Nos. 20-543 & 20-544

IN THE

Supreme Court of the United States

STEVEN T. MNUCHIN,
SECRETARY OF THE TREASURY,
Petitioner,

v.

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

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

v.

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

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Alaska Native Corporations are "Indian Tribe[s]" for purposes of Title V of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT 1
A. Background 4
1. CARES Act 4
2. ISDA 5
3. ANCSA and ANCs 6
B. Facts and Procedural History 11
ARGUMENT 15
I. The Purported Circuit Conflict Is Illusory 15
A. No Circuit Conflict Exists Under the CARES Act 16
B. No Circuit Conflict Exists Under ISDA 16
C. Any Questions About ISDA Should Be Resolved in an ISDA Case, If One Were To Arise 19
D. The Practical Consequences of the Decision Below Are Overstated 22
II. The Decision Below Is Correct 22
A. The Recognition Clause Squarely Applies to ANCs 23
B. The Legislative History Confirms the Ordinary Meaning of the Text 27
C. No ANC Presently Satisfies the Recognition Clause 29
D. Congress Has Not Ratified Any Well-Settled Judicial or Agency Interpretation

of the "Indian Tribe" Definition That Contravenes Its Plain Meaning.....31

III. The Court Should Also Deny Review Because Tribal Governments Urgently Need the Remaining Title V Funding To Combat the Pandemic 36

CONCLUSION.....40

TABLE OF AUTHORITIES

Page

Cases:

Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017) 25
Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998) 6
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Arctic Slope Native Ass'n, Ltd. v. Sebelius, 699 F.3d 1289 (Fed. Cir. 2012).....21
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Chickasaw Nation v. United States, 534 U.S. 84 (2001) 24
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Page

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Jama v. Immigration and Customs Enf't, 543 U.S. 335 (2005) 32, 33
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Liu v. SEC, 140 S. Ct. 1936 (2020).....32
Menominee Indian Tribe of Wis. v. United States, 136 S. Ct. 750 (2016) 5, 21, 22
Metro. Stevedore Co. v. Rambo, 515 U.S. 291 (1995) 33
NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995 (9th Cir. 2003) 5, 20
Salazar v. Ramah Navajo Chapter, 567 U.S. 182 (2012) 5
United States v. Garcia Sota, 948 F.3d 356 (D.C. Cir. 2020) 32
Wyandot Nation of Kansas v. United States, 858 F.3d 1392 (Fed. Cir. 2017).....29

Statutes & Regulations

7 U.S.C. § 2009bb-1 34
12 U.S.C. 4702(12) 10
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16 U.S.C. § 539p.....34
16 U.S.C. § 4302(4) 36

Page

Statutes & Regulations—continued:

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25 U.S.C. § 3501(4) 35
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25 U.S.C. § 5302(b) 5
25 U.S.C. § 5304(e) 2, 5, 23
25 U.S.C. § 5304(l) 5
25 U.S.C. § 5321(a)(1) 5
25 U.S.C. § 5325(a)(1) 22
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33 U.S.C. § 2243(a) 35
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42 U.S.C. § 801(a)(2)(B) 1, 4
42 U.S.C. § 801(b)(1) 4
42 U.S.C. § 801(d) 4
42 U.S.C. § 801(d)(1) 37
42 U.S.C. § 801(g)(1) 2, 4, 23
42 U.S.C. § 801(g)(5) 2, 4, 23
42 U.S.C. § 9601(36) 35
43 U.S.C. § 1602(c) 26
43 U.S.C. § 1606(a) 6
43 U.S.C. § 1606(d) 6
43 U.S.C. § 1606(f) 7
43 U.S.C. § 1606(g) 7
43 U.S.C. § 1606(h) 7
43 U.S.C. § 1607(a) 6
43 U.S.C. § 1607(c) 7
43 U.S.C. § 1622 7
43 U.S.C. § 1626(a) 38
43 U.S.C. § 1626(e) 11
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Page

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Pub. L. No. 115-121, 132 Stat. 40 (2018) 26
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2 C.F.R. § 200.1.....10, 11

Page

Statutes & Regulations—continued:

