[SCHEDULED FOR ORAL ARGUMENT SEPTEMBER 11, 2020]

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al.,
Plaintiffs-Appellants,

v.

STEVEN T. MNUCHIN, in his official capacity as Secretary of the U.S. Department of the Treasury,
Defendant-Appellee,

AHTNA, INC, et al.,
Intervenor-Defendants-Appellees.

On Appeal From the U.S. District Court for the District of Columbia
(No. 20-cv-01002) (Hon. Amit P. Mehta, District Judge)

BRIEF OF COOK INLET REGION, INC. AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Cook Inlet Region, Inc. (CIRI) is a privately held corporation formed under the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. §§ 1601 *et seq*. As the ANCSA regional corporation of southcentral Alaska, CIRI and its designated tribal organizations, based in Anchorage, provide critical services that enhance the socioeconomic well-being, education, health, and cultural heritage of Alaska Native and American Indian peoples living in the CIRI region. CIRI presently has 8,402 Alaska Native shareholders.

CIRI has no parent company; no publicly held company has a 10% or greater ownership interest in CIRI; and CIRI does not have any members who have issued shares or debt securities to the public.

/s/ Allon Kedem
Allon Kedem

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and Amici. The Brief of the Confederated Tribes Appellants lists all parties and intervenors appearing in this Court, as well as all amici that appeared before the district court. The following amici have appeared in this Court in support of Plaintiffs-Appellants: the National Congress of American Indians; Affiliated Tribes of Northwest Indians; All Pueblo Council of Governors; California Tribal Chairpersons' Association; Great Plains Tribal Chairmen's Association, Inc.; Midwest Alliance of Sovereign Tribes; United South and Eastern Tribes Sovereignty Protection Fund; National Indian Gaming Association; Arizona Indian Gaming Association; and California Nations Indian Gaming Association. In addition to Cook Inlet Region, Inc., the Alaska Federation of Natives and the U.S. congressional delegation from Alaska intend to appear in this Court as amici in support of Defendant-Appellee.

B. Ruling Under Review. The ruling under review is accurately stated in the Brief of the Confederated Tribes Appellants.

C. Related Cases. This Court has consolidated Case Nos. 20-5204, 20-5205, and 20-5209. Counsel is aware of no other related cases.

/s/ Allon Kedem
Allon Kedem

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

CIRI has consulted with the parties regarding the filing of its amicus brief. Defendant-Appellee, the ANC Intervenors, the Confederated Tribes Plaintiffs (No. 20-5205), and Plaintiff Ute Tribe of the Uintah and Ouray Reservation (No. 20-5204) consented to CIRI's participation as amicus curiae in this matter. The Cheyenne River Plaintiffs (No. 20-5209) have informed CIRI that they "take no position on [CIRI's] request to participate as an amicus at this time."

On August 11, 2020, CIRI filed a motion for leave to participate as amicus curiae. That motion remains pending.

Pursuant to Circuit Rule 29(d), CIRI certifies that a separate amicus brief is necessary to provide the Court with CIRI's distinct and valuable perspective on several matters relevant to this appeal. In satisfaction of this Court's rules, CIRI consulted with counsel for other amici supporting Defendant-Appellee. CIRI was informed that one group of prospective amici, the U.S. congressional delegation from Alaska, is prohibited by Senate rules from jointly filing an amicus brief with a private organization. CIRI further understands that the remaining amicus, the Alaska Federation of Natives, intends to file a brief that broadly

addresses the reasons that Alaska Native corporations (ANCs) count as "Indian tribes," including in the wider context of other statutory schemes that use similar language. CIRI understands that this brief will also address why these other statutes show that ANCs have "recognized governing bodies."

CIRI intends to focus more narrowly on the Eligibility Clause and to illustrate, through CIRI's provision of critical services for Alaska Natives and American Indians living within its geographic region, why that clause is satisfied. Among other things, the brief describes in practical detail CIRI's history of contracting and compacting with the federal government to provide health services within its region, including a special law that Congress passed in 1997 to facilitate CIRI's co-management of statewide health facilities in Anchorage. Although the brief argues that CIRI's experience supports the eligibility of all ANCs, the brief's specific and practical focus on CIRI's unique history would make it impracticable for CIRI and the Alaska Federation of Natives to combine their presentations into a single brief.

/s/ Allon Kedem
Allon Kedem

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GLOSSARY

ANC	Alaska Native corporation
ANCSA	Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601 *et seq.*)
CARES Act	Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020)
CIRI	Cook Inlet Region, Inc.
CIHA	Cook Inlet Housing Authority
CITC	Cook Inlet Tribal Council
ISDEAA	Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975)
NAHASDA	Native American Housing Assistance and Self Determination Act of 1996, 25 U.S.C. §§ 4101 *et seq.*
TANF	Temporary Assistance for Needy Families

INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

Cook Inlet Region, Inc. (CIRI) is one of twelve regional Alaska Native corporations (ANCs) created by the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601 *et seq.*). As the regional ANC for southcentral Alaska, CIRI currently has over 8,400 Alaska Native shareholders.

