THE CASE IS SCHEDULED FOR ORAL ARGUMENT ON SEPTEMBER 11, 2020

United States Court of Appeals
District of Columbia Circuit
Consolidated cases 20-5204, 20-5205, 20-5209

Confederated Tribes of the Chehalis Reservation, et al.,
Appellants
v.

Steven T. Mnuchin, in his official capacity as Secretary of U.S. Department of the Treasury, et al.,
Appellees

Reply Brief of the Navajo Nation, Ute Tribe of the Uintah and Ouray Reservation, Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, Native Village of Venetie, Nondalton Tribal Council, and Arctic Village Council

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GLOSSARY

AFN	Alaska Federation of Natives
ANC	Alaska Native Corporation
ANCSA	Alaska Native Claims Settlement Act
ARA	Association of ANCSA Regional Corp. Presidents/CEO's Inc.
ASRC	Arctic Slope Regional Corporation
BIA	U.S. Bureau of Indian Affairs
CARES Act	Coronavirus Aid, Relief, and Economic Security Act of 2020
CIRI	Cook Region Inlet, Inc.
ISDEAA	Indian Self-Determination and Education Assistance Act of 1975

DISCLOSURE STATEMENT

No party to this brief is a corporation to which FRAP Rule 26.1 applies. Appellants are each federally recognized Indian Tribes, and not corporations.

REPLY STATEMENT OF JURISDICTION

The parties to this brief adopt the reply argument of the Chehalis Group regarding jurisdiction.

SUMMARY OF ARGUMENT

No court has ever held that the Board of an ANC is a "recognized governing body of an Indian Tribe." That should end this inquiry.

Appellees fall back on the familiar trope that Alaska is different. As relevant to this case, that is not true. The ANCSA divested almost all of the federally recognized Tribes in Alaska of their *land* and then used its value to capitalize the ANCs. The 229 federally recognized Tribes in Alaska still fulfill the Tribal governmental role in the state; six of them are Plaintiffs in this case. In contrast, the ANCs are for-profit businesses like any other.[1]

With respect to the second aspect of their argument, Appellees take pains to evade the controlling precedent that "recognized" and "tribal government" are well-established terms of art in Indian law. Appellees argue for an outcome no court has endorsed before: that corporate boards of directors are the legal equivalent of tribal governments. The inescapable conclusion is that they are not and ruling so would

[1] Appellees claim that ANCs have not received "one penny" under the CARES Act. That is false. *E.g.*, https://www.adn.com/business-economy/2020/07/07/alaska-businesses-received-more-than-12-billion-in-federal-ppp-loans-heres-who-they-are/

fundamentally alter Title 25 of the United States Code and all of Indian law. It must be rejected.

ARGUMENT

I. CASE LAW UNIFORMLY HOLDS THAT ANCS ARE NOT RECOGNIZED GOVERNING BODIES.

In their opening brief, Appellants showed that case law uniformly holds that ANCs are not "recognized governing bodies of an Indian Tribe." Navajo Br.2-4. Appellees do not disagree, but instead, argue *all* of those cases were wrongly decided. They assert that where Congress used the phrase "recognized governing body of an Indian Tribe," it meant "recognized" in a generic sense—not as an established Indian law term of art. In order to reach their desired outcome, Appellees must break the phrase "recognized governing body of an Indian Tribe" into three pieces, and then define each separately. But this tortured path only leads to the wrong conclusion.

Appellees acknowledge the passive voice phrase "recognized Indian Tribe" means a tribe that the United States recognizes and includes on its list of federally recognized tribes. *E.g.*, Sec.Br.43, 46-47; ANC.Br.33. ANCs are plainly not "recognized Indian Tribes." 85 Fed.Reg. 5462 (Jan. 30, 2020). However, when it comes to "recognized governing body of an Indian Tribe" in the CARES Act, 42 U.S.C. § 801(g)(5), Appellees assert Congress was not using "recognized" as a term of art. *There is absolutely no support for this.* They incorrectly claim that the two

contexts are distinguishable, because, they assert, the United States keeps a list of federally recognized tribes, but does not keep a list of federally recognized governing bodies of Indian Tribes. Sec.Br.46-47; ANC.Br.33. They then conclude—contrary to all case law and to the body of Indian law—that the boards of directors of the for-profit ANCs are the "recognized governing bodies of an Indian Tribe."