2 C.F.R. § 200.54 ..... 10, 11
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12 C.F.R. § 1805.104 ..... 10, 14
25 C.F.R. § 83.2 30
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25 C.F.R. § 900.6 25
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25 C.F.R. § 900.8(d)(1) 21
25 C.F.R. § 900.244 22
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Page

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Page

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S. Rep. No. 92-581 (1971) 7
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OPINIONS BELOW

The opinion of the court of appeals (Gov't Pet. 1a–27a) is reported at 976 F.3d 15. The opinion of the district court (Gov't Pet. 28a–72a) is not yet published but is available at 2020 WL 3489479. The court's preliminary injunction decision (Gov't Pet. 84a–125a) is reported at 456 F. Supp. 3d 152.

JURISDICTION

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

STATEMENT

In response to the COVID-19 pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Title V of that Act appropriates billions of dollars to governments for expenditures related to the public health emergency, including $8 billion reserved exclusively for "Tribal governments." 42 U.S.C. § 801(a)(2)(B).

The Treasury Secretary, however, sought to disburse a portion of those funds to Alaska Native Corporations (ANCs), which, as their name suggests, are not Tribal governments at all. The relevant provision of the CARES Act defines a "Tribal government" by reference to the definition of "Indian

tribe" in the Indian Self-Determination and Education Assistance Act (ISDA). 42 U.S.C. § 801(g)(1), (5). And "Indian tribe[s]" are there defined to include only those entities "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5304(e). This "recognition clause" accordingly limits funding recipients under the CARES Act. And it is the government's position that ANCs are not presently recognized as eligible for special programs as the recognition clause requires.

Respondents, several federally recognized Indian tribes, including Alaska Native villages, sued to enjoin the illegal disbursement of funds rightfully allocated to them and sorely needed to fund their governmental efforts to confront the public health emergency. The court of appeals unanimously agreed with respondents that this case can and must be resolved based on a straightforward reading of the statutory text—and, in doing so, it rejected as grammatically incoherent petitioners' contention that the recognition clause constrains the tribal eligibility of each Indian group listed in the statutory definition except for the ANCs that immediately precede it. The decision is plainly correct, and it should be left undisturbed.

The ANCs suggest that the court of appeals created a circuit conflict warranting this Court's attention. That is incorrect. This is a CARES Act case. No other case has considered the permissible universe of Tribal governments that may receive Title

V funding, and given the Act's limited temporal and substantive scope, no other case ever will.

Petitioners rely instead on a single Ninth Circuit opinion from 1987 addressing a narrow agency issue under ISDA—an issue since mooted by separate statute, and one the court below had no occasion to address. And while petitioners cling to the Ninth Circuit's broad language of deference to a 1976 Interior Department memorandum suggesting in perfunctory fashion that ANCs enjoy per se tribal status under ISDA, they pay no heed to subsequent statutory and regulatory developments which have rendered the basis for that deference obsolete. Those developments likewise defeat petitioners' claims that Congress and the executive branch have enshrined a countertextual interpretation of ISDA. To the contrary, the court of appeals' conclusion that ANCs (like all other Indian groups) are subject to the recognition clause, and that they do not presently satisfy that clause, accords not only with plain text but also with critically important legislation and regulations governing multiple agencies, including recent Treasury regulations that petitioners nowhere mention in their telling.

Further consideration of this case will not resolve a circuit conflict, or clarify unsettled law, or fix an error of law. Instead, it will only serve to delay the disbursement of emergency funds at the height of a pandemic that disproportionately affects Native Americans. It would be irregular to grant review in this one-off case involving the CARES Act to resolve non-existent issues under ISDA without the benefit of

an ISDA record. The petitions for a writ of certiorari should be denied.

A. Background

1. CARES Act

Title V of the CARES Act appropriates $150 billion for "States, Tribal governments, and units of local government" to cover governmental expenditures necessitated by the COVID-19 public health emergency. 42 U.S.C. § 801(a)(1), (d). Of that sum, $8 billion is reserved for "Tribal governments." *Id.* § 801(a)(2)(B). Congress directed the Secretary of the Treasury to expeditiously disburse the relief funds by April 26, 2020. *Id.* § 801(b)(1).

