ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 11, 2020

No. 20-5204; consolidated with Nos. 20-5205, 20-5209

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Plaintiff-Appellants,

v.

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

Defendant-Appellees.

On Appeal from the United States District Court for the District of Columbia
Civil Action No. 1:20-cv-1002-APM (consolidated)

BRIEF OF *AMICI CURIAE* U.S. SENATORS LISA MURKOWSKI, DAN SULLIVAN, AND U.S. CONGRESSMAN DON YOUNG IN SUPPORT OF APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel hereby certifies as follows:

A. Parties and *Amici*

All current parties, intervenors, and *amici* appearing before the District Court are accurately stated in the Federal Government Appellee's Brief (Document No. 1857150). All parties, intervenors, and *Amici* currently appearing in this Court are accurately stated in the Federal Government Appellee's Brief (Document No. 1857150); Cook Inlet Region, Inc., has a motion pending to appear as *Amicus*.

The *Amici Curiae* appearing in this brief are as follows: U.S. Senators Lisa Murkowski, Dan Sullivan, and U.S. Congressman Don Young.

B. Rulings Under Review

The ruling under review is accurately stated in Federal Government Appellee's Brief (Document No. 1857150).

C. Related Cases

This case was not previously before this Court. The related cases pending before this Court are 20-5205 and 20-5209, which the Court has consolidated with this case. Counsel is not aware of other pending related cases.

STATEMENT OF CONSENT TO FILE

The undersigned counsel for *Amici Curiae* states that all Appellees have consented to the filing of this brief. Counsel requested consent from Appellants. Appellant Ute Tribe of the Uintah and Ouray Reservation stated they would oppose the proposed *Amici.* The Confederated Tribes of the Chehalis Reservation, *et al.*, indicated they would consent as long as the appropriate Rule 29 was observed. The Appellants Cheyenne River Sioux Tribe, *et al.*, have declined to reply.

As Appellants compose of separate groupings, they all are referred to herein as Appellants to avoid confusion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

GLOSSARY

ANC	Alaska Native Corporation
ANCSA	Alaska Native Claims Settlement Act of 1971
BIA	Bureau of Indian Affairs
CARES Act	Coronavirus Aid, Relief, and Economic Security Act
ISDEAA	Indian Self-Determination and Education Assistance Act of 1975
NAHASDA	Native American Housing Assistance and Self-Determination Act of 1996

STATEMENT OF IDENTITY, INTEREST OF *AMICI CURIAE*,[1] AND SOURCE OF AUTHORITY TO FILE

Amici are the two United States Senators and the one Member of the United States House of Representatives (collectively "Members of Congress" or *Amici* or *Amici* Members of Congress) elected from the State of Alaska. As Members of Congress, who serve the only State in the Nation that is home to both Federal List Act Tribes ("List Act Tribes")[2] and Alaska Native Corporations ("ANCs"), created by the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §1601, *et seq.*, we have a unique interest and expertise in the application of Federal law when it comes to legislating fairly on behalf of both List Act Tribes and ANCs.

This experience is particularly unique and useful in that the CARES Act, Pub. L. No. 116-136, Title V ("Title V"), was enacted to provide for emergency-relief funds to Indians tribes, the definition of which includes Alaska regional or village corporations, as well as List Act Tribes. 42 U.S.C. §§801(g)(1), (5).

Our unique perspective stems not only from our constituency, but from our service to this Nation. Senator Murkowski serves on the U.S. Senate Committee

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[1] No counsel of any party has authored this brief in whole or in part. No party and no counsel of any party has contributed money that was intended to fund preparing or submitting this brief; and no person contributed money that was intended to fund preparing or submitting the brief; this brief is prepared *pro bono*; *Amici* have authored the filing of this brief.

[2] Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454 §102(2), (3), 108 Stat. 4791 (1994).

on Indian Affairs, which passes and oversees laws specific to all Indian Affairs and has done so since 2003.

Senator Murkowski is also Chairman of the Committee on Energy and Natural Resources, which has jurisdiction over the Alaska Native Claims Settlement Act. She has served on the Energy Committee since 2002 and was Ranking Member from 2009 through 2014. Senator Murkowski also Chairs the Interior Appropriations Subcommittee, which funds a large share of federal Indian programs that uphold the federal trust responsibility, including the Bureau of Indian Affairs, the Indian Health Service, and the many tribes and tribal organizations that contract or compact such programs via the Indian Self-Determination and Education Assistance Act (PL 93-638). Senator Murkowski is also a member of the Health, Education, Labor, and Pensions Committee, which has been combating COVID-19 and dealing with our health care challenges across the country for all groups, including American Indians/Alaska Natives.

Senator Sullivan serves on the U.S. Senate Committee on Commerce, Science, and Transportation, which oversees many issues ranging from telecommunication to fisheries, marine transportation highways to interstate commerce, space to consumer safety, transportation to technology, Coast Guard to aviation. The Commerce Committee is one of the two Senate committees that oversees the surface transportation bill that is reauthorized about every five years,

including the Tribal Transportation Program, which includes ANCs as eligible Indian tribes. Senator Sullivan also sits on the U.S. Senate Committee on Environment and Public Works ("EPW"), another committee that has oversight on the surface transportation bill as well as the water resources development bill that is passed approximately every two years and provides eligibility and assistance to indigenous peoples. EPW also oversees the Environmental Protection Agency's Indian Environmental General Assistance Program, which includes ANCs as Indian tribal governments. Prior to his tenure as U.S. Senator, he served as the former Attorney General of the State of Alaska and was involved with litigation involving Indian law and Alaska Native law.

