawfully exercising delegated authority) to do so.

b. The unique history of federal recognition in Alaska underscores why it was plausible in ANCSA's wake that ANCs might obtain federally recognized status. Under the 1936 Amendment to the Indian Reorganization Act, ch. 254, Pub. L. No. 74-538, §1, 49 Stat. 1250 (Alaska IRA), which petitioners nowhere address, Congress authorized Alaska Natives groups "not heretofore recognized as bands or tribes" to organize based on "a common bond of occupation, or association, or residence," 25 U.S.C. 5119—a legal standard unique to Alaska. See H.R. Rep. No. 74-2244, at 1–3 (1936). Groups with a common economic bond organized pursuant to this provision. For example, the Hydaburg Cooperative Association organized around "a common bond of occupation in the fish industry, including the catching, processing, and selling

of fish and the building of fishing boats and equipment," Constitution & By-Laws 1 (Apr. 14, 1938).

Under the Secretary's Alaska IRA guidance, those economic groups were not to exercise governmental powers. Sansonetti Op. 31–33 (discussing Dep't of the Interior, *Instructions for Organization in Alaska Under the Reorganization Act* (Dec. 22, 1937)). But Interior later "expressly and unequivocally" acknowledged them as federally recognized Indian tribes, 58 Fed. Reg. 54,364-01, 54,365 (Oct. 21, 1993), and as a result, they enjoy full tribal powers today, see 25 U.S.C. 5123(f)–(g); 25 C.F.R. 83.2(b)–(c); 86 Fed. Reg. 7,558. Accordingly, petitioners' claim that historic sovereign status is common to all federally recognized tribes, Gov't Br. 42–43; ANC Br. 33–35, is incorrect, and Interior recently reiterated that recognition under the Alaska IRA "does not require descent or any connection to a historical Indian tribe," 85 Fed. Reg. at 42; see also *Carcieri v. Salazar*, 555 U.S. 379, 392 & n.6 (2009) (citing the Alaska IRA as an example of "Congress cho[osing] to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the [IRA] definitions").

Congress had also organized Alaska Natives for land claims purposes. In 1935, Congress authorized the Tlingit and Haida Indians to file a land claims suit in the Court of Claims, providing for a "central council" to interact with Interior and prepare plans for distributing judgment funds. See Act of June 19, 1935, §7, 49 Stat. 388, 389-390; Act of Aug. 19, 1965, Pub. L. No. 89-130, 79 Stat. 543, 543-544; see also 43 U.S.C. 1606(a)(10). When Interior decided in 1993 that the Central Council of Tlingit and Haida Indians

was created for limited purposes and lacked "general governmental powers[,]" *Hearing on S. 1784 Before the Subcomm. on Native American Affairs*, 103d Cong. 5–6 (1994), Congress reversed that decision and acknowledged the Central Council as a federally recognized tribe, §203, 108 Stat. at 4792.

c. The critical point here is not the likelihood of Congress recognizing ANCs as tribes, or of Interior promulgating regulations enabling their recognition, although it bears mention that Interior recently noted in its proposed Alaska IRA regulations that it was "unaware of any entity in Alaska that would be [statutorily] disqualified," 85 Fed. Reg. at 44, and consulted directly with ANCs on the proposal. Dep't of the Interior, Indian Affairs, *Alaska IRA*, Regulations and Other Documents in Development, https://tinyurl.com/5ckmsfef. The critical point is that, given the unique statutory and historical framework surrounding recognition in Alaska, and Congress's reticence on the subject in ANCSA, neither possibility was absurd at the time of ISDA's passage or at any time since.

B. Congress Has Not Ratified Petitioners' Interpretation.

Petitioners next invoke the prior-construction canon, arguing that Congress has ratified their preferred interpretation of ISDA. See Gov't Br. 24–33; ANC Br. 36–38. The argument is unpersuasive.