Title V defines a "Tribal government" as "the recognized governing body of an Indian Tribe," *id.* § 801(g)(5), and in turn defines an "Indian Tribe," *id.* § 801(g)(1), by reference to the Indian Self-Determination and Education Assistance Act (ISDA):

> [A]ny Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.]

25 U.S.C. § 5304(e).

2. ISDA

Congress's enactment of ISDA in 1975 marked a sea change in federal Indian policy. Congress authorized tribes to enter into "self-determination contracts" with federal agencies for the tribes to administer governmental programs. *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 753 (2016). Pursuant to those contracts, tribes operate programs including health care, education, and law enforcement that the federal government would otherwise provide. *See Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185 (2012); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 634 (2005). Congress thereby sought "to support[] and assist[] Indian tribes in the development of strong and stable tribal governments[.]" 25 U.S.C. § 5302(b).

ISDA does not require an Indian tribe to deliver all programs and services itself. A tribe may authorize a "tribal organization" to enter a self-determination contract on its behalf. *Id.* § 5321(a)(1). "Tribal organization[s]" include not only the recognized governing body of an Indian tribe (where the tribe administers services directly) but also other legally established organizations of Indians, including corporations. *Id.* § 5304(*l*); 25 C.F.R. § 900.8(b)(1); *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 997 (9th Cir. 2003).

In Alaska, the 229 federally recognized Alaska Native villages are the "Indian tribes" that authorize

self-determination contracts. 85 Fed. Reg. 5462-01, 5466–67 (Jan. 30, 2020); BIA Alaska Region, *Regional Indian Self-Determination Implementation Plan* 1 (Jan. 2015) (describing "the processing of [ISDA] contracts submitted by the 229 Tribes/Tribal Organizations who are within the Region's jurisdiction").[1] While many Alaska Native villages operate self-determination programs directly, villages also authorize regional non-profit associations to enter ISDA compacts on their behalf.

3. ANCSA and ANCs

a. Congress enacted the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (ANCSA), in 1971 as a "comprehensive statute designed to settle all land claims by Alaska Natives." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523 (1998). As a condition for receipt of lands and monies under the Act, Congress required Alaska Natives to organize themselves into state-chartered corporate entities while also maintaining their existing village structure. "Natives having a common heritage and sharing common interests" were required to form twelve regional for-profit corporations, 43 U.S.C. § 1606(a), (d), and the "Native residents of each Native village" were further required to "organize as a business for profit or nonprofit corporation[.]" *Id.* § 1607(a). All of the more than 200 village ANCs ultimately organized as for-profit entities. Op. Sol. of Interior, M-36975, 1993 WL 13801710, at *50 n.225 (Jan. 11, 1993) ("Sansonetti Op."). Like other corporations, ANCs are controlled

[1] https://on.doi.gov/3njS6B6.

by boards of directors and owned by individual shareholders. Although shareholders were originally required to be Native, non-Natives may hold shares today. *See* 43 U.S.C. §§ 1606(f)–(h), 1607(c), 1629c(a).

In addition to their responsibilities for managing the real property and financial assets transferred to them under the Act, ANCSA "charged … ANCs with a handful of functions that would ordinarily be performed by tribal governments." Gov't Pet. 20a. Congress did not define the nature of the United States' relationship with these new entities or with the Alaska Native villages, "reserving … debate" on the status of "the institutions established." S. Rep. No. 92-581, 34 (1971) (Joint Conference Statement). Nor did ANCSA make ANCs or the Native villages eligible for federal Indian programs generally, "presaging further congressional consideration of the relationship of the United States to Alaska Natives." Sansonetti Op. at *61–62 & n.264.

Congress's decision not to set in stone the respective status of the Native villages and ANCs was well-warranted, as experience shed light on the roles they might best fulfill. In 1985, the Interior Department reported to Congress as ANCSA required, 43 U.S.C. § 1622:

> At the time of ANCSA's passage …. [c]orporations were seen as vehicles to promote the health, education, social, and economic welfare of their shareholders….

> These expectations have placed unrealistic demands on the ANCSA corporations. Many are appropriate for governments, not corporations…. In addition, events since ANCSA have fostered the development of regional nonprofit service organizations and thus enabled the ANCSA corporations to concentrate more of their energy on profitmaking.