Although there are several federally recognized tribes within the geographic boundaries of the CIRI region, no federally recognized tribe exists for substantial portions of the Municipality of Anchorage or the Matanuska-Susitna Valley—two of the State's most heavily populated areas. As a result, only a fraction of the Alaska Natives and American Indians living in those areas receive services from federally recognized tribes.[2] For approximately 60,000 other Alaska Natives and American Indians in the region, CIRI serves that function instead, providing

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[1] No party's counsel authored this brief in whole or in part. Nor did any party or party's counsel, or any other person other than amicus curiae, contribute money that was intended to fund the preparation or submission of this brief.

[2] The federally recognized tribes providing services in these areas are the Native Village of Eklutna, Knik Tribal Council, and Chickaloon Village Traditional Council (previously known as the Chickaloon Native Village).

healthcare, housing assistance, job training, and a wide array of other social services.

CIRI therefore has an important interest in obtaining its share of the emergency relief funds appropriated by Congress in Title V of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020). Congress reserved $8 billion for Indian tribes providing desperately needed services to Alaska Natives and American Indians in response to the COVID-19 pandemic—exactly the kind of services that CIRI and other ANCs provide. If ANCs are excluded, the majority of Alaska Natives and American Indians living in the CIRI region may not receive the benefit of *any* Title V CARES Act funds.

The implications of this dispute, however, are not confined to ANCs' eligibility for CARES Act funds. For decades, CIRI and other ANCs have delegated their tribal authority to nonprofit organizations to enter into self-determination contracts—and, in CIRI's case, a self-governance compact—with the Executive Branch under the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. No. 93-638, 88 Stat. 2203 (1975). Pursuant to these agreements, CIRI provides a range of

governmental services to Alaska Natives and American Indians in the Municipality of Anchorage and the Matanuska-Susitna Valley, consistent with its mission to enhance the socioeconomic well-being, education, health, and cultural heritage of those peoples. Because the CARES Act's definition of "Indian tribe" draws directly from ISDEAA, any ruling that ANCs do not qualify as "Indian tribes" for purposes of the CARES Act, if extended to ISDEAA, could jeopardize CIRI's ability to deliver an even wider range of programs and benefits.

The district court correctly concluded that ANCs qualify as "Indian tribes" eligible for CARES Act funds. A192. In reaching that conclusion, however, the court accepted the incorrect premise that ANCs "never have, and almost certainly never will, satisfy the eligibility clause" in ISDEAA's definition of "Indian tribe"—that is, ANCs, in the court's view, are not and cannot be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." A195. Although this Court should affirm the district court's

judgment, it can and should do so on the simpler ground that ANCs *do* in fact satisfy the Eligibility Clause.[3]

As CIRI's experience powerfully illustrates, Congress and the Executive Branch have long recognized ANCs as partners in the many programs and services that Congress enacts for the benefit of Indians. In administering those programs and services on behalf of the federal government, ANCs serve as conduits through which the government fulfills its trust responsibilities to Alaska's Native population. The CARES Act is yet another example of Congress enlisting the assistance of ANCs to serve that function.

ARGUMENT

Although the Constitution speaks only of Congress's authority "[t]o regulate Commerce … with the Indian Tribes," art. I, § 8, the Supreme Court long ago recognized that the national government's plenary "power" over Indian affairs comes along with a "duty of protection." *United States v. Kagama*, 118 U.S. 375, 384 (1886). This duty is "grounded in the very nature of the government-Indian relationship."

[3] The government "respectfully disagrees" with this position but acknowledges that, if correct, it "provide[s] an alternative basis for treating ANCs as 'Indian tribes'" under the CARES Act. Gov't Br. 24 n.6.

Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001). To satisfy its "substantial trust responsibilities toward Native Americans," *id.*, the government has established numerous federal programs and services that are targeted at Indians because of their status as Indians.

A paradigmatic example is the "national Indian health policy," which Congress enacted "in fulfillment of its special trust responsibilities and legal obligations to Indians." 25 U.S.C. § 1602. The federal government has often provided these health services directly, through agencies like the Indian Health Service, which operates hospitals and health care facilities specifically for Indians. 42 U.S.C. § 2001(a). But it has also chosen, under statutes like ISDEAA, to allow tribal entities to step into the government's shoes and provide those services in the government's stead.

ANCs, like federally recognized tribes, have always been "eligible" to serve that role. As CIRI's long history of contracting and compacting under ISDEAA (among other statutes) makes clear, the government has repeatedly "recognized" ANCs as capable of carrying out important aspects of federal programs designed to meet the government's trust

responsibilities to Indians. That is precisely the type of recognition that the Eligibility Clause contemplates.

I. CIRI's Experience Illustrates How ANCs Step into the Shoes of the Government to Provide Progams and Services to Indians

For decades, CIRI and its designated tribal organizations have contracted and compacted with the Executive Branch to provide a wide range of programs and services for Alaska Natives and American Indians in large portions of the Municipality of Anchorage and the Matanuska-Susitna Valley. Over that period, Congress and the Executive Branch have repeatedly acknowledged CIRI's status as an "Indian tribe" for these purposes, notwithstanding its corporate form. Recognizing this fact, one group of Plaintiffs conceded in the district court that ANCs do qualify as "Indian tribes" under ISDEAA, Dist. Ct. Dkt. 76 at 13-17, and another conceded that only CIRI does, Dist. Ct. Dkt. 77 at 36-38. But CIRI's eligibility to participate in these programs is *not* unique. Contrary to Plaintiffs' suggestion below, CIRI's eligibility does not stem from a specific law passed by Congress in the 1990s, but rather from the distinctive Indian law status of ANCs, derived from ANCSA and reflected in their longstanding relationship with Alaska Natives and American Indians within their respective regions.