Finally, Congressman Young is the longest serving member and Dean of the House of Representatives ("House"), having devoted 48 years/24 terms to serving the interests of the State of Alaska and this Nation. Congressman Young actively participated in the Indian Self-Determination and Education Assistance Act ("ISDEAA")[3] and its amendments; amendments which include defining ANCs as Indian tribes. He is currently the Chairman Emeritus of the House Natural Resources Committee and is also Chairman Emeritus on the Subcommittee for Indigenous Peoples of the Unites States f/k/a Indian, Insular, and Alaska Native

[3] 25 U.S.C. §5304(e), ISDEAA.

Affairs. Accordingly, we are exceptionally familiar with Indian law and the intent behind it.

As Members of Congress serving indigenous constituents and on Congressional committees providing authorization and funding for and assistance to Alaska Native communities and entities, we are uniquely positioned to address the importance of ISDEAA and the legislative intent behind it. We are the only Members of Congress whose constituency population contains both List Act Tribes and ANCs and understand how those groups work together to further the goals of benefitting the maximum number of Native peoples, as Congress mandated in ANCSA and reinforced in a myriad of statutes.

Specifically, and without question, Congress used the ISDEAA definition of 'Indian Tribe' in Title V to include ANCs, as it has done in other statutes for decades. The term 'Tribal government,' therefore, should only be read with that definition in mind. As Members of Congress, we do not write, nor should statutes be read, disjunctively so as to superimpose a result desired by a small group of litigants and exclude language that was explicitly included to benefit all indigenous people. Rather, a statute is written and is designed to be read to give every word meaning and carry out our Congressional intent. *See Colautii v. Franklin,* 439 U.S. 379, 392 (1979) ("Appellants' argument . . . would make either the first or second condition redundant or superfluous, in violation of the elementary canon of

construction that a statute should be interpreted so as not to render one part inoperative").

We used the definition of Indian tribe from ISDEAA, which includes ANCs. We used the definition of Tribal government knowing that the two definitions would be read together; as they must be. We did not include ANCs in the definition of Indian tribe only to exclude ANCs later because they are not sovereign and do not have sovereign governing bodies.

The ISDEAA definition is used nearly universally by Congress when we want to include ANCs in Federal legislation. Many statutes have imported the ISDEAA definition either wholesale or, over the years, with slight modifications, and in conjunction with other parts of the statute, to fit the statutes' various purposes. This was also done in the CARES Act Title V.

We note that the various Appellants disagree and have disagreed with each other over whether or not the ISDEAA definition includes ANCs. Let us now settle that disagreement. It does. Congress has used it just for that purpose in many instances for decades, not just the case at hand.

There are other definitions, also used by Congress, that specifically *exclude* ANCs, and could have been used in Title V. We are intimately familiar with the

definition surrounding the Ada Deer List a/k/a the List Act Tribe definition[4] and that process[5] and could easily have chosen that definition to include only List Act Tribes. We did not.

The overarching goal of the CARES Act Title V was to provide indigenous peoples relief funds. To leave Alaska Native peoples out in the cold because of their association or stock in Alaska Native Corporations, which Congress created, while solely providing for Alaska Native peoples that are members of a List Act Tribe is nonsensical, and was clearly not Congress's intent.

We appreciate that the Appellants believe there are important policy considerations surrounding sovereignty and their interpretation of Tribal governments. First, no ANC has claimed sovereignty -- ANCs, a creation of Congress and governed in substance only by Congress, are not sovereign. Second, such policy considerations are best addressed by Congress, which has plenary power over Indian Affairs as it relates to the Federal government and legislation. Third, in order for the provision of the CARES Act at issue to be read differently, Congress could have either written it to include only List Act Tribes or passed additional legislation clarifying the intent. Neither scenario occurred. Rather, the

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[4] *See* Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454 §102(2), (3), 108 Stat. 4791 (1994).

[5] Tribes may seek to reorganize themselves under the Indian Reorganization Act for recognition under the List Act. *See, generally,* 25 U.S.C. §476.

CARES Act passed the Senate by a 96-0 vote and the House by a voice vote with the inclusion of ANCs as beneficiaries (and having governing bodies) on behalf of Alaska Native peoples. The law includes ANCs.

SUMMARY OF ARGUMENT

The CARES Act Title V included ANCs as Indian tribes with Tribal governments. The language was constructed to be inclusive and have maximum participation and inclusion of Native peoples, regardless of location and membership. That is the plain language of the statute given its ordinary meaning.