Their proffered distinction is simply wrong. Just as BIA keeps, updates, and publishes a list of federally recognized tribes, BIA keeps, updates, and publishes a list of federally recognized governing bodies of Indian Tribes: the "Tribal Leaders Directory." www.bia.gov/tribal-leaders directory. The reason the BIA keeps a list of recognized tribal governing bodies is the same as the reason it keeps a list of federally recognized tribes—the BIA has the duty to determine, both for itself and other federal agencies, which tribes are recognized. Similarly, "[t]he BIA, in its responsibility for carrying on government relations with the Tribe, is obligated to recognize and deal with some tribal governing body." *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). *See also* Sec.Br.43 (citing *Sac & Fox Tribe of the Miss. in Iowa Election Bd. v. BIA*, 439 F.3d 832, 833-34 (8th Cir. 2006).

Congress set aside Title V funds for the federally recognized governing body of an Indian Tribe to financially assist these governments during the COVID-19 crisis. ANCs are not listed as federally recognized governing bodies

of Indian tribes; they are business created by Congress to pursue profit. Those courts that have held the boards of directors of ANCs are not the "governing bodies of Indian Tribes" are correct. The District Court, and the Appellees here, are wrong.

II. THE DISTRICT COURT ERRED IN ADOPTING ISDEAA'S DEFINITION OF "TRIBAL ORGANIZATION" TO DEFINE "TRIBAL GOVERNMENT" IN THE CARES ACT.

Per the language of the CARES Act, eligibility for Title V funding is subject to a two-part test. A tribal government must be (1) an Indian tribe and have (2) a recognized governing body. Congress incorporated a single, discrete definition from ISDEAA into the CARES Act: "Indian tribe has the meaning given that term in [ISDEAA]." 42 § 801(g)(1) (citing 25 U.S.C. § 5304(e)). However, Congress chose not to import a statutory definition of "recognized governing body" into the CARES Act.

Nevertheless, the District Court interpreted the CARES Act as though it had adopted "recognized governing body" from ISDEAA's definition of "tribal organization" at 25 U.S.C. § 5304(l). Indeed, at least half of the District Court's analysis of whether ANCs constitute "recognized governing bodies" under the CARES Act is devoted to the question of whether ANCs are tribal organizations that contract with the federal government to provide public services under ISDEAA

pursuant to 25 U.S.C. § 5321—a question that on its face has nothing to do with the CARES Act. *See* Mem. Op. at 29-33 (JA207).

The District Court adopted "recognized governing body" from ISDEAA based on the unsupported conclusion that "it stands to reason that Congress brought that same meaning forward in the CARES Act[.]" *Id*. at 32 (JA210). The District Court used this as the "starting point" for its entire analysis of the second requisite element of Tribal government—"recognized governing body"—a starting point that led the court's reasoning astray. Mem. Op. at 29 (JA207).

Neither Appellees nor their Amici have endeavored to justify the district court's misuse of ISDEAA's text with any actual authority. Like the District Court, they accept that incorporating 25 U.S.C. § 5304(l) is proper because it confirms their desired conclusion. However, they retreat from the notion that it constitutes a "starting point," and instead suggest that it confirms the plain meaning of "recognized governing body." Sec.Br.43; ANC.Br.30. Clearly, "recognized governing body" requires explication and the term has a well-established meaning in Indian law. That is the correct starting point. This Circuit, like others, elevates liberal construction in favor of Indians over other canons of statutory interpretation. *E.g.*, *Muscogee (Creek) Nation v. Hodel*, 851 F.3d 1439, 1445 (D.C. Cir. 1988). Other courts have held that the plain meaning canon is subordinate to the Indian canon. *E.g. N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002)

("In the context of Indian law, appeals to 'plain language' or 'plain meaning' must give way to canons of statutory construction peculiar to Indian law."); *see also Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493 (7th Cir. 1993).