1. The prior-construction canon provides that, under certain circumstances, Congress is presumed to ratify a "well-settled" administrative or judicial

construction of a statutory provision when it reenacts the provision or incorporates it into a new law without change. See, e.g., *Liu* v. *SEC*, 140 S. Ct. 1936, 1947 (2020); *Helsinn Healthcare S.A.* v. *Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633–34 (2019). But the canon is only a tool for interpreting ambiguous statutory provisions. It cannot override text when a statute's meaning is plain. See *Brown* v. *Gardner*, 513 U.S. 115, 121 (1994) ("There is an obvious trump to the reenactment argument, however, in the rule that '[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction.'"); see *Milner* v. *Dep't of Navy*, 562 U.S. 562, 576 (2011).

The prior-construction canon is inapplicable here because the statutory text is plain. Indeed, petitioners do not ask the Court to afford deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (or even *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)) to the interpretation proffered by the government in this case.[5]

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[5] The prior-construction canon is a particularly uncomfortable fit when applied to an administrative interpretation for which the government does not seek deference. The Court has long held that an agency is permitted to change its interpretation after the statute is reenacted. See *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 351 (1953); *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 100 (1939). Under modern principles of administrative law, the most one can infer from reenactment is that Congress thought the statute was ambiguous and the agency's interpretation was permissible. See *Chevron*, 467 U.S. at 843–844. Without a request for deference, the presumption that Congress thought the agency was reasonably interpreting an ambiguous statute does not assist the Court in determining what the *best* interpretation of the statute is.

2. Even if the text were ambiguous, petitioners' invocation of the prior-construction canon would still lack merit. The canon only applies when administrative or judicial interpretations have "settled" the meaning of a statute. See, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998); *Liu*, 140 S. Ct. at 1947. But neither administrative nor judicial interpretations have settled that all village and regional ANCs automatically qualify as "Indian tribes."

a. Petitioners assert that Congress ratified their proposed construction when it reenacted ISDA's "Indian tribe" definition in 1988. But the government's stated positions and practice after ISDA's enactment undermine that claim.

In 1975, Interior and HHS, the two agencies charged with implementing ISDA, promulgated formal regulations. See 40 Fed. Reg. 51,282 (Nov. 4, 1975); 40 Fed Reg. 53,142 (Nov. 14, 1975). Neither indicated that ANCs qualify as Indian tribes without satisfying the recognition clause. To the contrary, they continued to list the ANCs as the immediate antecedent to the clause, which Interior defined to require federal recognition. See 40 Fed. Reg. 51,282. Those regulations remained in effect through 1988 and beyond. E.g., 25 C.F.R. 273.106, 275.2(f), 276.2(i).

Petitioners instead base their claim on a 1976 memorandum from an Assistant Solicitor of the Interior, Gov't Br. 8; see J.A. 45, that was never "formally expressed." Pet. App. 23a. This Court has been reluctant to apply the prior-construction canon to informal agency interpretations. See, *e.g.*, *Comm'r* v. *P.G.*

Lake, Inc., 356 U.S. 260, 266 n.5 (1958). And that reluctance is especially pertinent here where the memorandum never mentions Interior's promulgated regulations or attempts to reconcile its position with them.

Moreover, the informal interpretation never took root in agency practice. Instead, the agencies issued guidance recognizing Native villages as the "Indian tribes" in Alaska.

In 1981, the Indian Health Service (IHS) published "administrative guidelines" in the Federal Register governing ISDA contracting in Alaska. J.A. 55–70. These were "an interpretive supplement to and [did] not replace or change the existing regulations[.]" J.A.56.

The guidelines outline the basic ISDA requirement that "before the IHS may enter into a contract with a tribal organization, it must be requested to do so by the tribe or tribes which will be benefited by the contract." J.A. 58. They then provide in no uncertain terms that "the statute requires *village* approval" of contracts, J.A. 59 (emphasis added), and that villages possess the authority to direct ISDA contracting by governmental resolution. See, *e.g.*, J.A. 59, 62, 66–69.

The guidelines include no parallel provisions for ANCs. They do not contemplate any circumstances under which ANCs can authorize ISDA contracts as "Indian tribes" for their shareholders' benefit. Nor do they require that ANCs approve contract requests by Native villages that would also benefit the ANCs (a virtual certainty given overlapping membership)—

provisions that ISDA would have mandated if the ANCs were "Indian tribes." See 25 U.S.C. 5304(*l*).