A. ANCs Were Created to Serve an Indian Law Purpose

ANCs are not (and do not claim to be) sovereign Indian tribes, but they are not merely state-chartered, for-profit corporations either. ANCs are instead creatures of ANCSA, a statute "enacted by Congress pursuant to its plenary authority under the Constitution of the United States to regulate Indian affairs." 43 U.S.C. § 1601 note. To resolve pending aboriginal land claims, Congress agreed to convey lands and settlement funds to Alaska Natives. But rather than rely on the traditional reservation system—which was a poor fit for Alaska's unique tribal history and geography—Congress and Alaska Natives agreed to a different model: They conceived ANCs and empowered them to serve as stewards of the settlement lands and funds for the benefit of the Native community. Far from typical for-profit corporations, ANCs were created in an exercise of Congress's Indian law authority; although state-chartered, and not themselves sovereign, their very reason for being is to help fulfill Congress's obligations toward Alaska's Native community.

To create ANCs, Congress directed the Secretary of the Interior to divide Alaska into twelve geographic regions, each "composed as far as practicable of Natives having a common heritage and sharing common

interests." *Id.* § 1606(a). Each region formed a corporation, with articles of incorporation reviewed by the Secretary of the Interior to avoid any "inequities among Native individuals or groups of Native individuals." *Id.* § 1606(e). ANCs were then authorized to issue stock to their shareholders, all of whom were Alaska Natives. *Id.* § 1606(g)(1).

From the beginning, all ANCs have been controlled by their Native shareholders. Although ANC stock can be inherited by non-Natives, Congress took steps to ensure continued Native control, including by nullifying the voting rights of shares inherited by non-Natives. *Id.* § 1606(h)(1)(B)-(C), (2)(C)(ii), (3)(D)(i). Congress was also clear that majority-Native ownership conferred a distinct Indian law status: It specified that, "*[f]or all purposes of Federal law*, [such] a Native Corporation shall be considered to be a corporation owned and controlled by Natives." *Id.* § 1626(e)(1) (emphasis added). Every ANC currently qualifies; each has *always* qualified.

Congress also formalized the connection between ANCs and the Native communities they were created to serve. It directed the Secretary to enroll every eligible Alaska Native into one of the twelve regional ANCs, irrespective of tribal enrollment. *Id.* § 1604(b); *see id.* § 1602(b) (defining

"Native" by reference to minimum blood quantum *or* membership in a Native village or group). Conversely, Congress did *not* require Alaska Natives to enroll in a federally recognized tribe, even though many such tribes existed in Alaska at the time. *Cf.* Act of May 1, 1936, ch. 254, § 1, 49 Stat. 1250 (1936) (granting Alaska Native groups the right to form tribal governments under the Indian Reorganization Act).

In sum, the ANCSA system of regional and village ANCs was one of the vehicles Congress chose for meeting the federal government's obligations to Alaska Natives, in return for surrendering their aboriginal land claims. Native-controlled ANCs would own settlement lands, replacing the traditional model of the federal government holding Indian lands in trust. *Cf.* 25 U.S.C. § 5108. And ANCs would serve a central role in carrying out the government's commitment to the health and welfare of Alaska Natives.

B. ANCs Provide Programs and Services to Alaska Natives and American Indians

Nothing in ANCSA was intended to impede the continued provision of programs and services to Alaska Natives. Indeed, Congress directed that "Alaska Natives shall *remain eligible* for all Federal Indian programs on the same basis as other Native Americans." 43 U.S.C. § 1626(d)

(emphasis added); *see id.* § 1626(a) (ANCSA does not "substitute for any governmental programs otherwise available to the Native people of Alaska").

ANCs have always understood their mission as enhancing the lives of Alaska's Native peoples, both economically and socially. *See* H.R. Rep. No. 92-746, at 42 (1971) (Conf. Rep.) ("The Regional Corporations would also perform some social welfare functions of regional benefit…."). In the decades since ANCSA's enactment, ANCs have worked closely with federally recognized tribes in Alaska to develop systems for serving their communities. ANCs' roles are particularly critical in areas of Alaska where no federally recognized tribes exist or where a federally recognized tribe is not providing services. There, ANCs provide for many Alaska Natives and American Indians services that might otherwise be provided by sovereign tribes or the federal government.

Below are examples in which CIRI and other ANCs have assisted the federal government in fulfilling its obligations to Alaska Natives and American Indians under federal law. They establish beyond dispute that these ANCs are "Indian tribes" for purposes of ISDEAA—and, more specifically, that they are eligible to partner with the federal government in

implementing the targeted programs and services Congress has created for Alaska Natives and American Indians.

