IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al., Plaintiffs, v. STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, Defendant.	Case No. 20-cv-01002 (APM)
CHEYENNE RIVER SIOUX TRIBE, et al., Plaintiffs, v. STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, Defendant.	Case No. 20-cv-01059 (APM)
UTE TRIBE OF THE UINTAH AND OURAY RESERVATION, Plaintiff, v. STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, Defendant.	Case No. 20-cv-01070 (APM)

Amicus Curiae Brief of the Alaska Federation of Natives
(Submitted in Support of Defendants)

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The Alaska Federation of Natives ("AFN") respectfully submits this amicus curiae brief regarding the pending cross-motions for summary judgment filed on May 29, 2020. *See* May 31, 2020 Minute Order (order granting AFN's motion for leave to file this brief).[1]

I. Statement of Interest

As explained more fully in AFN's motion for leave (DE 75), AFN is a statewide Alaska Native membership association. AFN's members include most of the Sovereign Tribes[2] in Alaska ("Sovereign Tribes") that Plaintiffs contend should be the exclusive recipients of Coronavirus Aid, Relief, and Emergency Services Act tribal funding in Alaska. P.L. 116-136, § 5001 ("CARES"). AFN's members also include most of the regional and village for-profit Alaska Native Corporations ("ANCs") formed under the Alaska Native Claims Settlement Act ("ANCSA"), which the Treasury Department has correctly determined are also eligible for funding. DE 75 at 3. Finally, AFN's members include most of the not-for-profit Alaska Native regional tribal organizations, village organizations and tribal consortia ("Native Regional Consortia") affiliated with ANCs and Alaska's Sovereign Tribes which run the social services, regional hospitals and village clinics that serve Alaska Native communities across the State, and will not receive CARES Act Tribal funding under the Treasury's allocation rules. *Id.*[3]

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[1] This brief was not written in whole or in part by counsel for a party, and no one other than the amicus curiae and its counsel contributed money intended to fund the preparation of the brief. A Local Rule 7.1 certificate noting that AFN is a not-for-profit association is supplied as DE 75-1.

[2] AFN notes that the inherent authority over Alaska Natives who are tribal members is vested in the Sovereign Tribes and not the Alaska Native Corporations.

[3] AFN's membership does not include five Native health corporations that are not merged with their regional counterpart, or the Alaska Native Tribal Health Consortium which is a statewide-tribal health compact. AFN's membership also does include Cook Inlet Tribal Council which is not a regional Native consortia but a regional tribal organization, which provides similar services.

II. Introduction and Overview

A. The Alaska Native Community Responds to the Pandemic.

As early as January 2020, AFN, in response to the emerging Pandemic, worked to mobilize the Alaska Native community, including all three components of its membership (ANCs, which in Alaska manage the Native lands conveyed pursuant to ANCSA, Native Regional Consortia, and Sovereign Tribes). The multitude of Native entities who answered the call to action did so based on the Federal Indian laws specific to Alaska and a history of Alaska Native self-governing efforts that drastically differs from most of the American Indian experience in the Lower 48. The result is a complex web that spreads responsibilities for the welfare of Alaska Natives over multiple Native entities, including ANCs, rather than concentrating those responsibilities solely in Sovereign Tribes. Changing these responsibilities should be the decision of Alaska Natives themselves in true self-determination and not dictated by tribes outside of Alaska or national Indian organizations.

Working with Sovereign Tribes and the Native Regional Consortia, ANCs have been playing a vital role in alleviating the health and economic hardship to Alaska Natives caused by the Pandemic. By example, Chugach Alaska Corporation ("CAC"), took the lead in organizing Alaska Native entities and individuals around their area through regularly scheduled region-wide meetings to educate Alaska Natives on the seriousness of the virus and to design and implement a coordinated response. Through one of those meetings CAC learned that basic personal protective equipment ("PPE") was lagging as expected in the small village clinics, there was a need for increased food supply, and in-coming travelers were a problem. CAC and their affiliated village ANCs and associated regional tribal consortium moved to assist returning

students from out of state who were stranded across the Nation due to closures of their schools; identified that temporary housing for patients returning from cancer treatment was needed; and assisted with a principal in one of the village schools who had recently returned from out of state travel and was refusing to quarantine as instructed by the State of Alaska. CAC, through AFN, immediately reported the concern to the State for resolution. A Sealaska press release describes that ANC's work, which is another example of Pandemic efforts by a regional ANC.[4]

Alaska Natives responded to Covid-19 with memories of the last pandemic, the 1918 Spanish flu, in the back of their minds. That pandemic formed a historical trauma still felt by many Native peoples today. The first wave of the Spanish flu largely spared Alaska, but the second wave hit the Native community with devastating force in 1919.[5] Sadly, there are strong signs a second wave of the present Pandemic is building in Alaska now. Because of the remoteness of the Native villages, and statewide lockdown during the first wave, the path has been altered temporarily; however, cases are rising as travel opens up and there are strong signs a

[4] Sealaska Pledges $1 Million to COVID-19 Relief and Recovery, (April 7, 2020), https://www.sealaska.com/community/sealaska-pledges-1-million-to-covid-19-relief-and-recovery/, (last visited Jun. 4, 2020).