The guidelines did account for ANCs in one limited regard. In 1981, not every village had a functioning governmental body. See *supra* p. 34. Accordingly, the guidelines stated that, in the absence of such a government, the agency would treat the village ANC—or, if one did not exist, the regional ANC—"as the village governing body … *for that particular village*." J.A. 59–60 (emphasis added). Thus, the guidelines allowed for an ANC to act *only on behalf of a recognized village*—and only as a last resort—but not in an ANC's own right. See also BIA, *Village Self-Determination Workbook* (Nov. 1977), tinyurl.com/yc2sftzo (similar guidance for BIA).

Agency practice comported with the guidelines' recognition of the villages as the repositories of contracting authority in Alaska. Because every federally recognized village developed its own tribal government, the agencies rarely used the last-resort option. Indeed, petitioners have identified just one example of an ANC directing ISDA contracting functions prior to the 1988 reenactment, and it is anomalous: Interior and HHS permitted CIRI, a regional ANC, to authorize two nonprofit organizations to enter into ISDA contracts for Anchorage instead of requiring approval from the geographically remote tribes in the region. See *Cook Inlet Native Ass'n* v. *Heckler*, No. A84-571 Civil, Mem. of Decision (D. Alaska Jan. 7, 1986), D.Ct. Dkt. 77-1, at 2–3, 13–14. Even that proved controversial, and Congress subsequently authorized CIRI's

provision of health-care services in Anchorage by separate statute. See *infra* p. 47, 49–50.[6]

In sum, there was no "well-settled" agency interpretation nor a widespread agency practice of treating ANCs as Indian tribes for Congress to ratify in 1988.

b. Nor is there evidence that Congress was aware of the 1976 Interior memorandum when it reenacted the "Indian tribe" definition in 1988, or that it intended for that memorandum to override the plain text. See *Gardner*, 513 U.S. at 121 (reenactment is "without significance" when the statutory text and legislative history make "no reference" to an agency's interpretation and no evidence exists suggesting Congress "was even aware" of it). While the Court has in some limited circumstances held that Congress ratified an informal interpretation, it has done so only when there was compelling evidence that Congress agreed with the agency's view and intended for it to enjoy the force of law. See *Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *Bragdon*, 524 U.S. at 644; *United States* v. *Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 131–135 (1978).

That is not the case here. The drafting history of the 1988 ISDA amendments indicates that the "reenactment" of the definition was a ministerial

[6] According to a GAO report, two other anomalies not mentioned by petitioners arose after 1988 for the communities of Valdez and Seward, where there are no federally recognized tribes. See GAO, *Indian Self-Determination Contracting: Effects of Individual Community Contracting for Health Services in Alaska* 2 n.2 (June 1998); see also Alaska Br. 21 n.4, 22, 26 (mentioning Valdez and Seward); Alaska Del. Br. 33–34 (same).

afterthought. Throughout the legislative process, the proposed bills added several new definitions and renumbered the existing ones. See H.R. 1223, 2–3, 100th Cong. (1st Sess. 1987); S. 1703, 3–5, 100th Cong. (1st Sess. 1987); 134 Cong. Rec. 12,856 (May 27, 1988). Only in the final bill did the House propose to republish the full definition section—with new numbering—in lieu of a complicated description of the renumbering that otherwise needed to occur. See 134 Cong. Rec. 23,336 (Sept. 9, 1988).

While the government cites an "early version" of the 1988 amendments to conjure congressional awareness of its counter-textual construction, Br. 31, that version is so "early" that it was passed by the House *in a previous Congress* and then died on the vine. "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation." *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169–170 (2001) (quotation marks and brackets omitted). That is even more so here, where the bill simply would have amended ISDA to name regional non-profit corporations, at least one of which (the Central Council) was federally recognized. Nor does the accompanying committee report suggest an understanding that all ANCs qualify as tribes; and in any event, "language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient[.]" *SEC v. Sloan*, 436 U.S. 103, 121 (1978). A prepared statement from CIRI submitted for the record in a four-person hearing adds nothing, see *id.* Gov't Br. 31-32. Lastly, nowhere does the government account for statements in the legislative history indicating Congress's belief that ISDA contracting was limited to

federally recognized villages and tribes alone. See, *e.g.*, S. Rep. No. 100-274, at 5, 22 (1987); 134 Cong. Rec. 12,861 (May 27, 1988) (statement of Sen. Evans).