The Appellants seek to define 'Tribal government' and 'Indian tribe' as 'terms of art.' Not surprisingly, these 'terms of art' equate 'Indian tribe' to a List Act Tribe and 'Tribal government' to the List Act Tribe's governing body. In actuality, that narrow interpretation was soundly rejected when Congress used the ISDEAA definition and defined Tribal government in harmony with ISDEAA; thereby including ANCs.

The language of Title V is clear on its face in that it is intended to benefit ANCs and the inquiry should begin and end there. However, as Members of Congress who wrote, negotiated, and voted for this language, our and Congress's definitive intent was to supply aid to indigenous peoples, including all Alaska Native peoples.

With the vast remoteness of Alaska, we lack infrastructure connecting isolated villages, and the Alaska List Act Tribes and the ANCs exist for the benefit of their members and shareholders by working together. This is unlike the "Lower 48" or contiguous United States List Act Tribes, who do not have such a symbiotic and interwoven relationship with each other because no ANC or similar Congressionally created entity exists. In our state, some Alaska Native peoples may belong to a List Act Tribe, some to an ANC, some to both, and some to neither.

To support a reading of Title V that excludes ANCs and their shareholders would be contrary to our intent in the passage of the CARES Act and disregard the prior legislative history of ISDEAA. As Members of Congress, this would be an offensive result. Congress included ANCs because it furthers the reach of the benefits intended for all Alaska Native peoples.

Any tortured result claiming that any term, such as 'Indian tribe' or 'Tribal government,' is a 'term of art' when convenient, circumvents the plain ordinary language Members of Congress wrote into the statute and defeats the inclusive intent of the statute. It also completely ignores that Congress had a choice to specifically *exclude* ANCs in Title V. Finally, a result that does not find that ANCs are intentionally included in Title V would not only ignore the plain language of the statute, but ignore Congress's clear intent by using a definition that

has been used for over 40 years. Failing to recognize Congress's intent would also undermine this Court's and the 9th Circuit's established precedent, interpretations that have been long-used by agencies, and do a disservice to the Native peoples of Alaska simply because they are Alaska Natives. In short, reading the statute to exclude ANCs would accomplish the opposite of what Congress intended the CARES Act to do to support *all* Native peoples.

ARGUMENT

I. The CARES Act Title V, the Alaska Native Claims Settlement Act, and the Indian Self-Determination and Education Assistance Act Maximize Participation of Native Peoples to Facilitate Self-Determination

A. The CARES Act Title V is an Act of Inclusion and the ISDEAA Definition, as Amended, is Not Used to Narrow Statutory Coverage. Title V of CARES Act Makes it Clear That ANCs are Indian Tribes and Have Tribal Governments for the Purposes of the Coronavirus Relief Fund.

Nearly every current Justice on the U.S. Supreme Court has authored an opinion, and every court generally follows the statutory construction canon, that terms in a statute should be given their ordinary meaning. Here is the plain text that should be afforded its ordinary meaning from Title V.

> **"(g) Definitions.—** In this section:
> **"(1) Indian tribe.—** The term `Indian Tribe' has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (*25 U.S.C. 5304(e)*) [ISDEAA].
> **"(5) Tribal government.—** The term `Tribal government' means the recognized governing body of an Indian Tribe."

25 U.S.C. §5304(e), ISDEAA, reads as follows:

> '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 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.

The statute must be read conjunctively, as we wrote it. First, ISDEAA defines an ANC as an Indian tribe in the CARES Act Title V. Second, the recognized body of that definition of Indian tribe is necessarily the governing body of an ANC. Third, there is no requirement that the governing body be recognized by the Secretary of the Interior by way of the List Act; that could easily have been written and was not. Fourth, there is no other definition offered in this section. Lastly, Congress not only recognized and recognizes the governing body of an ANC -- it mandated, established, and monitored the creation of the governing bodies of the ANCs. Thus, ANCs are Indian tribes with recognized governing bodies, as defined in ISDEAA, and were included, as intended by Members of Congress, in the CARES Act Title V.

This result is entirely consistent with the actions of Members of Congress regarding this law and Supreme Court precedent as well. *See Freeman v. Quicken Loans*, 566 U.S. 624, 632 (2012)(rejecting an interpretation that would attempt to

impose liability on the very class for whom the benefit was enacted).[6] When read together it would be nonsensical to include ANCs in the definition of Indian tribe, only to exclude them based on a strained conception of 'term of art.' It is the burden of the Appellants to demonstrate why this Court should vary from our Congressional language and intent. They have failed to do so.

B. The Alaska Native Claims Settlement Act Did Not Diminish the Status of Alaska's Indigenous Peoples--It Reinforced It

The Alaska Native Claims Settlement Act of 1971 was enacted to maximize Indian participation and self-determination of the Alaska Native peoples. ANCSA was a settlement between the United States Congress, pursuant to the Indian Commerce Clause of the U.S. Const. art. I §8, cl.3, and the Alaska Native peoples, which established Alaska Native Corporations.[7] Stock was distributed only to Alaska Natives with a certain blood quantum,[8] and the ANCs were given payments and land by the United States to settle the indigenous land claims of Alaska's Native peoples.