1. ANCs' long history of contracting and compacting as "Indian tribes" under ISDEAA

ISDEAA, enacted in 1975, reaffirmed the government's "unique and continuing relationship with and responsibility to the Indian people," and adopted a model of partnering with Indian tribes to carry out those responsibilities. ISDEAA § 3(b). By entering into a self-determination contract or a self-governance compact under ISDEAA, an Indian tribe can *directly* provide services that the federal government would otherwise provide. The statute was intended to ensure "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal services and programs. *Id.* For Alaska Natives and American Indians living in the Municipality of Anchorage and the Matanuska-Susitna Valley, most of whom do not receive services from any federally recognized tribe, CIRI serves that function.

In the 1980s, for example, CIRI designated Southcentral Foundation as the tribal organization dedicated to providing health services for Alaska Natives and American Indians in its region. *See* Ex. 1 to Supplemental Minich Decl. (Dist. Ct. Dkt. 78-2). Acting under CIRI's delegation

of tribal authority, Southcentral entered into ISDEAA self-determination contracts with the Indian Health Service.

In the 1990s, Congress amended ISDEAA to allow for self-governance *compacts*, known as Title V compacts, which allow ISDEAA tribes to assume full funding and control over programs and services and tailor them to suit their particular needs. 25 U.S.C. § 5385(b)(1). In October 1994, CIRI became the first—and, to date, the only—ANC to enter into a Title V compact with the Executive Branch. Acting again as CIRI's designee, Southcentral signed the Alaska Tribal Health Compact, along with more than a dozen other Alaska Native tribal entities.

The Compact leaves no doubt that the Executive Branch regards ANCs as eligible to implement the special programs and services provided by the United States to Indians because of their status as Indians. The preamble, for example, reaffirms the government's "unique and continuing relationship" with, and "special trust responsibilities" to, Alaska Natives and American Indians. *See* Ex. 2 to Supplemental Minich Decl. at 3. It acknowledges that Congress defined the term "Indian tribe" broadly in ISDEAA to "ensur[e] that all Alaska Natives and America[n] Indians in Alaska can receive the services provided by the Federal

Government *through an Alaska Native provider*." *Id.* at 2 (emphasis added). And finally, it "recognize[s] the government to government relationship between the signatory Tribes and the Secretary." *Id.* at 6; *see* 25 C.F.R. § 1000.161 (defining self-governance compact as "an executed document that affirms the government-to-government relationship between a self-governance Tribe and the United States"). Under the Compact, Southcentral regularly negotiates funding agreements with the Indian Health Service, undertaking to provide medical care, behavioral health services, and other programs and services to eligible Alaska Natives and American Indians in the region. *See, e.g.*, Ex. 3 to Supplemental Minich Decl. at 4-16.

In 1997, the Indian Health Service decided to turn over newly constructed statewide health facilities in Anchorage to Alaska Native management. Because these facilities would provide services to Alaska Natives and American Indians from across the State, a dispute arose over whether CIRI (through Southcentral) was required to obtain ISDEAA authorizing resolutions from each of the more than 200 tribes in Alaska before it could provide certain services at the new facilities under Southcentral's existing compact and funding agreement. 25 U.S.C. § 5321(a);

id. § 5304(*l*) (if organization is "to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant"); *see Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 987-89 (9th Cir. 1999). Congress stepped in to resolve the dispute, enacting a law that provided:

> Cook Inlet Region, Inc., through Southcentral Foundation … is hereby authorized to enter into contracts or funding agreements under [ISDEAA] for all services provided at or through the Alaska Native Primary Care Center or other satellite clinics in Anchorage or the Matanuska-Susitna Valley without submission of any *further authorizing resolutions* from any other Alaska Native Region, village corporation, Indian Reorganization Act council, or tribe, no matter where located.

Pub. L. No. 105-83, § 325(d), 111 Stat. 1543, 1598 (1997) (italics and underline added).

Contrary to Plaintiffs' contention below (Dist. Ct. Dkt. 77 at 38), Section 325 did not *establish* that CIRI (and CIRI alone) "enjoy[ed] the same status as Indian Tribes" for ISDEAA purposes. By the time Section 325 was enacted, CIRI and other ANCs had long engaged in ISDEAA contracting and compacting. Southcentral had already been a signatory to the Alaska Tribal Health Compact for three years. Another CIRI designee, Cook Inlet Tribal Council, had already contracted with the Indian Health Service to provide substance abuse services and with the Bureau

of Indian Affairs to administer job placement and training programs. *See* Minich Decl. ¶ 8 (Dist. Ct. Dkt. 45-6); CITC, *Annual Report Fiscal Year 2015: Employment and Training Services* (2015).[4] And other ANCs had similarly been recognized by the Executive Branch as eligible to provide healthcare and other services through designated tribal organizations. *E.g.*, Supplemental Buretta Decl. ¶¶ 2, 6 (Dist. Ct. Dkt. 86-1) (Chugach Alaska Corp. designated Valdez Native Association to enter into ISDEAA contracts in 1995).