The government also contends that Congress acquiesced to the 1976 interpretation when it amended *other* definitional provisions in 1988, 1990, and 1994. Br. 29–30 & n.3. But again, there is no evidence Congress even considered ANC status; congressional inaction of this sort "deserve[s] little weight in the interpretive process." *Alexander v. Sandoval,* 532 U.S. 275, 292 (2001) (brackets in original) (citation omitted).[7]

c. Petitioners additionally argue that ratification occurred when Congress incorporated the ISDA definition into the CARES Act. Gov't Br. 32; ANC Br. 38. But the government points to little evidence of its construction between the 1988 amendments and the 2020 CARES Act except for passing statements in the Federal Register and a single administrative appeals decision that had nothing to do with ANCs. See Br. 25. Nor, contrary to the ANCs' claims (not endorsed by the government), did a widespread practice arise

[7] The government also argues that Congress's amendment of ANCSA without addressing the 1976 memorandum demonstrates its approval of that interpretation. See Br. 32. But the government cites no authority for the farfetched proposition that Congress's failure to correct an administrative interpretation of one statute while amending an entirely different statute demonstrates acquiescence in the interpretation.

of agency authorization of ANC contracting under ISDA.[8]

There instead exists substantial evidence of congressional understanding to the contrary. In 1994 and 2000, Congress amended ISDA to allow "Indian tribes" to enter into self-governance compacts with Interior and HHS. Under those amendments, Interior and HHS must enter into compacts with each participating Indian tribe in a manner consistent with the government's "trust responsibility" and "the government-to-government relationship between Indian tribes and the United States." 25 U.S.C. 5384, 5385 (HHS); see also 25 U.S.C. 5329, 5363, 5364 (Interior). Those requirements only make sense for entities that have been federally recognized and hence enjoy a government-to-government relationship with the United States. Other ISDA provisions likewise presuppose

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[8] Although the ANCs claim that "ANCs have entered into scores of [ISDA] contracts," Br. 10, their own citations do not support that claim. The ANCs cite four unsubstantiated extra-record declarations submitted to the district court. One is from CIRI concerning the circumstances in Anchorage discussed above. The remaining three simply state that the ANCs entered into cadastral survey contracts with the Bureau of Land Management for ANCSA-related land surveying—contracts authorized under a *separate* statute. See Alaska Land Transfer Acceleration Act, Pub. L. No. 108-452, §209(a), 118 Stat. 3575, 3586 (2004) (43 U.S.C. 1611 note). See also Alaska Br. 21–22 (pointing to similar declarations). Recent BIA and IHS lists of ISDA compacts and contracts do not include a single ANC. See *BIA Self-Governance Tribes/Consortia* (2019), https://on.doi.gov/3mrk5h7; IHS, *Fiscal Year (FY) 2018 Report to Congress on Contract Funding of Indian Self-Determination and Education Assistance Act Awards* 10, https://bit.ly/2XKkNLI. The IHS list includes the two authorizations discussed, *supra* p. 41–42.

federal recognition and the powers that come with it. See, *e.g.*, 25 U.S.C. 5307(c), 5321(c)(3), 5322, 5329(c), 5332, 5365, 5383(d), 5397 (discussing, *e.g.*, tribal sovereign immunity and deference to tribal laws).

In addition, recent regulations from various agencies, including HHS, unequivocally link the ISDA definition to BIA's list of federally recognized tribes. See 45 C.F.R. 75.2 (HHS) (reprinting "Indian tribe" definition and then adding: "See annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services."); 2 C.F.R. 200.1, 200.54 (OMB) (same), 1108.225 (DOD) (same). And the Treasury Department—the agency charged with administering the CARES Act— adopted a regulation in 2015 interpreting a virtually identical definition of "Indian tribe" in 12 U.S.C. 4702(12) consistent with respondents' position, stating that to satisfy the definition, "[e]ach" entity, including an ANC, must be recognized. See 12 C.F.R. 1805.104. As the court of appeals correctly declared, that regulation is irreconcilable with Treasury's position here. See Pet. App. 23a.