[5] *Influenza in Bristol Bay 1919, "The Saddest Repudiation of A Benevolent Intention"* Maria Gilson de Valpine, 2015. The author writes: "Because of its remoteness, the region had escaped the first wave of influenza arriving in 1919 in the Bristol Bay region of Alaska. However, as the ice melted in 1919 and preparations for fishing season began, the dead, the dying and the orphaned were discovered in appalling numbers." Further, as an example, "Captain Dodge and his medical staff met with Dr. French at the Kanakanak School where they were apprised of 300 sick and dying Natives in neighboring villages and 100 orphans newly transported to the site. A medical party went ashore on the evening tide to survey victims at Coffee Point, where the disease had found a large number of victims. A detail was also sent ashore to "bury the dead and to shoot stray dogs, a number of which had been feeding upon the bodies of persons who had died unprotected and alone in isolated localities." The descendants of the Native children orphaned, collected and transported to new locations, make up a part of the Native leadership today.

second wave combined with the annual seasonal flu has the potential to overwhelm Alaska's capacity to date without extraordinary mitigation efforts.

B. Treasury's Interpretation of the CARES Act Fits Alaska's Model of Tribalism.

The telltale sign that Plaintiffs are reading the CARES Act and its incorporated statutory definitions incorrectly is the unreasonableness of the result they seek when judged from the perspective of relief for the overall Alaska Native community, as distinct from the ANCs.

The Plaintiff Tribes ask the Court to direct the Treasury Department to replace a CARES Act funding distribution system they allege is over-inclusive with one that would be severely under-inclusive in Alaska, because so much of what is done in the Lower 48 States by Sovereign Tribes that manage their own reservation lands and economic resources is done in Alaska by ANCs. ANCs manage Native lands and economic resources as a result of the decisions of Congress in ANCSA to: (1) entrust lands and money from the settlement of aboriginal claims to ANCs, rather than to create reservations managed by Sovereign Tribes, 43 U.S.C. §§ 1601, 1606(r), 1611, while (2) clarifying that this different system was not to result in Alaska Natives receiving fewer services than American Indians in the Lower 48 States. *Id.*, § 1626(d).

Much of the criteria adopted by the Treasury Department to disburse the CARES Act funding to American Indians and Alaska Natives lends itself to ANC inclusion – namely employee counts, budgets, and populations. Because ANCs rather than Sovereign Tribes manage the vast bulk of Alaska Native lands and economic resources, the employee count and budget criteria on which Treasury is basing much of the CARES Act distributions are naturally found in Alaska much more in the ANCs.[6] Sovereign Tribes work through their affiliated

[6] ANCs have a unique and positive role to undertake during this national emergency. The ANCs have developed infrastructure and capability to move quickly, obtain resources and supply chains, mobilize manpower, leverage public-private partnerships to stretch resources, and

ANCs, Native Regional Consortia and the statewide tribal health consortium to accomplish shared goals, as a practical matter. Most Sovereign Tribes have little economic resources of their own and so can generate only small to non-existent employee counts and budgets to report in CARES Act tribal funding requests. Examples of the work done by the ANCs to provide services to Alaska Natives that in the Lower 48 States would be provided directly by Sovereign Tribes are detailed in the ANCs' opening brief. DE 78-1 at 45-50.[7] The situation is exacerbated because, as discussed more below, Treasury's allocation plan excludes from CARES Act tribal funding another large amount of pertinent employee count and budgets – the employees and budgets of the 17 Native Regional Consortia / Tribal Organizations and statewide Native tribal health consortium which provides much of the health and social services to Alaska Natives.

A similar problem exists with the population criteria used by Treasury in allocating CARES Act tribal funding. While many Alaska Natives are members of a Sovereign Tribe, and so could be counted in the population statistics presented in that Tribe's funding application, many other Alaska Natives are not members of a Sovereign Tribe but are shareholders of ANCs, and so are included in Treasury's implementation of CARES Act tribal funding through their status as ANC shareholders. Treasury's implementation complies with an ANCSA provision that Plaintiffs overlook in seeking to exclude ANCs. 43 U.S.C. § 1602(b) (defining "Alaska Native" by blood quantum, without requiring individual be a tribal member).

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provide long term perspectives on recovery from the cascading impacts which put at risk the Native people and Native land base if the economy is unable to recover.

[7] Rather than challenging the details of Treasury's allocation formula as purportedly being excessively generous to ANCs, Plaintiffs have elected to "swing for the fences," by trying to disqualify ANCs entirely. Thus, Plaintiffs' assertions that ANCs also engage in far-flung government contracting activities (the Alaska analog to the casino businesses of Lower 48 Sovereign Tribes – which coincidentally the Lower 48 Sovereign Tribes also contract for) must not distract attention from the services to Alaska Natives that ANCs provide.

In summary, because the substantial employee counts, budgets, and member populations, on which Treasury is basing CARES Act tribal distributions are in the Sovereign Tribes in the Lower 48 States, but in Alaska are to a considerable extent in the ANCs rather than their affiliated Sovereign Tribes, excluding ANCs from CARES Act tribal funding would result in a severely under-inclusive distribution in Alaska that Congress is highly unlikely to have intended, particularly given the sudden, sweeping emergency nature of the Pandemic and the congressional response in the CARES Act.