U.S. Dep't of the Interior, *ANCSA 1985 Study*, ES-12 (June 29, 1984).[2]

b. In 1993, the Interior Department confirmed that Alaska Native villages have the status of federally recognized Indian tribes eligible for the special programs and services provided by the United States to Indians and enjoy a government-to-government relationship with the United States. *See* Gov't Pet. 21a–22a. At the same time, Interior confirmed that ANCs lack that status, subject to further legislation by Congress or a subsequent change in Interior's position. *See id.*

c. Consistent with their non-recognized status, ANCs have not been treated as full-fledged "Indian tribes" under ISDA. While it is true that in 1976, an internal memorandum prepared by the Assistant Solicitor for Indian Affairs ("Soller memorandum") asserted that ANCs qualify as "Indian tribes" without regard to ISDA's recognition clause, the memorandum did not initiate 45 years of consistent administrative construction in disregard of ISDA's

[2] https://bit.ly/2KtgGkd.

text. Gov't Pet. 3. Soller's single-paragraph analysis, which contained no discussion of ordinary meaning or grammar and no citation of legal authority, App., C.A. Doc. 1854684 ("C.A. App."), A-138, stated that not only ANCs, but also Alaska Native villages, fall outside the purview of the recognition clause—a view the government has disavowed in this litigation, *see* Tr. of Summ. J. Mot. Hr'g, D.Ct., at 56 (June 12, 2020); Gov't Pet. 58a n.10.

Since then, more considered guidance has clarified the status of ANCs under ISDA. In 1981, the Department of Health and Human Services' (HHS) Indian Health Service (IHS) confirmed that ANCs do not have the same ISDA status as Alaska Native villages, explaining that if an Alaska Native village has a government, the village's governing body must approve ISDA contracts. *See* 46 Fed. Reg. 27,178-02, 27,178 (May 18, 1981). Only when a village had no government did IHS allow an ANC to act—not in its own stead, but *as* "the village governing body …. for that particular village." *Id*. at 27,179. Bureau of Indian Affairs (BIA) guidance provides the same. *See Douglas Indian Ass'n v. Juneau Area Dir., BIA*, 27 IBIA 292, 293 (1995). Today, every Alaska Native village has a Tribal government, and ANCs have no role in authorizing ISDA contracts. The sole exception is the rare circumstance in which no federally recognized village exists at all (namely, in Anchorage); there, the regional ANC has been permitted to authorize ISDA contracts, largely by virtue of a separate statute. *See infra* at 16-17.

Accordingly, while the ANCs allege that they have "entered into scores of [ISDA] contracts," ANC Pet. 8, 24, the IHS website they cite in fact does not list a single ANC, nor does the corresponding BIA website.[3]

d. Current regulations from a spectrum of agencies confirm that ANCs are subject to the recognition clause. For example, Treasury's 2015 regulations implementing the "Indian tribe" definition (virtually identical to ISDA's) in the Community Development Banking and Financial Institutions Act, 12 U.S.C. § 4702(12), provide:

> Indian Tribe means any Indian Tribe, band, pueblo, nation, or other organized group or community, including any Alaska Native village or regional or village corporation, as defined in or established pursuant to [ANCSA]. *Each* such Indian Tribe *must be recognized* as eligible for special programs and services provided by the United States to Indians because of their status as Indians[.]

12 C.F.R. § 1805.104 (emphases added). The very agency responsible for administering the CARES Act has made clear that the recognition clause applies to ANCs. *See also* 45 C.F.R. § 75.2 (HHS); 2 C.F.R.

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[3] IHS, *Fiscal Year (FY) 2018 Report to Congress on Contract Funding of Indian Self-Determination and Education Assistance Act Awards* 10, https://bit.ly/2XKkNLI; *BIA Self-Governance Tribes/Consortia*, https://on.doi.gov/3mrk5h7. The IHS list includes two tribal organizations affiliated with the Anchorage regional ANC noted above.