Stock in these corporations *may* be inherited by or gifted to non-Natives, but such stock has no voting rights and only begins to have such power once it is in

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[6] *See, e.g., NLRB v. SW General, Inc.,* 137 S. Ct. 929, 938-39 (2017)(considering disputed terms from statutory subsection individually and then the terms together).
[7] Pub. L. No. 92-203 (1971).
[8] *Id*. §3(b).

Native ownership again.[9] Stock may not be bought or sold.[10] These corporations were established by Congress for the maximum participation by Native peoples in decisions affecting their lives.[11] They were also established to "address the serious health and welfare problems" suffered by Alaska Native peoples.[12]

Congress established these corporations and allowed them to be registered in the State of Alaska, but explicitly reserved to Congress oversight of these corporations which it has exercised by substantively amending ANCSA many times through the years.[13] Congress negotiated ANCSA not only for maximum participation by Alaska Native peoples but explicitly to empower and fulfill its obligations to Native peoples for self-determination.[14]

> (b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with **maximum participation by Natives in decisions affecting their rights and property**, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and

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[9] *Id*. §7(g)-(h) (1971); Pub. L. No. 100-241 §2(2) (1988).
[10] *Id.* at fn. 9.
[11] Pub. L. No. 92-203 §2(b) (1971).
[12] Pub. L. No. 100-241 §2(2) (1988).
[13] Pub. L. No. 92-203 §26 (1971)
[14] Report from the House of Representatives, Mr. Udall, Chair, to accompany H.R. 4162, "Amending the Alaska Native Claims Settlement Act to Provide Alaska Natives with Certain Options for the Continued Ownership of Lands and Corporate Shares Received Pursuant to the Act and for Other Purposes," H.R. Rep. No. 99-712 (1986). *See also* Report From the House of Representatives, Additional Views, Mr. Udall, Chair, to accompany H.R. 278, H.R. Rep. No. 100-31 (1987); *see also* Pub. L. No. 92-203 (1971).

> institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;[15]

"Both ANCSA, as amended, and this Act are Indian legislation enacted by Congress pursuant to its plenary authority under the Commerce Clause to regulate Indian Affairs."[16] Without any qualifications, the governing law states "***Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans***."[17] ANCSA did not dilute the rights of Alaska Native peoples by setting up ANCs -- it explicitly made them eligible for Federal Indian programs on the same basis as other Native Americans; regardless of List Act status.

Moreover, the recognized governing bodies of these Congressionally mandated corporations is a Board of Directors, as was dictated by Congress and enforced by the Secretary of Interior during the establishment of the corporations. *See* Pub. L. No. 92-203 §7 (Alaska Native regional corporations were likewise required to approve similar Articles and Bylaws for the village corporations).

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[15] Pub. L. No. 92-203 §(2)(b) (1971) (emphasis added).
[16] Report from the House of Representatives, Mr. Udall, Chair, to accompany H.R. 4162," Amending the Alaska Native Claims Settlement Act to Provide Alaska Natives with Certain Options for the Continued Ownership of Lands and Corporate Shares Received Pursuant to the Act and for Other Purposes," H.R. Rep. No. 99-712 (1986). *See also* Report From the House of Representatives, Additional Views, Mr. Udall, Chair, to accompany H.R. 278, H.R. Rep. No. 100-31 (1987).
[17] 43 U.S.C. §1626(d) (emphasis added).

Congress, through ANCSA, mandated, monitored, and enforced these governing bodies as follows:

> (e)The original articles of incorporation and bylaws shall be approved by the Secretary [of the Interior] before they are filed, and they shall be submitted for approval within eighteen months after the date of enactment of this Act. The articles of incorporation may not be amended during the Regional Corporation's first five years without the approval of the Secretary. The Secretary may withhold approval under this section if in his judgment inequities among Native individuals or groups of Native individuals would be created.
> (f) The management of the Regional Corporation shall be vested in a board of directors, all of whom, with the exception of the initial board, shall be stockholders over the age of eighteen.

Id.

Congress clearly established a specific form of governing body for Alaska Native Corporations; thereby conferring the highest form of recognition.

C. Indian Self-Determination and Education Assistance Act Amendment Specifically Recognizes Alaska Native Corporations as Indian Tribes

Following that same sentiment of maximizing Indian participation and self-determination, ISDEAA was specifically amended to include ANCs. The amendment was intended to include or maximize participation by Alaska Native peoples -- not to exclude them.

> SEC. 3. (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by ***assuring maximum Indian participation*** in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

> (b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the ***Indian people through the establishment of a meaningful Indian self-determination policy*** which will permit an orderly transition from Federal domination of programs and services to Indian people in the planning conduct, and administration of those programs and services.[18]

To that end, H.R. Rep. No. 93-1600 (1974), made clear that Congress amended the definition of Indian tribe to include ANCs.

> Section 4 contains definitions for the purposes of the Act. The Sub-committee amended the definition of 'Indian tribe' to include regional and village corporations established by the Alaska Native Claims Settlement Act.