C. The Statutory Interpretation Debate.

The Alaska-specific tribal context set forth above is critical to evaluating the specific statutory text at issue here. The decision by Congress to define the term "Indian Tribe" by reference to the definition in a statute (25 U.S.C. § 5304, the "Self-Determination Act") that was amended just before enactment to include ANCs in the definition of "Indian Tribes" makes perfect functional sense in this context. *See* DE 79-1 at 2, 24-26, 28 (cites in Treasury brief). Plaintiffs attempt to limit the scope of the express inclusion, but Defendants supply the more persuasive textual analysis, including rebuttal of Plaintiffs "which" argument. DE 78-1 at 32-43, 79-1 at 1, 5-6.

The CARES Act fits in well with the broader realm of Federal statutes governing Indian programs. These statutes follow a consistent pattern, generally referencing and including ANCs within statutory definitions of "Indian Tribe" when economic programs are at issue, while conspicuously omitting ANCs when purely sovereign functions such as tribal enrollments, courts and police are involved, or where the special characteristics of ANCs under ANCSA make them inappropriate participants. Congress and Federal agencies also consistently use the term "recognized governing body" in a way that clarifies that, where an ANC qualifies as an "Indian

Tribe," the ANC has a "recognized governing body." *See*, DE 79-1 at 30-35. This wide-angle view of the many U.S. Code provisions regarding Indians further supports the Defendants' analysis of the CARES Act.

D. Treasury Made Related Decisions Effecting Alaska Funding while Finding ANCs Eligible.

Plaintiffs overlook that Treasury, in implementing CARES Act tribal funding, made two decisions that will greatly reduce distributions in Alaska. First, Treasury decided to exclude the Native Regional Consortia and the statewide Native tribal health consortium, which provide much of the health and social services to Alaska Natives. This resulted in an overall limitation on funding in Alaska not found in the Lower 48 States, where more health and social services are provided directly by Sovereign Tribes, thereby allowing tribal hospitals there to receive funding from *both* the CARES Act tribal funding route and a separate medical funding route involving the Indian Health Service ("IHS").[8] Second, Treasury has not yet permitted the Alaskan Sovereign Tribes to include in their employee and budget counts (on which distributions are based) the employees and budgets of their closely-affiliated ANCs and Native Regional Consortia devoted to providing services to Alaska Natives. Implementing a statutory program involving distribution of limited funds is an exercise in balance. The Court should be wary of Plaintiffs' arguments to overturn the part of Treasury's balancing that came out favorable to Alaska Natives, while leaving in place the unfavorable parts, particularly in light of Congress's clarification that the creation of ANCs should not reduce benefits. *See* 43 U.S.C. § 1626(d).

[8] *See* Administrative Record (A.R.) Vol. 009 at 124 (summarizing a comment letter from AFN to the Treasury and Interior Departments advocating inclusion of Native Regional Consortia and dated April 10, 2020 – the same day that Interior informed AFN that it had determined that Regional Consortia would not be eligible for tribal relief). The Native Regional Consortia in Alaska are only eligible for the IHS funding, which is appreciated, but insufficient.

As the Defendants' thorough briefing regarding the statutory text and the legislative history surrounding the passage of the Self-Determination Act with respect to Alaska Natives and the "Indian Tribe" definition shows, Congress knew what it was doing when, in the CARES Act, it borrowed the key "Indian Tribe" definition from the Self-Determination Act. As the Federal Defendant and ANC Defendant-Intervenors rightly stress, when Congress in the CARES Act imported the Self-Determination Act's definition of "Indian Tribe," it borrowed a definition that had been construed by both the relevant Court of Appeals (the Ninth Circuit's *Bowen*[9] decision) and the Department of the Interior as including ANCs. There, and in numerous other enactments that provide services to Alaska Natives using the Self-Determination Act eligibility standard, Congress gave no sign that it wanted to overturn that definitional apple cart.

III. Argument

A. Defendants' Inclusionary Reading of the CARES Act Comports with ANCSA. Plaintiffs' Exclusionary Reading Does Not.

It would be ironic and inequitable in the extreme if, by utilizing the precise format for generating the revenues necessary to advance the Alaska Native community, required by Congress in ANCSA, the format of forming for-profit corporations with public interest responsibilities (ANCs), Alaska Natives lose funding and eligibility for an emergency aid program solely due to a post-CARES-enactment re-interpretation of proper organizational formats.

ANCSA provides that: "Notwithstanding any other provision of law, Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans." 43 U.S.C. § 1626(d). This provision in the fundamental statute governing the relationship

[9] *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471, 1472-77 (9th Cir. 1987).

between the United States and Alaska Natives, which is often described as a treaty substitute, provides a good rule of thumb in reading later statutes.

Carrying out this continuing statutory policy requires that Congress, in adopting new programs, decides whether the special statutory entities Congress formed in ANCSA (ANCs) are eligible to participate in whatever new government program is being created. As the Court knows from the briefs of the Parties, eligibility under the Self-Determination Act (and CARES) is provided to "the recognized governing body" of an "Indian Tribe." The key term "Indian Tribe" is defined to include:

> "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). As discussed above, because the Federal Defendant and ANC Intervenors have fully briefed these provisions, AFN will focus on (1) the insight gained by seeing where the CARES Act and Self-Determination Act definitions fit into the broader scheme of Federal statutes applicable to Indians, and (2) the ANCSA policy of ensuring that Alaska Natives receive the same services as Indians elsewhere, while providing those services differently.