If anything, as the language underlined above suggests, Section 325 underscores that *all* regional and village ANCs count as "Indian tribes" for ISDEAA purposes. After all, only "Indian tribes" can provide authorizing resolutions, 25 U.S.C. § 5304(*l*), and Congress deemed it necessary to waive the need for such resolutions from federally recognized tribes *or* from "Alaska Native Region[s]" and "village corporation[s]." That comports with the Executive Branch's practice of requiring tribes seeking to provide services on CIRI lands to obtain an authorizing resolution from CIRI. Recently, for example, the Chickaloon Village Tribal Council, a

[4] https://www.bia.gov/sites/bia.gov/files/CITC.AR_.2014.2015.Nar%20%20508%20Comp.pdf.

federally recognized tribe, sought to deliver health services to its citizens *outside* the boundaries of Chickaloon tribal lands but *within* the CIRI region. Before the Indian Health Service would permit the tribe to include those facilities in its ISDEAA funding agreement, it was required to obtain an authorizing resolution from CIRI, which CIRI provided. *See* Cook Inlet Region, Inc. Resolution 17-13 (Oct. 18, 2017).

2. ANCs' role as "Indian tribes" under other federal programs

Beyond ISDEAA, CIRI and other ANCs have been enlisted by the federal government to assist in implementing many other federal Indian programs as the recipients of federal funds that support critical services to Alaska Native communities. The experience of two other CIRI-designated tribal organizations (and their counterparts at other ANCs) is illustrative.

Cook Inlet Tribal Council (CITC) provides critical social services to tens of thousands of Alaska Natives and American Indians in the CIRI region. Congress expressly included CITC and other tribal organizations affiliated with regional ANCs as tribal grant recipients in the Temporary Assistance for Needy Families (TANF) program—a federal grant program that enables states and tribal governments to provide cash

assistance and other services for needy families with children. 42 U.S.C. § 612; *see id.* § 619(4)(B) (including "Alaska Native regional nonprofit corporations"). CITC is the *sole* provider of tribal TANF in the Anchorage area and has provided assistance to thousands of individuals under that program.[5]

Cook Inlet Housing Authority (CIHA) is yet another CIRI designee that provides important services to Alaska Natives and American Indians in its region. In the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA), 25 U.S.C. §§ 4101 *et seq.*, Congress authorized block grants for housing assistance to "Indian tribes." Congress used the same definition of "Indian tribe" as in ISDEAA, *id.* § 4103(13)(B), and the Executive Branch has long recognized ANCs, including CIRI, as eligible recipients of block grant funds. Thus, for more than 20 years, CIHA has been the tribal housing entity responsible for administering block grant funds and managing housing programs in the CIRI region. Minich Decl. ¶ 13. Other ANCs have similarly provided

[5] *Native American and Alaska Natives Issues: Hearing Before the H. Subcomm. on Interior, Environment, and Related Agencies*, 113th Cong. (2013), *available at* https://docs.house.gov/meetings/AP/AP06/20130424/100521/HMTG-113-AP06-Wstate-FredeenA-20130424.pdf.

NAHASDA assistance through their own tribal organizations. *See* Buretta Decl. ¶ 3 (Dist. Ct. Dkt. 45-5) (North Pacific Rim Housing Authority is Chugach's designee); Schutt Decl. ¶ 9 (Dist. Ct. Dkt. 45-1) (Interior Regional Housing Authority, as Doyon Ltd.'s designee, serves Fairbanks and Doyon region).

II. ANCs Satisfy the Eligibility Clause in the CARES Act's Definition of "Indian Tribe"

Applying the ordinary meaning of the statutory terms, ANCs easily satisfy both components of the Eligibility Clause: They are "eligible for the special programs and services provided by the United States to Indians because of their status as Indians," and they are "recognized" as such, 25 U.S.C. § 5304(e). This fact is well illustrated by the myriad ways the federal government has enlisted the assistance of CIRI and other ANCs and the robust role ANCs have historically played in implementing essential federal programs and services for Alaska Natives and American Indians.

A. ANCs Are "Eligible for the Special Programs and Services Provided by the United States to Indians Because of Their Status as Indians"

ANCSA expressly states that "Alaska Natives *shall remain eligible* for all Federal Indian programs on the same basis as other Native

Americans." 43 U.S.C. § 1626(d) (emphasis added). As Part I illustrates, ANCs are active partners alongside the Executive Branch in those programs and services that Congress has enacted in fulfillment of its responsibilities toward Indians. Accordingly, ANCs are unquestionably "eligible" within the statute's meaning.

The district court summarily concluded that ANCs cannot meet this aspect of the Eligibility Clause because, as "for-profit corporations established by Congress and recognized under Alaska law," the ANCs themselves "do not enjoy 'status as Indians.'" A195. This reasoning suffers from an obvious flaw: It misconstrues the referent for the phrase "*their* status as Indians." In the district court's view, the entity satisfying the Eligibility Clause must itself "enjoy 'status as Indians.'" But that reading cannot be right, for a variety of reasons. For one thing, it creates a mismatch between the eligible entity, which is singular ("any Indian tribe, band, nation, or other organized group or community"), and the plural terms in the relevant phrase ("*their* status as *Indians*"). For another thing, *none* of the listed entities "enjoy[s] 'status as Indians.'" An Indian tribe may be composed of Indians, but no one would describe it as having

a "status as Indians." The same is true of a "band, nation, or other organized group or community."[6]

Instead, the obvious referent of the relevant phrase comes immediately before it: The programs and services must go to "*Indians* because of *their* status as *Indians*." *See Grecian Magnesite Mining, Indus. & Shipping Co., S.A. v. Comm'r of Internal Revenue*, 926 F.3d 819, 824 (D.C. Cir. 2019) (pronouns "should ordinarily be read as modifying only the noun or phrase that it immediately follows"). In other words, the programs and services for which the entity is eligible must be made available to Indians by virtue of their Indian status—not for another reason, such as financial status, that can apply to Americans generally. *See Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 918 F.3d 610, 616 (9th Cir. 2019) (same phrase in Indian Gaming Regulatory Act "refers to eligibility to participate in federal programs specifically targeted to Indians").