The history of amending this statute must hold significant weight in judicial interpretation of our actions. *See, e.g., U.S. v. Brown,* 333 U.S. 18, 25 (1948) (concluding amendment of disputed provision 'was intended to broaden the Act's coverage or to assure its broad coverage.'); *see also Pierce County v. Guillen*, 537 U.S. 129, 145 (2003)(holding that when Congress acts to amend a statute, the court presumes Congress intended the amendment to have real and substantial effect and that giving that amendment less weight would render our actions an exercise in futility)(citing to *Stone v. INS,* 514 U.S. 386, 397 (1995)).

Failing to recognize the significance and importance of the ISDEAA amendment designed to specifically include ANCs in the definition of Indian tribes

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[18] Indian Self-Determination and Education Assistance Act, S. Rep. No. 93-1017, p. 2 (1974) (emphasis added).

is akin to making an Act of Congress an exercise in futility. That must not be allowed.

D. It is Commonplace to Use the ISDEAA Definition and Expand It, Tailor It, or Distinguish It From the List Act Tribal Definition in the Same Statute

Importing the ISDEAA definition into a statute to specifically include ANCs is commonplace for legislation in Congress. We consider it the "gold standard" to use when ANC inclusion is desired.

Often the ISDEAA definition is used and expanded or altered in one form or another to fit a particular statute's purpose, but such adjustment does not alter the underlying mission to include ANCs for maximum participation by Native peoples. It is a statute of inclusion.

In that regard, there are approximately 50 statutes on the books, which incorporate the ISDEAA definition of Indian tribes that includes ANCs. Some of these statutes do an identical incorporation or substantially similar incorporation and others take it further or intertwine it with other provisions for the purpose of that specific statute.

For instance, some statutes take ISDEAA and title ANCs to be "federally recognized tribes." The following list are examples of *some statutes* that deem ANCs federally recognized tribes: (1) Public And Assisted Housing Drug Elimination Act, 42 U.S.C. §11905(6); (2) State Flexibility Clarification Act, 2

U.S.C. §658(13); and (3) Native American Housing Assistance and Self-Determination Act ("NAHASDA"), Pub. L. No. 104-330, 110 Stat. 4016 (1996).[19] Thus, pursuant to these statutory definitions, ANCs qualify as 'federally recognized' Indian tribes, which must, by the very definition given in each statute have recognized governing bodies.

Furthermore, some statutes use the ISDEAA definition and a List Act definition or type definition in the very same statute thereby recognizing the difference between the two.[20] If the two are used together to define Indian tribe, one simply cannot be a term of art.

Another example of Congress recognizing the difference between List Act Tribes and Indian tribes defined by ISDEAA is the Museum and Library Services Act, 20 U.S.C. §9101(5), which ***removed*** "***as recognized by the Secretary of the Interior***" (specifically eliminating the reference to only List Act Tribes qualifying for that particular statute) in order to follow the ISDEAA definition and include

[19] Notably, NAHASDA is used by some Regional ANCs to designate a tribal housing authority, in conjunction with List Act Tribes, to provide the maximum benefit of Natives; similar to the designations used for health care services throughout Alaska (*see, e.g.,* Decl. of Minich, Dist.Ct.Dkt. 45-6; Suppl. Decl. and Attach. of Minich, Dist.Ct.Dkt. 78-2; Decl. and Attach. of Buretta, Dist.Ct.Dkt. 45-5; Decl. of Schutt, Dist.Ct.Dkt. 45-1).

[20] Prevent All Cigarette Trafficking Act, 15 U.S.C. §375(8) (using both definitions to catch the maximum number of offenders regardless of definition).

ANCs. Much the same way the CARES Act does, other statutes also define tribal governing body specific to that statute and also follow the ISDEAA statute.[21]

In yet another example, the Indian Environmental Assistance Program Act of 1992, uses the definition of ISDEAA and expands the ISDEAA amendment so that it explicitly recognizes Indian tribal governments to include ANCs.[22] As does the Indian General Welfare Benefits - **Indian tribal government,** "which includes any agencies or instrumentalities of an Indian tribal government and any Alaska Native regional or village corporation, as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)." 26 U.S.C. §139E(c)(1) (emphasis in the original).[23]

The Appellants deem 'Indian tribe' and 'tribal governments' to be 'terms of art' so these terms conveniently refer only to List Act Tribes and their

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[21] *See* Native American Education Improvement Act of 2001, which uses the ISDEAA definition of Indian tribe and further defines the governing body of such a tribe with respect to any school that receives assistance under this Act ***as the governing body of the Indian tribe involved that "represent at least 90 percent of the students served by such school***." 25 U.S.C. §§2021(20), (19)(emphasis added); *see also* U.S.C. §2326(b)(3) recognizing that Alaska Native entities (regardless of List Act Tribe status) may receive funding for schools.

[22] Indian Environmental General Assistance Act of 1992, 42 U.S.C. §4368b(c)(1) (using the ISDEAA definition to define Tribal government as well, which include ANCs).

[23] Attached for judicial notice is a listing of some of the statutes that incorporate or do not incorporate the ISDEAA definition. *See* Addendum 1.

governments. This is unsupported,[24] not the way the statute reads, and not as we, Members of Congress, intended. In sum, it is not unusual for Congress to incorporate ISDEAA, and expand it, tailor it, or distinguish it, to achieve the maximum participation of Native peoples for self-determination.