There is no single, all-purpose definition of "Indian Tribe"[10] in the dozens of Federal statutes that utilize that term. Rather, the term has distinct and different meanings for Federal and tribal governments under different Federal statutes. For Native people, the term "Indian Tribe" varies, but generally means the "existence … [of a] shared language, rituals, narratives, kinship or clan ties, and a shared relationship to specific land."[11] While ANCs have been

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[10] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[1], at 135 (Nell Jessup Newton, et al. eds., LexisNexis 2005) [hereinafter COHEN'S HANDBOOK].

[11] *Id*. at § 3.02[2], at 136.

referred to in the varying Federal legislation as Indian tribal governments, Federally recognized Indian Tribes, Alaska Native entities, and myriad other terms, there is no dispute as to the functions and role of ANCs under ANCSA. Alaska NativeCorporations are legal entities created *and required* by the Alaska Native Claims Settlement Act.[12] ANCs, therefore, function similarly to for-profit corporations in some respects but, significantly, unlike other for-profit corporations, ANCs are expected to address the social and cultural needs of their Alaska Native shareholders in addition to providing economic returns. Accordingly, they operate with a different mission than most for-profit corporations. ANCs focus on maintaining their Indigenous cultural values, adapting the corporate structure to reflect those values, engaging in the State, National and global economy, strengthening local economies, and pursuing profits, benefits to shareholders and benefits to the community/environment, as opposed to the usual corporate focus of non-native corporations.

1. Federal Statutes that Include ANCs in Their Definition of Indian Tribe.

Almost 75 Federal statutes – including ANCSA – makes Alaska Native Corporations eligible for Indian programs through legislative language, generally following the Self-Determination Act definitional format. Since it was enacted, the Self-Determination Act "Indian Tribe" definition referencing ANCs has been included in at least 60 Federal statutes regarding economic development, land and resource management, education, housing, arts and culture, and health, safety and welfare, in order to define "Indian Tribe."

The Native American Housing Assistance and Self-Determination Act ("NAHASDA") has a definition of "Indian Tribe" that is grammatically similar to the 1975 Self-Determination

[12] 43 U.S.C. § 1601 *et. seq.*

Act passages being debated in the Parties brief. The NAHASDA statute further defines "federally recognized tribe" as:

> any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians pursuant to the Indian Self-Determination and Education Assistance Act[.][13]

ANCs as the economic engines for Alaska Natives can and are useful in promoting housing, and their exclusion would undermine efforts to provide Alaska Natives with the same housing opportunities afforded Indians in the Lower 48 States. Also, the lands upon which Native housing settlements are generally built are usually owned by the ANCs. The inclusion of ANCs in the housing statute thus fits the general policy set in ANCSA. NAHASDA's description of ANCs as being "federally recognized tribes" undercuts Plaintiffs' argument that they only type of Federal "recognition" that exists is Federal sovereign-to-sovereign recognition.

The Community Development Banking and Financial Institutions Act of 1994 defines "Indian Tribe" to include ANCs through language similar to that in the Self-Determination Act:

> any Indian tribe, band, pueblo, 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 [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.[14]

The central purpose the Act was to create a fund to promote economic revitalization and community development by investing in and assisting community development financial institutions through equity investments, capital grants, loans and technical assistance support. The statute's purpose is economic relief, and ANCs were unsurprisingly included in the program.

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[13] 25 U.S.C. § 4103(13)(B).
[14] 12 U.S.C. § 4702(12).

The Indian Financing Act of 1974 also defined "tribe" using words nearly identical to the Self Determination Act.[15] The Act provided for financing the economic development of Indians and Indian organizations.[16] The Act's program concerned mostly economic programs, such as grant and loan programs compatible with the corporate structure of ANCs.

The Economic Opportunity Act of 1964 defines "Indian Reservation or Alaska Native village" to include "any lands selected by Alaska Natives or Alaska Native organizations under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.]," which is a reference to ANCs, as only ANCs selected land under ANCSA.[17] This Act established many economic programs, many of which are still in effect today. The role of the ANCs as mangers of lands made them an appropriate candidate for involvement in this economic program.

ANCs manage (and own) land for the benefit of Alaska Natives, so unsurprisingly Federal statutes regarding lands often include ANCs in the definition of Indian Tribes. Excluding ANCs would prevent Alaska Natives from receiving benefits that Indians living in the Lower 48 receive from Sovereign Tribes that manage reservations. There are nearly 20 permanent Federal statutes that currently include ANC land as "tribal land," "Indian land," "Indian reservations," or in similar land definitions.[18] There is also a provision in ANCSA

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[15] 25 U.S.C. § 1452(c).
[16] 25 U.S.C. § 1451 et. seq.
[17] 42 U.S.C. § 2992c(3).
[18] *See, e.g.*, National Housing Act, 12 U.S.C. § 1715z-13(i)(2); Public Land Corps Act of 1993, 16 U.S.C. § 1722(6)(D); Federal Cave Resources Protection Act of 1988, 16 U.S.C. § 4302(3)-(4); Archeological Resources Protection Act of 1979, 16 U.S.C. § 470bb(4)-(5); Elementary and Secondary Education Act, 20 U.S.C. § 7713(5)(A)(ii)(III); Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3202(9); Energy Policy Act of 1992, 25 U.S.C. § 3501(2)(C); American Indian Agricultural Resource Management Act of 1993, 25 U.S.C. § 3703(10); Economic Recovery Tax Act of 1981, 26 U.S.C. § 168(j)(6); American Indian Vocational Rehabilitative Services Grants Act, 29 U.S.C. § 741(d);Veterans Home Loan Program Revitalization Act of 1992, 38 U.S.C. § 3765(1)(C); Native Americans Programs Act of 1974, 42 U.S.C. § 2991b(a).