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[6] Insofar as *any* organized group might be described as having a "status as Indians" by virtue of its Indian leadership, the same is true of ANCs: All ANCs are controlled by Alaska Natives, which "[f]or all purposes of Federal law" renders each ANC "a corporation owned and controlled by Natives." 43 U.S.C. § 1626(e)(1).

Because, as discussed above, ANCs have a distinct status under Indian law and are recognized by Congress and the Executive Branch as capable of partnering with the federal government to provide special programs and services for Alaska Natives and American Indians, they satisfy this component of the Eligibility Clause. Not every ANC has the same history of contracting and compacting as CIRI has. Nor does every federally recognized tribe. What matters for purposes of ISDEAA's definition is *eligibility* to step into the Executive Branch's shoes for these purposes. As CIRI's experience illustrates, ANCs can—and in fact often do—serve that role.

B. ANCs Are "*Recognized* as Eligible"

ANCs are also "*recognized* as eligible" for those programs and services. The plain meaning of "recognized" is "acknowledged"; ISDEAA itself uses the word in that sense elsewhere in the statute. *See* 25 U.S.C. § 5302(a) ("The Congress hereby *recognizes* the obligation of the United States to respond to the strong expression of the Indian people for self-determination…." (emphasis added)). Both Congress and the Executive Branch have repeatedly acknowledged ANCs' eligibility to administer programs and services directed to Alaska Natives. CIRI's Title V compact

is perhaps the clearest evidence on this point: Though CIRI is not a sovereign tribal government, the Executive Branch treats the compact as establishing "a government to government relationship" with CIRI for purposes of providing health services to Alaska Natives under ISDEAA. *Supra* pp. 12-13. No more is necessary to satisfy the "recognized" component of the clause.[7]

1. Congress and the Executive Branch recognize ANCs as eligible for Indian-specific programs and services

Over and over, Congress has recognized that ANCs are eligible to provide the benefits that Congress authorizes for Alaska Natives and American Indians in Indian-specific legislation:

- Tribal regional organizations, including organizations affiliated with regional ANCs, are eligible to administer the tribal TANF program in Alaska. 42 U.S.C. §§ 612, 619(4)(B).

- ANCs are "Indian tribes" for purposes of NAHASDA housing assistance grants. 25 U.S.C. §§ 4103(13)(B), 4111.

- ANCs are "Indian tribes" for purposes of energy assistance through tribal grants to promote the development of energy resources on Indian land. 25 U.S.C. §§ 3501(4), 3502.

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[7] The compact further acknowledges that the Executive Branch negotiated the terms of the compact with the "governing bodies" of the signatories. Ex. 2 to Supplemental Minich Decl. at 4. There can thus be no doubt that CIRI and other ANCs have "governing bod[ies]" that are "recognized" by the Executive Branch, as required to qualify as "Tribal governments" under the CARES Act. 42 U.S.C. § 801(g)(5).

- Congress listed regional ANCs alongside tribes as entities "eligible" for grants "to develop and maintain, or to improve and expand, programs that support schools … using Native American and Alaska Native languages as the primary languages of instruction." 20 U.S.C. § 7453(b)(1)-(2).

- Congress directed "all Federal agencies" to "consult with Alaska Native corporations on the same basis as Indian Tribes." 25 U.S.C. § 5301 note. Interior Department policy requires consulting with ANCs regarding "[a]ny activity that may impact the ability of an ANCSA Corporation to participate in Departmental programs for which it qualifies." Dep't of Interior, *Policy on Consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations* (2012).[8]

Federal agencies likewise "recognize" ANCs. The Executive Branch, for example, has published guidelines explaining that it will "recognize" an ANC as the "village governing body" (and thus the "Indian tribe" eligible to contract and provide authorizing resolutions) whenever no Indian Reorganization Act council or traditional village council exists. 46 Fed. Reg. 27,178, 27,179 (May 18, 1981).[9] That understanding is

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[8] *See also* Small Business Administration, *Tribal Consultation Policy* (2016) (requiring consultation with ANCs "in recognition of our Nation's responsibilities to American Indian and Alaska Native tribes and Alaska Native Corporations"); Federal Energy Regulatory Comm'n, *Revision to Policy Statement on Consultation with Indian Tribes in Commission Proceedings* (2019) ("recogniz[ing] … the statutory relationship between ANCSA Corporations and the Federal Government").

[9] Plaintiffs have pointed to these *Alaska Area Guidelines* to suggest that an ANC can operate as an Indian tribe under ISDEAA only as a

consistent with the Interior Department's and the Department of Health and Human Services' decades-long practices of contracting and compacting with CIRI and other ANCs in addition to federally recognized tribes. *See supra* pp. 9-17.