Instead of relying on the longstanding meaning of "recognized governing body," Appellees instead resort to the dictionary. *See* ANC.Br.29 (citing Governing Body, *Black's Law Dictionary* (11th ed. 2019) (discussing "XYZ, Inc."); *Teamsters Local Union No. 2000 v. Hoffa*, 284 F.Supp.2d 684, 699 (E.D. Mich. 2003) (discussing labor unions)). This is wholly inconsistent with the legal principles that govern Indians (which suggest a completely different "plain meaning" analysis), *see* parts (I) and (IV) *infra*, it is inconsistent with the Indian canons of construction, and it therefore does not render 25 U.S.C. § 5304(l) relevant to confirm the "plain meaning" that Appellees urge.

Congress's decision not to include ISDEAA's definition of "tribal organization" and "recognized governing body" in the CARES Act is consequential. *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1862 (2017) ("[I]n an inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant[.])"; *Cyan, Inc. v. Beaver Cnty. Emps. Retirement Fund*, 138 S. Ct. 1061, 1070 (2018) ("[W]hen Congress wants to refer to only a particular subsection or paragraph, it says so." (alterations, citation omitted)). It is ironic that in a decision that purports to be so faithful to the statutory text, the District Court chose to import wholesale a provision

that Congress chose not to incorporate. The District Court erred in holding that "Tribal government" in the CARES Act took on the meaning of "tribal organization" in ISDEAA.

III. THE DISTRICT COURT ERRED IN FINDING THAT ANCS DO NOT FALL UNDER THE SECOND CATEGORY OF ISDEAA'S DEFINITION OF "TRIBAL ORGANIZATION."

Appellees fail in arguing that ANCs are not "tribal organizations" within that term's second category. The Secretary mischaracterizes Appellants' argument on this count, alleging that Appellants have argued ANCs could not fall under the "recognized governing bodies" category. Sec.Br.47. Not so. Appellants merely pointed out that the term was improperly considered, and that, in its overreach, the District Court misconstrued "tribal organization," finding that state-chartered entities like ANCs do not fall within the second category, such that those entities "would not need the approval of federally recognized tribes to enter into ISDEAA contracts, or prior approvals by tribes are invalid." Navajo Br.7. Appellees provide no response to this critical problem.

Instead, Appellees assert that ANCs only fall within the first category, and falsely charge that Appellants have provided no evidence otherwise. ANC.Br.31-32; Sec.Br.47-48. In reality, ANCs fall perfectly within the second category. Appellants provided an unmistakable example via the Navajo Nation's authorizing resolution process, which serves as the basis for the federal government awarding ISDEAA

contracts to outside entities. Navajo Br.14-15; 25 U.S.C. § 5321; 25 C.F.R. § 900.8(d). The Secretary further adopts the District Court's conclusory proposition that it is "highly implausible" that ANCs could satisfy the second-prong, but additionally charges that Appellants fail to explain how an ANC is properly described as a "legally established organization of Indians." Sec.Br.47. Ironically, the Secretary then cites to the provisions of ANCSA which together illustrate how ANCs are legally-established (i.e. via ANCSA and Alaska corporation law) organizations of Indians (i.e. Alaska Native individuals serving as board members and shareholders). *Id*. at 47-48.[2]

Ultimately, Appellees miss the thrust of Appellants' argument with regard to "tribal organization." That term was improperly brought into consideration, and doing so only resulted in the District Court's flawed analysis and finding that state-chartered entities cannot fall within the term's second category. The statutory and regulatory provisions pertaining to "tribal organization" clearly establish otherwise. 25 U.S.C. § 5304(l); 25 U.S.C. § 5321; 25 C.F.R. § 900.8(d). *Gilbert v. Weahkee* unequivocally held that state-chartered entities may fall within the second category,