related to "Indian reservation" and "trust or restricted Indian-owned land areas." This provision states that for purposes of the Public Works and Economic Development Act of 1965,[19] the terms "Indian reservation" and "trust or restricted Indian-owned land areas" shall be interpreted by the Economic Development Administration and other federal agencies conducting loan or loan and grant programs in Alaska "to include lands granted to Natives under this chapter [ANCSA] as long as such lands remain in the ownership of the Native villages or the Regional Corporations."[20]

2. *Federal Statutes that Exclude ANCs in Definition of "Indian Tribe."*

By contrast, legislation that excludes ANCs appears to be clearly tied to the sovereign powers and authorities of Tribes to manage tribal membership and tribal self-governance, as opposed to providing services such as those found in CARES. In other cases, ANCSA itself establishes some characteristic of ANCs that make ANCs inappropriate service providers. As an initial example, the Indian Child Welfare Act (ICWA) defines an "Indian Tribe" in a way that includes Alaska Native **villages** but not village **corporations** or regional corporations, and so excludes ANCs from ICWA's child welfare program. That Act defines "Indian Tribe" as:

> any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43[.][21]

ICWA concerns placement preferences in child custody decisions where divorcing parents are not involved, which is a function clearly inappropriate for corporate ANCs, or for any for-profit corporation really. Excluding ANCs from ICWA matters would not prevent Alaska Natives

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19 42 U.S.C. § 3121 *et seq*.
20 *See* 43 U.S.C. § 1601(g).
21 25 U.S.C. § 1903(8).

from receiving the statutory protections envisioned by the Act available to Indians in the Lower 48 States. See 43 U.S.C. § 1626(d).

The Native American Graves Protection and Repatriation Act defines tribe similarly to ICWA, and so also excludes ANCs, through including Alaska Native villages but not village corporations or regional corporations. Ensuring proper respect for Indian graves is not at all an economic activity and is far more appropriately led by the Alaska Sovereign Tribe (although ANCs can and do help). That statute excludes ANCs from its definition of "Indian Tribe":

> any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.][22]

The Indian Law Enforcement Reform Act concerns sovereign police/court activities unsuitable for ANCs as for-profit corporation.[23] This statute defines "Indian Tribe" as:

> any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government[.][24]

Put another way, the ANCSA policy of providing to Alaska Natives the same services made available to Indians in the Lower 48 would not be advanced by attempting to turn for-profit corporations into police departments and courts. Additionally, statutory programs that are based on the sovereign immunity enjoyed by Sovereign Tribes or the inalienability of certain Indian lands (such as lands held in trust for Indians by the Department of the Interior) are inappropriate for ANC participation given the decisions by Congress in ANCSA to form ANCs as corporations and allow them to alienate land. 43 U.S.C. §§ 1606, 1629e.

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[22] 25 U.S.C. § 3001(7).
[23] 25 U.S.C. § 2801 et seq.
[24] 25 U.S.C. § 1301(1) (incorporated by reference in 25 U.S.C. § 2801(6)).

3 How the CARES Act Fits in this Statutory Pattern.

As general economic relief and health legislation, the CARES Act tribal relief funding provisions group far more naturally with the list of statutes discussed including ANCs in their definitions of "Indian Tribe" than with the list of statutes excluding ANCs from their definitions. Sovereign immunity and inalienable land are not involved in any way in the CARES Act. The uses to which CARES Act funding may be put are not limited to the police or judicial or "sovereign" functions for which ANCs are unsuited. P.L.116-136, § 5001. Assisting with mitigating the devastating general economic impact of Covid-19 is an economic function. The CARES Act is an economic relief statute. CARES Act Division A, which includes Title V, the Corona Virus Fund title in question, is entitled: "Keeping Workers Paid and Employed, Health Care System Enhancements, and Economic Stabilization." P.L.116-136, Div. A. This is a function well-suited for ANCs as the land managers and general economic engine of Alaska Natives.

Moreover, as discussed above, excluding ANCs would prevent Alaska Natives who are unaffiliated with any Sovereign Tribe from being considered or counted at all in the distribution of CARES Act relief benefits. *Supra*, p. 5. The only way those Alaska Natives can be considered or counted in the population portion of the distribution formula is through their status as ANC shareholders. As also discussed above, excluding ANCs would exclude the employee counts and budgets of the Alaska Native entities (ANCs) that manage lands and economic resources that in the Lower 48 States are managed by Sovereign Tribes, resulting in a gross undercount of the employees and budgets involving in providing services to Alaska Natives. *Supra*, pp. 4-5. A reading of the CARES Act and incorporated Self-Determination Act definition that includes ANCs squares far better with ANCSA than Plaintiffs' exclusionary reading. 43

U.S.C. § 1626(d) (nothing in ANCSA should prevent Alaska Natives from receiving the same benefits as Lower 48 Indians).