2. The statute does not incorporate the List Act's federal recognition process

The government and Plaintiffs argue (and the district court agreed) that the phrase "recognized as eligible" incorporates the formal administrative process by which the United States acknowledges the continuous existence of a historically based, sovereign tribal government. *See* 25 C.F.R. Part 83 (Procedures for Federal Acknowledgment of Indian Tribes). In their view, an entity may not be "recognized as eligible" for Indian-specific programs and services unless the entity appears on the Interior Secretary's annual list of federally recognized tribes. But the assumption that "recognized" must mean recognized under the Federally Recognized Indian Tribe List Act of 1994 is a literal non-sequitur: The

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"stand-in" or "last resort." Dist. Ct. Dkt. 77 at 36. But even if the Executive Branch prefers to contract with sovereign tribes before ANCs, that does not undermine the critical point: ANCs *must* fall within the statutory definition of "Indian tribe," or else they would not be eligible to contract at all. *See* A205.

List Act was enacted nearly two decades *after* ISDEAA, whose definition of "Indian tribe" has never been modified to refer to the List Act (or otherwise).

To be sure, Congress does sometimes use the term "recognized" to refer to tribes that have been formally acknowledged as *sovereign governments* by the United States. But the text, structure, or context of those provisions makes clear that Congress is using the term in that narrow constitutional sense. Most often, Congress uses a historically precise phrase such as "recognized Indian tribe," *e.g.*, 25 U.S.C. § 5129 (Indian Reorganization Act), or expressly discusses the sovereignty of the "recognized" entities, *e.g.*, *id.* § 1301(1) (Indian tribes that are "recognized as possessing powers of self-government").

In ISDEAA, however, Congress gave no indication that the Eligibility Clause would be confined by the List Act's concept of federal recognition. No attributes of sovereignty are necessary for an entity to be "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." And indeed, several features of the List Act make clear just how much of a mismatch it is with ISDEAA.

First, consider the distinct statutory structure of the List Act. The List Act's definition of "Indian tribe" does *not* rely on "eligibility," as ISDEAA's does, but instead defines that term in a manner that clearly includes only *sovereign* entities: "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*." 25 U.S.C. § 5130(2) (emphasis added). The List Act definition also conspicuously *omits* ANCs—further reinforcing that the relevant universe of entities is restricted to sovereigns.

Having thus defined "Indian tribe" as referring exclusively to sovereign tribal governments, the List Act then, in a separate provision, directs the Secretary to publish a "list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5131(a). This directive reflects one of the key purposes of the List Act: to create a definitive federal listing of those entities that are eligible for Indian services and programs by virtue of their *sovereign governmental status*. *See* 84 Fed. Reg. 1,200, 1,200 (Feb. 1, 2019) (the list

identifies those Indian tribes that "are acknowledged to have the immunities and privileges available to federally recognized Indian Tribes").

But nowhere does the List Act suggest that sovereign tribal governments are the *only* entities eligible to implement such services and programs. Nor does the Act purport to amend or narrow the broader definition of "Indian tribe" under *other* statutes—much less suggest that, from that point forward, only those entities included in the published List of Federally Recognized Tribes would be qualified to engage in tribal contracting or compacting under ISDEAA.[10]

Second, the List Act (like some other federal statutes) refers specifically to entities that "*the Secretary* recognizes to be eligible" for Indian programs and services. 25 U.S.C. § 5131(a) (emphasis added); *see, e.g.*, *id.* § 2703(5) (Indian Gaming Regulatory Act). ISDEAA's definition contains no such reference to the Secretary. It instead refers simply to

[10] A simple example illustrates the district court's error. Imagine a statute that defined "edible foods" as "fruits and vegetables" and required the Secretary of Agriculture to publish a list of "edible foods that are high in nutrients." The only foods appearing on the list would be fruits and vegetables. But if a *separate* statute provided funding for "edible foods that are high in nutrients," no one would think funding under *that* statute must be limited to fruits and vegetables. That is particularly true if the phrase "edible foods" appeared in numerous statutory definitions—each with slightly different wording—scattered throughout the U.S. Code.

entities that are "recognized as eligible" for Indian programs and services, without specifying where recognition must come from or the form that it should take. This difference is significant, because Congress can and often does recognize an entity's eligibility to participate in Indian programs and services *without* formally "recognizing" or "acknowledging" the entity as a sovereign tribe.

That was the case in a recent Ninth Circuit decision, where the Frank's Landing Indian Community, a non-federally recognized tribe, sought permission to engage in gaming under the Indian Gaming Regulatory Act (IGRA). *See Frank's Landing Indian Cmty.*, 918 F.3d at 612. Importantly for our purposes, Congress had enacted a statute stating that the Community was "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.* (quoting Pub. L. No. 100-153, § 10, 101 Stat. 889 (1987)). That statute entitled the Community to enter into ISDEAA contracts, but the Ninth Circuit held it was not enough to satisfy IGRA's definition of "Indian tribe," which required entities to be "recognized … *by the Secretary*." *Id.* at 612-13 (emphasis added). The same situation is present here: ANCSA and other statutes independently confirm that

ANCs meet the Eligibility Clause for ISDEAA and CARES Act purposes, even though they lack the sovereign governmental status of a federally recognized tribe.[11]

Third, unlike the List Act, ISDEAA's definition includes "any … organized group" of Indians in its list of qualifying entities. Unless the inclusion of "organized group" was pure surplusage, therefore, it must expand ISDEAA's definition of Indian tribe to include some entities that the List Act does not. And as the Confederated Tribes Plaintiffs concede, ANCs "plainly" qualify as "organized groups of Indians—they were organized by, and their shareholders are in the main, Alaska Natives." Br. 13-14.