II. Many Definitions Could Have Been Used That Do Not Include Alaska Native Corporations

Members of Congress could have used a definition that did not include ANCs, had Congress desired to do so. Members of Congress sit on committees that are critical to indigenous/Indian affairs and work on these clauses and legislation regularly. We know that there is no universal definition of Indian tribe or Tribal government that applies to all situations -- no term of art for Indian tribe or Tribal government. "Despite the importance of the inquiry, the United States has struggled to find an adequate definition of an Indian tribe. There is no universally recognized legal definition of the phrase, and no single federal statute defining it for all purposes. Felix S. Cohen, *Federal Indian Law* 3 (1982)." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272 (9th Cir. 2004). There simply cannot be a one size fits all definition as was quickly recognized when ANCSA was passed and ANCs were formed by Congress. We recognize the difference and

[24] The cases the Appellants cite to are readily distinguishable as being solely applied to sovereignty (which ANCs are not) or are misinterpreted, as was memorialized in the lower court in pleadings by the Department of Justice, the ANC intervenors, and the Alaska Federation of Natives.

legislate accordingly. *See Russello v. U.S.,* 464 U.S. 16, 23 (1983)(Congress acts intentionally and purposefully when there is disparate inclusion or exclusion).

Just as Congress uses ISDEAA to include ANCs, it also has alternatives to exclude ANCs. *See, e.g.*, 25 U.S.C. §5130(2) ("The term 'Indian Tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe.").

Other definitions cross-reference the List Act, Pub. L. No. 103-454, 108 Stat. 4791. *See, e.g.*, 42 U.S.C. §5122(6) ("The term 'Indian tribal government' means the governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994."). Others include Alaska Native villages, but not Alaska Native corporations (either regional or village corporations). *See, e.g.*, 20 U.S.C. §4402(5) ("'Indian Tribe' means 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), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."); *see also* 25 U.S.C. §3001(7); 34 U.S.C. §10389(3).

We, as the only Members of Congress representing both List Act Tribes and ANCs, know when one definition is used instead of another. It is then and only

then that the term becomes defined and only for the statute intended. In CARES Act Title V, we included ANCs.

III. The List Act Did Not Diminish the Rights of ANCs to Contract or Compact With the BIA

The Federally Recognized Tribe Act of 1994 did not diminish the rights of ANCs to contract or compact governmental functions pursuant to the original ISDEAA statute. ANCs do not need to go through the List Act process because they are statutorily recognized elsewhere. *Even if* it mattered for the purposes of this decision whether or not ANCs or their nonprofit designees may contract and compact, the ANCs have clearly shown they may and do. In multiple declarations attached to the Motion to Intervene,[25] the ANCs stated that they are treated as Indian tribes under ISDEAA. Indeed, in Minich's declaration and attachment, it is clear that there are governmental functions facilitated by the ANC through a designated nonprofit it founded pursuant to ISDEAA.[26] Chugach Alaska Corporation also designates its governmental functions when no List Act Tribe is present to ensure the Alaska Native residents in that area still receive services.[27] As the multiple declarations demonstrate, ANCs have the ability under the terms of

[25] *See, generally,* Dist.Ct.Dkt. 45-1 to 45-24.
[26] *See* Decl. of Minich, Dist.Ct.Dkt. 45-6; Suppl. Decl. of Minich, Dist.Ct.Dkt. 78-2.
[27] *See* Decl. of Buretta, Dist.Ct.Dkt. 45-5; Suppl. Decl. of Buretta, Dist.Ct.Dkt. 86-1.

ISDEAA to either perform or designate another entity (such as a nonprofit) to perform the contract and/or compact.[28] Many do just that.[29]

Moreover, ISDEAA does not require redundant recognition by the Secretary because ANCs are recognized as Indian tribes elsewhere. *See Frank's Landing Indian Community v. National Indian Gaming Comm'n*, 242 F. Supp. 3d 1156, 1166 (W.D. Wash. 2017), *aff'd,* 918 F.3d 610 (9th Circuit 2019). The BIA made that clear through its application of contracts and compacts with ANCs or their respective non-profit designees.

> Not included on the revised list are non-tribal Native entities that currently contract with or receive services from the BIA pursuant to specific statutory authority, including ANCSA village and regional corporations and various tribal organizations. The non-inclusion of these entities does not affect their continued eligibility for contracts and services. *** The list to be published in the Federal Register includes the revised list of 226 Alaskan tribal entities and the 318 tribes in the contiguous 48 states that are eligible for services from the Bureau of Indian Affairs.[30]

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[28] In this way the decision of the lower court can easily be understood as it focused on the performance of ISDEAA (93-638 or 638) contracts or compacts, rather than the importation of the definition. In doing so, it adopted the reasoning that Indian tribes and tribal organizations necessarily have tribal recognized governing bodies, according to ISDEAA. This is also correct. We take it further by giving insight into what Congress intended and how the statutes harmonize with our intention of inclusiveness. The other parties have adequately addressed The Alaska Area Guidelines for Tribal Clearance for Indian Self-Determination. We decline to do so.

[29] *See, generally,* Dist.Ct.Dkt. 45-1 to 45-24.