4. *A Broader Review of Indian Statutes Rebut Plaintiffs' Argument for a Narrow Construction of "Recognized Governing Body" that Excludes ANCs.*

As a second line of attack, Plaintiffs assert that, even if an individual ANC were to qualify as an Indian Tribe, it would not be an Indian Tribe with a "recognized governing body," and so would not be a "Tribal Government" eligible for CARES Act tribal funding. Plaintiffs assert that "recognized governing body" is a second limited hurdle, one that requires an entity that qualifies as an Indian Tribe to pass the additional hurdle of demonstrating that its leadership has been recognized by the Department of the Interior as having sovereign status. In other words, Plaintiffs interpret the word "recognized" in an extremely narrow technical way, although the CARES Act never directs that such a narrow definition be utilized. P.L. 116-136, § 5001.

Comparison to other Indian statutes which utilize essentially the same terms rebuts Plaintiffs' argument. Other statutes are set up so that it is immediately visually apparent that the dispositive issue is whether the entity asserting itself to be a Tribe qualifies as a Tribe under the definition of "Indian Tribe," and the phrase "recognized governing body" is simply employed to refer to whatever body is the lawful governing body of that Indian Tribe. *See* DE 79-1 at 30-31 (Treasury explains that if there is a dispute as to who the lawful leadership of an Indian Tribe is, the phrase "recognized governing body" allows the U.S. Government to determine the legitimate leadership). In other Indian statutes, the wording is the same, but "recognized governing body" and the definition of "Indian Tribe" including ANCs appears in very close proximity, which visually provides the clue that Treasury is correct in reading these stock statutory phrases.

Consider the Tribally-Controlled School Grant Act, where the definitions are:

> (4) Indian tribe
>
> The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, ***including an Alaska Native Village Corporation or Regional Corporation*** (as defined in or established pursuant to the [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. …
>
> (7) Tribal governing body
>
> The term "tribal governing body" means, with respect to any school that receives assistance under this Act, ***the recognized governing body*** of the Indian tribe involved.[25]

One cannot read the adjoining definitions as allowing for the absurd possibility of a headless organization that meets the definition of Indian Tribe but has no "recognized governing body." ANCs have board of directors, which ANCSA (and State corporate law) recognizes as their governing bodies. 43 U.S.C. § 1606(f) ("The management of a regional corporation shall be vested in a board of directors ….").

The next example is the Self-Determination Act itself, 25 U.S.C. § 5304. That statute uses the same stock phrase "recognized governing body" in order to help define the term "tribal organization." *Id.* A few definitions after including ANCs in the definition of "Indian Tribe," the statute defines "tribal organizations" in part as "the recognized governing body of ***any*** Indian tribe …." 25 U.S.C. § 5304(l) (emphasis added). The juxtaposition of "recognized governing body" in close proximity to a definition of "Indian Tribe" printed above that includes ANCs leads to the conclusion that ANCs (like "any" entities meeting the "Indian Tribe" definition) have "recognized governing bodies." There is no discussion of what happens if an entity meeting the definition of "Indian Tribe" lacks a "recognized governing body," a discussion that would be sorely needed if Plaintiffs' narrow reading that only sovereigns are "recognized" was correct.

[25] 25 U.S.C. § 2511 (emphasis added).

As an example of how Federal agencies have interpret these stock phrases, consider the Veteran Department's use of these terms in its rules regarding medical liability claims:

> (u) Tribal government means the Federally recognized governing body of 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, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

38 C.F.R. 14.627; *see also* 38 C.F.R. 39.2 (similar). The proximity of ANCs and "recognized governing body" in this unified definition makes it even more apparent that ANCs must be able to have recognized governing bodies, which must be their boards of directors. Further, the use of the phrase "Federal recognized governing body" in immediate juxtaposition with ANCs strongly suggests that ANCSA's specification that the lawful leadership organization of an ANC is its board of directors is ample Federal "recognition." Note that the rule also defines "Tribal government" to include the governing body of an ANC. 38 C.F.R. 14.627(u). There is nothing novel in the CARES Act treating ANC boards as "Tribal Governments" for purposes of dispensing economic aid.

Now Congress can if it wishes utilize the same stock phrases differently in different Indian statutes, but it generally tries hard to avoid doing so, because of the confusion that would then result. Because Congress is unlikely to have used the stock phrase "recognized governing body" in a different sense in the CARES Act tribal relief provisions than in other Indian legislation, it follows that the "recognized governing body" of an ANC is its proper leadership, which ANCSA defines (and thus recognizes) is its board of directors. 43 U.S.C. § 1606(f).

B. The Unique Nature of Alaska Native Organizations Stems from Congressional Choices, as in ANCSA, the Self-Determination Act, and CARES.

To understand the unique nature of Alaska Native service delivery programs as recognized and required under Federal law, it is imperative to understand that Alaska Natives operate in a governmental ecosystem different from most other States: Alaska has multiple tribes, regional tribal organizations and Federally-established Alaska Native Corporations that are not just corporations, they are *Native* Corporations, with far broader missions than ordinary corporations.

Congress passed ANCSA in 1971 to address the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). In doing so, Congress diverged from previous approaches to American Indian policy in the Lower 48 States and sought to avoid creating "a reservation system or lengthy wardship or trusteeship." *See id*. § 1601(b); *see also Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 523-24 (1998). Instead, Congress divided Alaska into 12 geographic regions, and directed the formation of 12 corresponding Alaska Native regional corporations along with more than 200 Native village corporations. 43 U.S.C. §§ 1606(a), 1606(d), 1607(a). Alaska Natives were enrolled as shareholders in those corporations according to their place of residence or origin. *Id*. §§ 1606(g); 1607(a).