§§ 200.1, 200.54 (OMB), 1108.225 (DOD) (regulations tying ISDA's definition of "Indian tribe" to Interior's annual list of recognized Indian groups).

e. Today, ANCs are thriving corporate entities, and Congress has worked hard to facilitate their success. For example, ANCs, their subsidiaries, and joint ventures are considered minority and economically disadvantaged business enterprises. 43 U.S.C. § 1626(e). In fiscal year 2017, ANCs generated a combined revenue of $9.1 billion. Gov't Pet. 89a. Together, the twelve regional ANCs alone have over 138,000 shareholders and more than 43,000 employees. *Id.* ANC business ventures include oil and gas drilling, refining, and marketing; mining and other resource development; military contracting; real estate; and construction. And while a number of ANCs engage in laudable corporate philanthropy, that does not transform them into Tribal governments.

B. Facts and Procedural History

1. Respondents are a diverse group of seventeen federally recognized Alaska Native villages and Indian tribes that have taken extraordinary actions to confront the pandemic. They have declared states of emergency; issued and enforced stay-at-home orders and other critical public health regulations; established acute health care facilities to treat COVID-19 patients; procured medical and personal protective equipment; hired additional first responders and essential staff; provided emergency food, medicines, and utilities to community members;

and, in some cases, instituted tight border controls and quarantine measures. They have done so while their governmental revenues have collapsed. C.A. App. A-33–34, 37, 40–41, 46–50, 53–55, 59–64, 69–70, 73–75, 78, 149–51, 155, 159–60, 162–63, 167.

2. Treasury initially indicated that the full $8 billion in Title V tribal funding would be disbursed to the over 570 federally recognized Indian tribes and Alaska Native villages. C.A. App. A-123–24. But it then suggested it would designate the approximately 200 regional and village ANCs as "Tribal governments" and allocate funds to each. Gov't Pet. 6a.

3. Respondents filed suit challenging the Secretary's decision as violating the APA and sought a preliminary injunction to prevent the Secretary from disbursing relief funds to ANCs. C.A. App. A-15.

Treasury then requested Interior's views on whether ANCs qualify as "Tribal governments." C.A. App. A-135. In a brief letter, the Interior Solicitor responded affirmatively, citing the reference to ANCs in the ISDA definition. *Id.* But he did not mention the recognition clause, nor address whether ANCs would fulfill it. *Id.*

Based solely on the Solicitor's letter, Treasury's General Counsel recommended that the Secretary deem ANCs "Tribal governments," and the Secretary concurred. C.A. App. A-141, 144. Nothing in the administrative record reflects any independent

analysis by Treasury of ANCs' eligibility for Title V payments.

4. On April 27, 2020, the district court preliminarily enjoined the Secretary from paying Title V funds to ANCs. Gov't Pet. 84a–125a. The court determined that ANCs do not satisfy the recognition clause and thus are not eligible to receive any portion of the $8 billion reserved for Tribal governments. *Id.* at 108a–109a. The court reasoned that it could not "ignore the clear grammatical construct of the [ISDA] definition, which applies the [recognition] clause to every entity and group listed in the statute." *Id.* at 112a–113a. It further determined that respondents "easily satisfy their burden to show that they will suffer irreparable injury," *id.* at 101a, because "[t]hese are monies that Congress appropriated on an emergency basis to assist Tribal governments in providing core public services to battle a pandemic," *id.* at 103a.

The district court subsequently granted summary judgment to petitioners. The court reiterated that the "[t]he [recognition] clause plainly modifies each of the nouns that precedes it, including ANCs." Gov't Pet. 44a. But elevating a dubious interpretation of ISDA's meager legislative history above its plain text, the court "look[ed] beyond the statute's grammatical structure," *id.* at 45a, and gave the definition what it confessed to be an "unnatural reading" leading to a "strange result," *id.* at 52a—that the recognition language applies to all entities listed in the definition *except* ANCs.

5. The court of appeals reversed. Gov't Pet. 1a–25a. In a unanimous decision authored by Judge Katsas and joined by Judges Henderson and Millett, the court concluded that "[t]he text and structure of this [Indian tribe] definition make clear that the recognition clause, which is adjectival, modifies all of the nouns listed in the clauses that precede it." *Id.* at 11a–12a. The court of appeals further concluded—*with the government's full agreement*—that the recognition clause is a term of art describing federally recognized tribes, and that no ANC is currently recognized as the clause requires. *Id.* at 13a–18a.