[30] Press Release, *Interior Publishes Revised List Of Alaska Native Tribes Eligible For Services From Bureau Of Indian Affairs*, Dept. of Interior (Oct. 15, 1993), accessed at https://www.bia.gov/as-ia/opa/online-press-release/interior-publishes-revised-list-alaska-native-tribes-eligible (last visited Aug. 14, 2020).

In 1987, when the Assistant Solicitor General for Indian Affairs was challenged on the agency's administration of contracting with ANCs as Indian tribes, the 9th Circuit agreed that, pursuant to ISDEAA, ANCs are Indian tribes. The Assistant Solicitor interpreted the eligibility language "to modify only the words 'any Indian tribe, band, nation, or other organized group or community . . ..'"[31] According to the court, "[b]ecause the modifying language was in the law before the reference to the [N]ative corporations, the secretaries reasonably interpreted the eligibility clause to modify only the first entities listed in the definition."[32] Thus, "[r]egional profit corporations were properly recognized as Indian tribes for purposes of the [ISDEAA]."[33]

The court also found it persuasive that the ISDEAA's purpose is to ensure maximum Native participation in and control over Native programs and that "the corporations formed pursuant to [ANCSA] also were established to provide maximum participation by Natives in decisions affecting their rights and property."[34] Because "[t]he construction of the statute by the agency charged with its administration is entitled to substantial deference," and because the

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[31] *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471, 1474 (9th Cir. 1987). (quoting Memorandum of Charles Soller, May 21, 1976).
[32] *Id.* at 1475.
[33] *Id.*
[34] *Id.* at 1476.

administrative interpretation of the statute here was reasonable and consistent with statutory language and legislative history, the Ninth Circuit affirmed the district court's judgment confirming the agency interpretation of inclusiveness.

This Court has agreed that ANCs are Indian tribes pursuant to ISDEAA. In *AFL-CIO v. U.S.,* 330 F.3d 513, 516 (2003), *cert. denied,* this Court affirmed the lower court holding in *AFGE/AFL-CIO v. United States*, 195 F.Supp.2d 4 (2002). Both courts examined and held that Alaska regional and village corporations were federally recognized Indian tribes pursuant to ISDEAA.[35]

As this Court stated when examining ISDEAA and ANCs, the "only question properly before us is whether the government violated the Due Process Clause when it invoked [the DoD provision] to grant a contract to a firm wholly owned by Indian tribes."[36] Justice Scalia, when he was on this Court, stated it succinctly "in a sense the Constitution itself establishes the rationality . . . of the classification, by providing a separate federal power that reaches only to the present group."[37] As Scalia was further cited by this Court, when he found precedent in *U.S. v. Antelope,* 430 U.S. 641, 649 fn. 11 (1977), "the 'Constitution

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[35] *AFL-CIO* v. U.S., 330 F.3d 513, 516 (2003)("Both Chugach Alaska Corporation and Afognak Village Corporation are federally recognized Indians tribes.") 25 U.S.C. §450b(e) now 25 U.S.C. §5304(e).
[36] *Id*. at 519.
[37] *Id*. at 521.

itself provides support for legislation directed specifically at Indian tribes.'"[38] This Court thus held that economic legislation for the benefit of Indian tribes that were ANCs was a legitimate legislative purpose.[39]

Congress established ANCs under its Constitutional authority, Congress amended ISDEAA under the same authority, and today we continue to legislate affairs governing Indians, including Alaska Native peoples, as we did with the CARES Act Title V. We are acutely aware of our responsibilities of service on committees and subcommittees, both to our constituents and this Nation. Under the analysis by the Circuit Courts, including ANCs as Indian tribes entitled to benefits afforded them as such is not only permissible but such legislation is a Constitutional power held by Members of Congress. We correctly exercised this Constitutional power by including ANCs in CARES Act Title V.

IV. Conclusion

What we, as Members of Congress, did is clear. We intended, and the statutes reflect, the inclusion of ANCs as Indian tribes with Tribal governments. We did not restrict Tribal governments to only those certain tribes who have

[38] *Id.* at 521-22.
[39] *Id*. at 523.

sovereign authority. Had that been our intent, we could have said just that. Rather, we used the terms Indian tribes and Tribal governments to include ANCs.[40]

Appellants have not and *cannot* prove that we intended to exclude ANCs because we did not so intend. It bears repeating that the CARES Act was passed to support expenditures necessary to respond to the pandemic occurring in our Nation. We, with obvious intention, certainly meant to include all indigenous peoples in writing and passing Title V and not discriminate based on status. We also intended the disbursements to be made expeditiously and are acutely aware, especially with the statutory requirement to incur expenditures by December 30 of this year, the harm that the stall of these disbursements has made on *only our constituents*. This cannot be allowed to continue any longer.

Accordingly, a judgment must be rendered in favor of the ANCs and the funds that have been wrongfully withheld from them must be immediately disbursed.

[40] We have reviewed the briefing of the ANC intervenor counsel for summary judgment in the lower court and agree with the statutory interpretation canons found therein.

DATED this 20th day of August, 2020.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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DATED this 20th day of August, 2020.