In exchange for the extinguishment of their aboriginal land claims, ANCSA authorized the conveyance of approximately 44 million acres of land to the newly formed Native regional and village corporations.[26] *Id*. §§ 1611, 1613. Congress intended that the conveyance of these lands would ensure that Alaska Natives have the necessary means by which to provide for their

[26] These conveyances made the Alaska Native Corporations the third-largest landowners in Alaska, following the Federal Government and the State.

own economic and social well-being, and to maintain their subsistence and cultural traditions. *See id*. § 1601(b) (settlement to be accomplished "in conformity with the real economic and social needs of Natives"); *id*. § 1606(r) (Native Corporations authorized "to provide benefits … to promote the health, education, or welfare of [its] shareholders").

Congress explicitly intended that ANCs would use and develop these lands to benefit both their shareholders and all Alaska Natives. Regional Native Corporations and village Native Corporations within a region have unique bilateral obligations; further statewide obligations including on-going revenue sharing of subsurface resource development between a regional Native corporation and all other Native corporations (both regional and village) are unprecedented in US history. 43 U.S.C. § 1608.

Congress envisioned for ANCs something more than creating corporations in the usual sense of maximizing shareholder value. The goal was to address "the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. § 1601(b). To that end, Congress has continued since enacting ANCSA to grant ANCs rights, duties, and preferences, some of which overlap with rights, duties, and preferences granted to Federally recognized Indian Tribes, and others of which are unique to ANCs. It extended in perpetuity the inalienability of ANC stock and the restriction against non-Natives holding corporate voting rights. 43 U.S.C. §§ 1606(h)(1)-(2), 1629(b)-(c). It exempted ANCs from Federal securities and investment laws, while also preempting State corporate law in a wide range of areas. *Id*. §§ 1625, 1627, 1629b, 1629c, 1629d, 1629e. And it further exempted ANCs from certain employment restrictions in Title VII of the Civil Rights Act to ensure that ANCs would be able to hire Alaska Natives without

running afoul of Federal law, *id*. § 1626(g), and enacted laws protecting undeveloped ANCSA lands from taxation and involuntary alienation, *id*. § 1636(d).

In addition, the Bureau of Indian Affairs ("BIA"), in providing lists of eligible entities for all of its programs has stated that Alaska Native corporations are "statutorily eligible for funding and services from the Bureau," 53 Fed. Reg. 52829, 52833, and even when the agency provided a new list which did not include ANCs, the Bureau expressly provided that the excluded entities are "made eligible for Federal contracting and services ***by statute*** and their non-inclusion on the list below does not affect the continued eligibility of the entities for contracts and services." 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993) (emphasis added). Plaintiffs' argument that the BIA chose to exclude ANCs from its long list of programs for Indians by not including them on one specific list rings hollow when BIA in the same document reassured the world that ANCs remain eligible for these important programs. *See id.*

The point that ANCs have "corporate" features that make them less-preferred participants in some of the various programs for which they are eligible has long been addressed by BIA through a prioritization system that prefers Sovereign Tribes and villages over ANCs, rather than exclusion of ANCs from eligibility for participation, which is the goal Plaintiffs seek. Under the BIA/IHS Guidelines, Federally Recognized Tribes take precedence over ANCs in 638 contracting, but ANCs are not excluded:

> "Villages, as the smallest tribal units under the ANCSA must approve contracts which will benefit their members. The actual benefit of proposed contracts for IHS functions accrues to residents of individual villages as recipients of the health services. The IHS has determined, therefore, that the statute requires village approval, either directly or by Delegation to a tribal organization."

Alaska Area Guidelines for Tribal Clearance for Indian Self-Determination Contracts, 46 Fed. Reg. 27178 (May 18, 1981) ("Alaska Guidelines"). However, contrary to Plaintiffs' assertions,

the Alaska Guidelines establish *explicitly* that ANCs "will be recognized" as the "governing body" of an Alaska Native village for purposes of the Self-Determination Act, subject to a specified "order of precedence." *Id.* (establishing that IHS "***will recognize as the village governing body*** … the [IRA] Council … then the traditional village … then the village profit corporation … then the regional profit corporation.") (emphasis added). The BIA, too, established that ANCs "will be recognized" according to the same order of priority. *See* BIA Juneau Area Office and Alaska Area Native Health Service, Alaska Native Village Self-Determination Briefing Book 7 (Nov. 1977) (describing the same "order of priority").[27]

The precedence rules IHS and BIA help to address the problem of overlapping services or, as articulated by Congress in the Tlingit and Haida Status Clarification Act, the "duplication of Federal service funding." *See* 1976 Soller Memorandum, A.R. 12, p. 2 ("If, as suggested in your memorandum, the Bureau receives competing requests from villages, village corporations, and regional corporations for grants to serve the same clientele, then a determination must be made as to which potential grantee will put these funds to best use."); *see* DE 71 (A.R. index).