Based on a careful examination of the historical record, the court of appeals rejected the contention that adherence to the plain language of the definition would result in surplusage given the uncertainty at the time of ISDA's enactment as to which Alaskan entities would ultimately be recognized by the government. *Id.* at 18a–22a. It found no warrant for avoiding the dictates of text through resort to legislative history. And it "reject[ed] the government's plea for deference" to the perfunctory Soller memorandum, noting that the memorandum "did not address any of the textual or historical considerations" canvassed by the court and that "it appears inconsistent with a binding regulation adopted by the Department of the Treasury, the agency before the [c]ourt on this appeal." *Id.* at 23a (citing 12 C.F.R. § 1805.104).

ARGUMENT

I. The Purported Circuit Conflict Is Illusory

No circuit conflict exists involving the statute at issue in this case. Indeed, no other decision addresses the CARES Act definition of a "Tribal government." And, given the CARES Act's limited temporal and substantive scope, that will not change. The government does not meaningfully dispute this point.

The ANCs argue instead that the decision below conflicts with a Ninth Circuit ISDA decision, *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471 (9th Cir. 1987). But, as the D.C. Circuit's opinion makes plain, it did not purport to resolve key issues regarding the ANCs' role under ISDA, Gov't Pet. 24a, as doing so was unnecessary to deciding this CARES Act case. Nor does the decision purport to affect any ISDA contract.

Bowen, meanwhile, is largely obsolete. It involved issues unique to agency practice in Anchorage that have since been mooted by a separate 1997 statute. And while the ANCs attempt to draw on *Bowen*'s broader language of deference, three decades of intervening statutes, regulations, and further Ninth Circuit decisions have stripped that language of any force.

Nor, given longstanding agency practice under ISDA, is there reason to expect that a dispute will arise over whether an ANC meets the definition of an

"Indian tribe." If any conflict does emerge, it should be resolved in an ISDA case, where the ANCs' sweeping claims about the operation of the statute can be tested against a properly developed record. In the meantime, the Court can be confident that the decision below will not disrupt the administration of ISDA or the provision of federally funded services to Alaska Natives. Indeed, the government makes no claim to the contrary.

A. No Circuit Conflict Exists Under the CARES Act

No conflict exists concerning the proper interpretation of the CARES Act, and petitioners do not suggest otherwise. The D.C. Circuit is the only court of appeals to consider whether ANCs are "Tribal governments" eligible for emergency COVID-19 relief funds. And it will remain the only court to do so. Upon the conclusion of this litigation, the Secretary will presumably disburse all remaining Title V funds to those entities deemed eligible as Tribal governments, and the question of eligibility for CARES Act funds will not arise again.

B. No Circuit Conflict Exists Under ISDA

Unable to identify a conflict regarding the actual statute at issue, the ANCs posit an ISDA conflict instead. That is a vast overreach.

1. In *Bowen*, the Ninth Circuit considered a narrow set of facts unique to Anchorage and involving a single regional ANC, Cook Inlet Region, Inc. (CIRI).

The dispute involved the tribal approvals required under ISDA for certain contracted programs serving Alaska Natives in Anchorage, where there are no federally recognized Alaska Native villages. *See Cook Inlet Native Ass'n v. Heckler*, No. A84-571 Civil, Mem. of Decision (D. Alaska Jan. 7, 1986), D.C. Doc. 77-1 at 3. The district court concluded that "[w]here (as [in] Anchorage) there is no applicable village entity, it is reasonable and appropriate for the regional for-profit corporation to be designated as the 'Indian tribe' for such area." *Id.* at 17. The Ninth Circuit affirmed, reasoning as follows: "[T]he legislative history does not indicate that Congress intended to preclude the agency interpretation [that the recognition clause does not apply to ANCs]. The court must, therefore, defer to that interpretation." *Bowen*, 810 F.2d at 1476.