/s/ Christine V. Williams
Christine V. Williams
Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE

The undersigned certifies that on the 20th day of August, 2020, a true and correct copy of the **BRIEF OF *AMICI CURIAE* U.S. SENATORS LISA MURKOWSKI, DAN SULLIVAN, AND U.S. CONGRESSMAN DON YOUNG IN SUPPORT OF APPELLEES** was filed electronically with the CM/ECF system, which will send notification to the parties on record. Upon approval of form, *Amici* will submit the required hard copies.

/s/ Christine V. Williams
Christine V. Williams
Attorneys for *Amici Curiae*

ADDENDUM

FEDERAL LEGISLATION **THAT INCLUDES** ALASKA NATIVE CORPORATIONS **AS TRIBES UTILIZING** ISDEAA[1]

1. 2 U.S.C. § 658(13)
2. 7 U.S.C. § 7781(1)
3. 7 U.S.C. § 1926 (a)(19)(A), 7 U.S.C. §§ 1926(20)(B), 21(A)
4. 10 U.S.C. § 2323a(e)(3)
5. 15 U.S.C. § 375(8)
6. 15 U.S.C. § 632(d)
7. 15 U.S.C. § 637(a)(13)
8. 16 U.S.C. § 4702(9)
9. 18 U.S.C. § 1159(c)(3)
10. 20 U.S.C. § 80q-14(8)
11. 20 U.S.C. § 2326(b)(2)
12. 20 U.S.C. § 7011(6)
13. 20 U.S.C. § 7546(2)(A)
14. 20 U.S.C. § 9101(5)
15. 20 U.S.C. § 9402(5)
16. 25 U.S.C. § 305e(a)(3)(A)
17. 25 U.S.C. § 1603(14)
18. 25 U.S.C. § 1685(b)(4)
19. 25 U.S.C. § 1801(a)(2)
20. 25 U.S.C. § 2021(20)
21. 25 U.S.C. § 2403(3)
22. 25 U.S.C. § 2511(4)
23. 25 U.S.C. § 2902(5)
24. 25 U.S.C. § 3202(10)
25. 25 U.S.C. § 3307(f)(2)
26. 25 U.S.C. § 3703(10)
27. 25 U.S.C. § 3802(4)
28. 25 U.S.C. § 4001(2)
29. 25 U.S.C. § 4103(13)
30. 25 U.S.C. § 4302(6)
31. 26 U.S.C. § 45A(c)(6)
32. 26 U.S.C. § 139D(c)(1)

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[1] Many of the statutes herein cite to the definitional section of the Indian Self-Determination and Education Assistance Act ("ISDEAA") as 25 U.S.C. § 450b. That section has been transferred by the compilers of the U.S. Code to 25 U.S.C. § 5304.

33. 26 U.S.C. § 3306(u)
34. 29 U.S.C. § 3221(b)(2)
35. 33 U.S.C. § 2269(a)
36. 33 U.S.C. § 2338(a)
37. 34 U.S.C. § 12291(a)(16)
38. 38 U.S.C. § 3765(3)(A)
39. 42 U.S.C. § 247b-14(e)
40. 42 U.S.C. § 1471(b)(6)
41. 42 U.S.C. § 1490p-2(r)(4)
42. 42 U.S.C. § 3002(27)
43. 42 U.S.C. § 3122(7)
44. 42 U.S.C. § 4368b(c)(1)
45. 42 U.S.C. § 8011(k)(9)
46. 42 U.S.C. § 8802(12)
47. 42 U.S.C. § 10402(5)
48. 42 U.S.C. § 11905(6)
49. 54 U.S.C. § 300309

FEDERAL LEGISLATION **THAT INCLUDES** ALASKA NATIVE CORPORATIONS **AS TRIBES SIMILAR** TO ISDEAA

1. 16 U.S.C. § 1722(7)
2. 20 U.S.C. § 1401(13)
3. 25 U.S.C. § 1452(c)
4. 26 U.S.C. § 139E(c)(1)
5. 38 U.S.C. § 3115(c)
6. 40 U.S.C. § 502(c)(3)(B)
7. 42 U.S.C. § 12511(21)(A) and (B)

FEDERAL LEGISLATION THAT **DOES NOT INCLUDE** ALASKA NATIVE CORPORATIONS **AS TRIBES**

1. 20 U.S.C. § 4402(5)
2. 25 U.S.C. § 1903(8)
3. 25 U.S.C. § 3001(7)
4. 25 U.S.C. § 1301(1)
5. 25 U.S.C. § 2101(2)
6. 25 U.S.C. § 2201(1)
7. 25 U.S.C. § 2703(5)
8. 25 U.S.C. § 2801(6)

9. 25 U.S.C. § 5130(2)
10. 34 U.S.C. § 12133
11. 34 U.S.C. § 12161(b)
12. 34 U.S.C. § 12227
13. 34 U.S.C. § 12271(d)
14. 34 U.S.C. § 10389(3)
15. 42 U.S.C. § 1996a(c)(2)
16. 42 U.S.C. § 290bb-25(n)(3)
17. 42 U.S.C. § 5122(6)
18. 42 U.S.C. § 6991(1)