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[2] The Secretary, building off of the District Court's flawed application of 43 U.S.C. § 1601(b) (See Mem. Op. at 7 (JA207), suggests ANCs are not composed of "Indians." Sec.Br.47-48. This further demonstrates the Secretary's insufficient understanding of federal Indian law, a key maxim of which is that "Indian" is a political and not a racial classification. *See* §IV, *infra.*

441 F.Supp. 3d 799, at *8 (D.S.D. 2020), and a survey of the case law makes clear that other courts agree. *See N.L.R.B. v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 997-1000 (9th Cir. 2003) (specifying that the state-chartered entity in question was "sanctioned" by the tribe); *E.E.O.C. v. Navajo Health Foundation-Sage Memorial Hospital, Inc.*, No. CV-06-2125-PCT-DGC, 2007 WL 2683825 (D. Ariz. Sept. 7, 2007); *Redman v. St. Stephens Indian School Educational Association, Inc.*, Civil Action No. 05-CV-110J, 2006 WL 8433204, *2-4 (D. Wyo. Jan. 13, 2006); *Wright v. Prairie Chicken*, 579 N.W.2d 7, 8-9 (S.D. 1998). These cases illustrate that state-chartered entities are "sanctioned" per the second category when tribal governments approve them to enter into ISDEAA contracts.[3] No material difference exists between ANCs and other state-chartered entities in this respect, as illustrated by *Ukpeagvik Inupiat Corp. v. HHS*, 2013 WL 12119576 (D. Alaska

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[3] The Secretary attempts to explain away the phenomenon of entities seeking tribal government approval by vaguely asserting it is "the general rule applicable to all tribes in ISDEAA contracting." Sec.Br.48. The case the Secretary cites for this proposition instead supports the notion that entities are sanctioned by *tribes* to enter into ISDEAA contracts. *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 534, 538 (D.D.C. 2014) ("*Upon authorization by a tribe*, a 'tribal organization' may submit a proposal for a self-determination contract to the relevant Secretary" (emphasis added)). 25 C.F.R. § 900.8(d)(1) does not establish such a rule, instead it "elaborates upon, but does not displace" the requirement that entities obtain tribal government approval to enter into ISDEAA contracts. *Council for Tribal Employment Rights v. United States*, 112 Fed. Cl. 231, 248 (2013). And two of the three statutory provisions to which the Secretary cites—i.e. 25 U.S.C. §§ 5304(l), 5321(a)(1)—do not establish a "general rule" but issue direct mandates that outside entities obtain tribal government authorization to enter into ISDEAA contracts.

2013), and neither the District Court nor Appellees have shown otherwise. On this matter, the District Court was incorrect, and its conclusion on "tribal organization" should be vacated.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT THE CONTEXT OF TITLE V WITHIN THE ENTIRE CARES ACT DID NOT MATTER.

In their opening brief, the Appellants demonstrated that the overarching structure of the CARES Act further supports that Title V funds are solely for federally recognized tribes, for expenditure on *governmental purposes.* Other titles of the CARES Act provide relief for corporations. Appellees have no substantive response. They cannot dispute that Title V is for governments, and they admit ANCs are not governments.[4] They cannot dispute the canon that requires this Court to

[4] Amici AFN and other parties have tried to persuade this court that the Tribes in Alaska somehow "drastically differ[] from most of the American Indian experience in the Lower 48." AFN Amicus Br.3. This characterization is untrue, and perpetuates a dangerous rationale used for decades to justify treating Alaska Tribes as less than. E.*g.*, *Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195, 211 (D.D.C. 2013). Appellants have described in detail how Alaska Tribes—not ANCs—provide myriad governmental services to their communities as an exercise of their Tribal sovereignty, including medical care, housing programs, natural resource programs, tribal courts, child welfare and family assistance programs, and transportation programs. Cheyenne Plaintiffs Memo in Support of MSJ at 5-7, n.9 (May 29, 2020), Dkt. 76-2. Tribes in Alaska are just like Tribes in the Lower 48 and nothing in ANCSA disrupted that. CIRI's role is unique, provided for in special legislation, and is not representative of the usual role that ANCs play, or rather, do not play, in providing governmental services to Alaska Natives. One uniquely situated ANC with its own specific legislation is not an open door for all ANCs to access Title V funding.