In sum, petitioners' administrative ratification argument distills to the position that the CARES Act Congress should be presumed to have incorporated an interpretation advanced in an informal 1976 internal memorandum while simultaneously ignoring the numerous statutory and regulatory provisions defining ISDA contracting as the province of federally recognized tribes. The contention defeats itself.

d. In addition to the 1976 memorandum, petitioners argue that Congress ratified the Ninth Circuit's

decision in *Cook Inlet Native Association* v. *Bowen*, 810 F.2d 1471 (1987), through the 1988 reenactment. Gov't Br. 30–32; ANC Br. 36–37. But a lone appellate decision does not "settle" a statute's meaning such that Congress can be said to have ratified it. Compare *Jama*, 543 U.S. at 349–50 (holding that two courts of appeals decisions did not settle the meaning of a statute), with *Helsinn Healthcare*, 139 S. Ct. at 633–34 (holding that a "substantial body of law," including numerous decisions from this Court, did).

The ANCs suggest that the paucity of precedent should not matter because the Ninth Circuit is "home to every ANC." Br. 13. But as this case reflects, litigation involving the ISDA definition or ISDA contracting in Alaska can and does arise elsewhere, including in the District of Columbia and Federal Circuits. See, *e.g.*, *Arctic Slope Native Ass'n, Ltd.* v. *Sebelius*, 699 F.3d 1289, 1290–1291 (Fed. Cir. 2012).

Moreover, *Cook Inlet* has little force. The case involved the unique situation in Anchorage discussed above, and the Ninth Circuit (incorrectly) applied *Chevron* deference to the administering agencies' challenged decision. 810 F.2d at 1476. In addition, in a 1997 appropriations statute, Congress explicitly permitted CIRI to authorize health-care contracts in the Anchorage area. See Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, §325(d), 111 Stat. 1543, 1597–1598. The Ninth Circuit has accordingly never applied *Cook Inlet* in a subsequent case. See *Cook Inlet Treaty Tribes* v. *Shalala*, 166 F.3d 986, 988, 990 (9th Cir. 1999) (citing the decision only as background and finding moot the dispute involving CIRI). There

simply is no well-settled judicial precedent treating ANCs as "Indian tribes," because there has been no widespread agency practice in that regard for courts to address. Whether framed in terms of agency practice or judicial precedent, therefore, petitioners' ratification argument provides no warrant for departing from the plain text of ISDA and Title V.

C. Later-Enacted Statutes Do Not Conflict With the Plain-Text Interpretation of ISDA.

Petitioners separately argue that certain later-enacted statutes "presuppose that ANCs meet [the ISDA] definition." Gov't Br. 35; see ANC Br. 38–41. But the statutes tell a different story.

1. Congress has used ISDA's "Indian tribe" definition in over 150 statutes. As the government recognizes, Br. 33–34, some of those statutes unquestionably do not apply to ANCs. See, *e.g.*, 34 U.S.C. 10531(a), 10533(5) (providing "grants to States, units of local government, and Indian tribes" for law enforcement purposes); 25 U.S.C. 4001(2) (governing tribal trust accounts, which ANCs do not have); 16 U.S.C. 539p(b)(3), (c) (Southeast Arizona Land Exchange). Under petitioners' argument, the reference to ANCs in the "Indian tribe" definition would be impermissibly superfluous in all of these statutes. The problem lies not with the statutes but with petitioners' theory of superfluity.

Title V is likewise not designed to extend to non-recognized entities. It provides funding for state, tribal, and local governments to combat the

pandemic. Terms are "known by the company they keep," *Lagos* v. *United States*, 138 S. Ct. 1684, 1688–89 (2018), and Title V's focus on governmental expenditures further confirms "Indian tribe" definition's plain meaning.