In the context of this litigation, Plaintiffs have argued that ANC eligibility for CARES Act funding will result in double dipping. However, this an issue of allocation methodology, not of eligibility, and the Treasury Department has already made clear that it "intends to take steps to

[27] Congress too – as a matter of statute – established a rule of precedence, or priority, as between the Central Council of Tlingit and Haida Indian Tribes of Alaska, a Federally-Recognized Tribe, and Southeast Alaska's villages *in order to avoid "duplication of Federal service funding."* Federally Recognized Indian Tribe List Act, P. L. 103-454, title II, 108 Stat. 4792, 4793 (1994).

account for overlaps between Alaskan Native village membership and Alaska Native corporation shareholders or other beneficiaries."[28]

In sum, ANCs and their governing bodies fit comfortably within the definition of "Indian Tribe" in the Self-Determination Act, and the CARES Act and, for almost 40 years, have qualified as the "recognized governing body" of an Indian Tribe whenever this definition is used.

C. Regional Distinctions Mirror Tribal Affiliations and Capacity Differences.

The congressionally-established boundaries for the 12 regional Native corporations mirror boundaries of tribal affiliation – they were formed on the basis of tribal affiliation and cultural ties, not an arbitrary shareholder format of western culture. As a statewide Native organization working on a wide array of social services, AFN recognizes the diversity and traditional cultural lines, which mirror the geographical regions of ANCSA, of ANCs and that the many inter-tribal consortiums predated and created the regional corporations and that their boundaries line up.[29]

Another reason to understand the unique nature of service delivery for Alaska Natives is that, unlike most large Tribes in the contiguous States, the smaller Sovereign Tribes in Alaska generally do not have large departments for such services as health and housing – for many larger scale services. Rather, many, if not most, Alaskan Sovereign Tribes rely on organizations with greater capacity and financial resources of larger scale such as regional inter-tribal health consortiums, regional housing authorities, Regional Native Consortia and ANCs. These other

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[28] Coronavirus Relief Fund Payments to Tribal Governments, Department of Treasury (Apr. 23, 2020), https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Payments-to-Tribal-Governments.pdf.

[29] Tanana Chiefs Conference was formed in 1915, recently celebrated its 100-year historic gathering, the tribal chiefs make up the board; the tribal chiefs formed Doyon the regional Native corporation, and village Native corporations in that region.

Native entities most often have greater capacity and scale to deliver more comprehensive health care on a regional basis, which is particularly important in Alaska with remote health delivery systems and a central Alaska Native hospital, operated by a statewide inter-tribal consortium.

An example of the avoidance of duplication is the approach adopted by Indian Health Service in the Alaska Guidelines discuss above, 46 Fed. Reg. 27178, which provides for a prioritization in contracting of *eligible entities* which were made eligible by the Self-Determination Act. There is in the guidelines an acknowledgement that the entities, including Alaska Native corporations, are eligible, and the Guidelines are to provide an avoidance of duplication, not a means to deny eligibility. AFN works every day within Alaska Native leadership to achieve what one might call, for lack of a better phrase "navigating multiple eligibility and avoiding duplications," in order to maximize the delivery of services as intended by Congress. ANCs are a vital part of this picture, particularly given the decision by Treasury (unchallenged in this litigation) to deny CARES Act tribal funding to the 12 Native Regional Consortia who run the hospitals and many of the social programs that serve Alaska Natives.[30] Plaintiffs efforts to also cut out ANCs would knock one more leg out from under the table of an Alaskan tribal ecosystem that is so different from that in the Lower 48 States and that depends entirely on close coordination of work among the ANCs, the 12 Native Regional Consortia, and the Sovereign Tribes.

D. AFN's Own Work Combatting this Pandemic Confirms the Need for ANC Help.

Working around the clock since February 2020, AFN held daily debriefs with the statewide inter-tribal health consortium and the highest-ranking U.S. military officials in Alaska, sharing status reports, critical needs and prioritization for the next day's work. Native health

[30] The Regional Native Consortia (as opposed to statewide consortia) are AFN members.

professionals with support from AFN successfully obtained critical early testing equipment, and testing supplies from the private sector; successfully *implemented* in real time a historic partnership[31] between the Native health system, the U.S. Department of Defense, the U.S. Veterans Administration (and others) to secure the first ever transfer during a national emergency of N95 masks, gloves, gowns and other medical supplies from war time supplies, and not the national stockpile. This is significant because there is a global expansion of demand, the complexity of manufacturing for certain critical elements, disruptions to supply chains and hoarding which curtailed PPE supply. Recall the Native village health clinics in Alaska are at the very end of the road in the supply chain. Native health organizations and professionals in turn lent early testing equipment to the U.S. military in Alaska in a true partnership to keep their mission going.

IV. CONCLUSION

The Defendants have the better view of the statutory language debate, as demonstrated in their briefs. DE 78-1, 79-1. By this brief AFN shows that the Defendants' reading of the statutory language fits far better with both ANCSA and the overall body of the statutory law concerning American Indians and Alaska Natives than Plaintiffs' reading. The Court should grant Defendant's motions for summary judgment.

[31] Alaska Federal Health Care Partnership (AFHCP) includes the U.S. Army and Air Force, U.S. Veterans Administration, U.S. Coast Guard, IHS, and the Alaska Native Tribal Health Consortium to leverage and share resources, talents, and experience for all Federal beneficiaries such as Alaska Natives. The partnership worked exactly as planned.

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Respectfully submitted,

The Alaska Federation of Natives

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Certificate of Service

On June 4, 2020, I filed the foregoing through the Court's Electronic Case Filing system, which will automatically serve on all counsel of record a link providing access to the filing and any attachments to the filing.

/s/ James H. Lister
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