consider that structure. §II, *infra*; Navajo Br.§V. Instead, their argument appears to reduce down to an assertion that this Court should ignore that canon because it does not support their position.

The Court should interpret the phrase at issue within the overarching structure of the CARES Act. Within Title V, Congress provided funding for governments, including for recognized governing bodies of Indian Tribes.

Appellees further argue in the alternative that ANCs are entitled to CARES Act Title V funds because they provide benefits similar to those provided by governments to some Alaska Natives who are not members of federally recognized tribes. ANC.Br.35-37.[5] The ANCs' argument is not merely irrelevant to the legal question of whether ANCs constitute Tribal governments, it is a race-based argument that has no place in this dispute.

There are many people who may be racially classifiable as Native American, but who, for a variety of reasons, are not members of or eligible for enrollment in a federally recognized tribe. Contrary to Appellees' assumption, that is true in the Lower 48 as much as it is in Alaska. Federal laws like the CARES Act's funding for

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[5] In their brief, the ANCs assert "[t]ens of thousands of Alaska Natives are not enrolled in a federally recognized tribe." ANC.Br.35. They do not provide any citation for that assertion, and the assertion is also immaterial, for the reasons discussed in the body of this brief, and because enrollment is often not a criteria for assistance from a tribe.

federally recognized tribes are not, and cannot be, based upon race. Under federal Indian law, "Indian" is not a racial category; it is a political category, defined by those who are members of federal recognized tribes. *United States v. Antelope*, 430 U.S. 641, 646 (1977); *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974).

ANCs are providing benefits to *shareholders* on the basis of being shareholders, not on the basis of race. Indeed, by virtue of their inheritance policies, the ANCs have shareholders who have no Alaska Native ancestry. E.g., https://www.aleutcorp.com/shareholders/shareholder-department/faq/ (explaining in detail)

Furthermore, by advancing this argument the ANCs present to this court reasoning that is contrary to the foundation of federal Indian law.[6] Congress can provide benefits, and can adopt laws, specific to those who are Indian as a political classification, *id.* at 553-55, but it cannot and did not provide CARES Act benefits based upon race. The ANCs' assertion to the contrary is irrelevant and also incorrect.

CONCLUSION

For the foregoing reasons, Appellants urge this Court to reverse the decision of the District Court.

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[6] These "race based" arguments are typically advanced by opponents of tribal sovereignty. *E.g.*, Brief of Individual Plaintiffs-Appellees, *Brackeen v. Bernardt*, Case No. 18-11479 (5th Cir. Feb. 6, 2019) (arguing that the Indian Child Welfare Act's classifications are racial classifications).

Respectfully submitted this 26th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because this brief contains 2933 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rules. I relied on my word processor to obtain the count and it is Microsoft Office Word 2020.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2020 in Times New Roman, 14-point font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: /s/ *Jeffrey S. Rasmussen*
Jeffrey S. Rasmussen

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANTS' REPLY BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Webroot, dated 08/26/2020, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ Jeffrey *S. Rasmussen*
Jeffrey S. Rasmussen

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 2020, a copy of this **APPELLANTS' REPLY BRIEF**, was served via the ECF/NDA system which will send notification of such filing to all parties of record.

I hereby certify that on the 26th day of August, 2020, the original and 8 copies of the foregoing **APPELLANTS' REPLY BRIEF**, was delivered by courier to the Clerk of the Court, U.S. Court of Appeals, District of Columbia Circuit.

By: /s/ *Jeffrey S. Rasmussen*
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