2. Petitioners attempt to find support for their position in a handful of other statutes, but none assists them.

The Native American Housing Assistance and Self Determination Act defines "federally recognized tribe" using the same text as ISDA's "Indian tribe" definition except for the insertion of the phrase "pursuant to [ISDA]" at the end of the recognition clause. 25 U.S.C. 4103(13)(B). The ANCs contend that the added phrase "confirm[s]" they qualify as "Indian tribes" under ISDA, Br. 39, but that contention is circular and relies on the assumption that ANCs satisfy the ISDA definition in the first place. The ANCs also argue that the language suggests that they can be "recognized" under ISDA without being recognized more generally. See Br. 40. But ISDA creates no limited-purpose recognition process. See *supra* p. 29. As the government suggested below, the better understanding is that the phrase simply serves as a cross-reference to ISDA. See Gov't C.A. Br. 36 & n.13.

The government also invokes the 1997 appropriations statute discussed above, see *supra* p. 47, which it claims "presupposes that ANCs qualify as 'Indian tribes.'" Br. 35–36. But that statute created a new, statewide Alaska Native health-care system, run by thirteen named organizations; explicitly authorized CIRI through its designee to enter into health-care

contracts in the Anchorage area; and preempted future ISDA contracting for health care outside the new statewide system. Pub. L. No. 105-83, §§325–326, 111 Stat. 1597–1599. Nothing about these provisions turned on a congressional determination that ANCs enjoy per se "Indian tribe" status absent recognition.

Petitioners further contend that Congress presupposed that ANCs meet the ISDA definition in enacting two statutes that exclude ANCs. Gov't Br. 36–37; ANC Br. 38–40. But those statutes simply provide that ANCs are forever excluded from their ambit *even if* any ANCs become federally recognized—which makes sense given that the statutes concern energy development and hazardous substances regulation, areas in which ANCs have significant business interests. See 25 U.S.C. 3501(4); 42 U.S.C. 9601(36).

Petitioners' reliance on the biomass demonstration project statute fares no better. See Gov't Br. 37; ANC Br. 41. That provision created a "Tribal Biomass Demonstration Project" and a separate "Alaska Native Biomass Demonstration Project," with the latter open to both "Indian tribes" *and* "tribal organizations." 25 U.S.C. 3115b note. Nothing in the statute contemplates ANC participation other than in the latter capacity absent federal recognition.

3. Petitioners' statutory narrative nowhere accounts for recently enacted legislation directly at odds with their position. In 2016, Congress authorized the Secretary of the Army to provide funding and technical assistance to any "Native village, Regional Corporation, or Village Corporation (as those terms are defined in [ANCSA])," even though the existing

statute authorized the Secretary to do the same for "Indian tribes" as defined in ISDA. 33 U.S.C. 2243(a), (b); WINN Act, Pub. L. No. 114-322, §1202(c)(1), 130 Stat. 1628, 1684 (2016). That amendment would have been unnecessary if Congress understood that ANCs already qualified as "Indian tribes."

Similarly, Congress knows how to ensure that a statute applies to all ANCs. For example, Congress has used language similar to the ISDA definition but placed ANCs in a separate subsection. See 40 U.S.C. 502(c)(3); 44 U.S.C. 3601(8). Elsewhere, it has omitted the recognition clause altogether, see 16 U.S.C. 470bb(5); 16 U.S.C. 4302(4); 20 U.S.C. 1401(13), or, as the government notes, Br. 37, has mandated that "the term Indian tribe shall include Alaska native corporations established pursuant to [ANCSA]," Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. V, subtit. A, §501(k)(2)(C), 134 Stat. 1182, 2077—which it did not do in ISDA or the CARES Act.

Any argument resting on the "corpus juris" must account for the entire corpus, which petitioners have failed to do. As with their other arguments, petitioners have offered no valid reason to depart from ISDA's plain text.

III. Adherence to Text Would Protect Both Tribal Governmental Authority and Services for Alaska Natives.

The ANCs assert in dramatic fashion that "the decision below shatters the basic infrastructure of Native life in Alaska," Br. 3, and will eliminate federally funded services for Alaska Natives, Br. 49–50. But

"dire warnings are just that, and not a license for us to disregard the law." *McGirt* v. *Oklahoma,* 140 S. Ct. 2452, 2481 (2020). The government sensibly does not join in the ANCs' claims, which are vastly overstated and directed to the wrong forum.