ISDEAA's inclusion of "organized group" alongside ANCs was not an anomaly. To our knowledge, *every* statutory definition of "Indian

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[11] The cases cited by the Confederated Tribes Plaintiffs do not undercut this conclusion. The statute at issue in *Wyandot Nation of Kansas v. United States*, 858 F.3d 1392, 1398 (Fed. Cir. 2017), though it mentions ANCs, was clearly limited to Indian tribes with trust accounts managed by the federal government—that is, formally recognized sovereign tribes. Accordingly, the only question there, and in other cited cases, was whether the litigating tribe should have been included on the Secretary's list. The question here, by contrast, is whether it makes sense to use the List Act to limit eligibility under a statute that *does not* otherwise require tribal sovereignty.

tribe" that expressly references ANCs also includes the term "organized group."[12] *E.g.*, 25 U.S.C. § 4001(2) (American Indian Trust Fund Management Reform Act); *id.* § 1603(14) (Indian Health Care Improvement Act); *id.* § 2403(3) (Indian Alcohol and Substance Abuse Prevention and Treatment Act); *id.* § 4103(13)(A)-(B) (NAHASDA); 12 U.S.C. § 4702(12) (Community Development Banking and Financial Institutions Act); 54 U.S.C. § 300309 (National Historic Preservation Act). The exclusion of the term "organized group" from the List Act thus provides further evidence that Congress knew the Secretary's list of federally recognized tribes would not capture the full range of entities that qualify as "Indian tribes" under ISDEAA.

Finally, the List Act's history demonstrates Congress's awareness that ANCs could be eligible for Indian-specific programs and services yet not be included on the Secretary's list of federally recognized tribes. In 1988, before the Act's enactment, the Secretary had *included* ANCs on

[12] The reverse is also largely true: The majority of definitions that include the term "organized group" also expressly reference ANCs. And the few statutes that mention organized groups but *not* ANCs, *e.g.*, 25 U.S.C. § 1903(8) (Indian Child Welfare Act), make clear in other ways that they are limited to tribal *sovereigns*, *see id.* § 1911(a) ("An Indian tribe shall have jurisdiction exclusive as to any State…").

the list of recognized tribes after federal agencies "demand[ed] … a list of organizations which are *eligible for their funding and services*." 53 Fed. Reg. 52,829, 52,832 (Dec. 29, 1988) (emphasis added). In 1993, the Secretary revised that list to exclude ANCs—but only because ANCs "lack tribal status in a political sense." 58 Fed. Reg. 54,364, 54,365 (Oct. 21, 1993). At the same time, the Secretary expressly *reaffirmed* that the excluded entities, including ANCs, are "*made eligible for Federal contracting and services by statute* and their non-inclusion on the list below does not affect the continued eligibility … for contracts and services." *Id.* at 54,365 (emphasis added).

This reversal formed the backdrop for Congress's enactment of the List Act the following year. Congress agreed that the Secretary's list should include only those entities with sovereign political status. *See* 25 U.S.C. § 5130 note (the United States "maintains a government-to-government relationship" with "recognized Indian tribes" and "recognizes the sovereignty of those tribes"). But Congress signaled no disagreement with the Secretary's determination that the exclusion of other Native entities from the list, including ANCs, did not mean those entities had

somehow lost their long-recognized "eligibility" to participate in delivering Indian programs and services.

In short, the List Act and ISDEAA are apples and oranges. Whether an entity is subject to Secretarial acknowledgment as a sovereign tribe under the former does not determine whether it is "recognized as eligible" to implement programs and services under the latter. For all the reasons discussed above, ANCs are in fact "recognized as eligible" for Indian programs and services and therefore satisfy ISDEAA's Eligibility Clause.

* * *

ANCs provide far more than "charitable contributions to Alaska Natives," as Plaintiffs' amici suggest. NCAI Br. 27. Working closely with federally recognized tribes, ANCs step into the Executive Branch's shoes to provide much-needed programs and services ranging from healthcare to housing assistance to workforce development. Where no federally recognized tribe exists or provides these programs and services, ANCs offer the *only* tribal benefits.

These services are all the more essential today, as Alaska Natives and American Indians continue to suffer disproportionately from the

devastating health and socioeconomic consequences of the COVID-19 pandemic. As CIRI's President and CEO observed, absent the services that CIRI and its designated tribal organizations provide, many Alaska Natives and American Indians living in the Municipality of Anchorage and the Matanuska-Susitna Valley simply "will not have access to critical resources needed to address the COVID-19 pandemic." Minich Decl. ¶ 9. Because Congress expressly included ANCs in the CARES Act definition of "Indian tribe," and because ANCs satisfy that definition's Eligibility Clause, this Court should affirm the district court's judgment that ANCs are entitled to CARES Act funds.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,499 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

/s/ Allon Kedem
Allon Kedem

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on August 20, 2020, the foregoing brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

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