A. If ANCs were in fact "the principal purveyors of benefits and services to more than a hundred thousand Alaska Natives" over the past four decades, ANC Br. 49, presumably they would have brought that evidence to the Court's attention. Instead, their argument rests entirely on the idiosyncratic role that CIRI plays in the Anchorage area. See *id.*; Alaska Br. 21; CIRI Br. 31; Alaska Del. Br. 25, 32–33. CIRI-affiliated nonprofits there do not function as tribal governments but instead are similar to urban Indian organizations. See 25 U.S.C. 1603(29), 1653. And Congress has addressed CIRI's health-care role, and the statewide delivery of health services to all Alaska Natives, by separate statute. See *supra* p. 47, 49–50. A decision affirming the judgment below will therefore have no effect on such services. Health-care delivery indeed has received separate coronavirus relief funding under both the CARES Act, 134 Stat. at 360, 550–551 (providing more than $1 billion to IHS, including tribal and urban Indian organizations), and the American Rescue Plan Act of 2021 (ARPA), Pub. L. No. 117-2, 135 Stat. 4, 240 (providing more than $6 billion).

Moreover, the government does not dispute that its obligation to provide services to Indians in both Alaska and the Lower 48 states is independent of ISDA. See *Menominee*, 136 S. Ct. at 753; 25 U.S.C. 5325(a)(1); 25 C.F.R. 900.244, 900.256. Where

services are not contracted through ISDA, the government provides those services directly or uses other statutory authorities to contract with Indian-owned businesses and non-profit organizations. See, *e.g.*, 25 U.S.C. 47, 5342, 1653. And when service delivery issues arise in Alaska (as they do elsewhere), Congress knows how to address them. See, *e.g.*, 42 U.S.C. 619(4).

Congress plainly does not understand ANCs to play the role they claim here. In the recently enacted ARPA, Congress made emphatically clear that tribal government funding should go to federally recognized tribes alone. See §9901, 135 Stat. at 223. And it declined to adopt an amendment from Senator Murkowski that would have reallocated $500 million in tribal funding to the ANCs. S. Amdt. 1313 to H.R. 1319 (submitted Mar. 5, 2021), https://tinyurl.com/fd2xec9f.

B. The government's suggestion that the Court should "treat[] Alaska Native villages and ANCs the same way," Br. 46, under ISDA and the many federal statutes that use the ISDA definition would radically alter the status quo.

Because ISDA mandates that each "Indian tribe" approve any contract that benefits the tribe, 25 U.S.C. 5304(*l*), and because a recognized tribe's membership and geography is largely coextensive with that of its village corporation, see *supra* p. 8, any contract that benefits a tribe will almost always benefit the corresponding ANC. Accordingly, petitioners' interpretation would vest ANCs with veto authority over the governmental decisions of federally recognized tribes.

Tribal status would also enable ANCs, many of them billion-dollar enterprises, to compete with recognized tribes in Alaska for funding and control over essential governmental programs and services, and with tribes nationwide for finite (and often inadequate) appropriations. ANCs have long pursued available federal contracting opportunities, see*, e.g.,* GAO-16-113, *Alaska Native Corporations: Oversight Weaknesses Continue to Limit SBA's Ability to Monitor Compliance with 8(a) Program Requirements* Highlights (Mar. 2016) (discussing $4 billion in SBA Section 8(a) contracts held by ANCs), and there is no reason to believe they would not leverage their newfound status to advance their commercial interests to the detriment of tribal governments and Congress's self-determination policy.

It is impossible to foretell the full ramifications of treating 200 profitmaking corporations that control 44 million acres of land in Alaska as equivalent to federally recognized Indian tribes under the scores of federal statutes that, like the CARES Act, use the ISDA definition. But such treatment would unquestionably vest ANCs with new and untold tribal powers, touching all aspects of federal Indian law and policy and transforming the balance of governmental authority in Alaska. If that decision is to be made, it should be by Congress.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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