In the decision below, the D.C. Circuit did not offer any view on the narrow agency practice at issue in *Bowen*. Nor will it have any occasion to do so, as Congress has since addressed that discrete issue by separate statute. In 1997, Congress authorized CIRI, through an affiliate, to enter into ISDA contracts in Anchorage and surrounding areas without Native village approval. *See* Pub. L. No. 105-83, § 325(d), 111 Stat. 1543, 1598. The Ninth Circuit has accordingly held that disputes about CIRI-administered contracts akin to the one resolved in *Bowen* are now moot. *See Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 990 (9th Cir. 1999).

2. The ANCs latch onto *Bowen*'s deference to the Soller memorandum, 810 F.2d at 1476, claiming

that the decision anointed a privilege to ANCs (immunity from the strictures of the recognition clause) unavailable to any other group claiming tribal status. But even if such deference had been appropriate in 1987, intervening statutes and regulations make clear that the Ninth Circuit would likely reach a different conclusion if the issue were to arise today.

In 1994, Congress acted decisively to ensure equal treatment of tribes across federal statutes and to forbid ad hoc determinations of tribal status. It did so by prohibiting disparate treatment of tribes by federal agencies, Pub. L. No. 103-263, § 5(b), 108 Stat. 707, 709 (1994), and by enacting the Federally Recognized Indian Tribe List Act of 1994 (List Act), Pub. L. No. 103-454, 108 Stat. 4791. The List Act requires the Secretary of the Interior to publish for the use of federal agencies an annual list of tribes meeting the requirements of the recognition clause. 25 U.S.C. § 5131(a); *see also* 85 Fed. Reg. 5462-01 (Jan. 30, 2020) (current list). Just months ago, the Ninth Circuit recognized the transformative role of these statutes in eliminating the privileging of certain tribal groups over others. *See Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 993 (9th Cir. 2020).

Federal agencies—including Treasury, which administers the CARES Act, and HHS, which administers ISDA together with Interior—have heeded Congress's 1994 directives. Their regulations make clear that *every* entity seeking "Indian tribe" status under the ISDA definition must satisfy the

recognition clause and appear on Interior's list of recognized entities. *See supra* at 10-11.

Given these intervening developments, there is ample reason to believe that the Ninth Circuit would reject a blanket claim of deference for the Soller memorandum, just as the D.C. Circuit did here. The court of appeals' decision presents no conflict, and even if it did, there would be no rush to resolve the conflict (and as discussed next, significant reason not to) before *any* court of appeals has interpreted the relevant provisions of ISDA in light of the current statutory and regulatory regime.

C. Any Questions About ISDA Should Be Resolved in an ISDA Case, If One Were To Arise

1. This is not an ISDA case. As such, it is a poor vehicle for the Court to address issues arising under that statute. No ISDA-based record was developed below. And the narrow APA record is limited to the Secretary's decision under the CARES Act. C.A. App. A-141–145. Without an ISDA record, the ANCs and amici have advanced misplaced claims that have not been vetted by the relevant agencies, through civil discovery, or by the courts below. For example, the ANCs' allegation that they have "entered into scores of [ISDA] contracts," ANC Pet. 8, 24, is wholly unsupported by the record, *see supra* at 10. Amici's citations of ANCs' self-serving assertions of "Indian tribe" status are similarly unavailing. None of these materials is part of the administrative record, and it would be improvident to grant review

based on unsubstantiated claims of the sort advanced here.

2. The decision below, moreover, does not shut ANCs out of the realm of ISDA contracting. To the contrary, while the decision properly respects the sovereign prerogative of Native villages in authorizing ISDA contracts, it in no way forecloses the possibility that villages can sanction ANC participation in contracting as "tribal organizations." Gov't Pet. 23a–24a. The Ninth Circuit has indeed recognized that state-chartered corporations may contract as "tribal organizations" to deliver services where tribes have sanctioned them to do so. *See Chapa De Indian Health Program*, 316 F.3d at 997, 999–1000. And IHS's "COVID-19 Response, 100 Day Review" characterizes ANCs as "tribal organizations" *as distinguished from* "tribal governments."[4] If this Court were to weigh in at all, it should do so in the context of an ISDA dispute where these issues have been properly developed and presented.

3. There is little reason to expect that such a dispute will ever arise. As discussed above, under longstanding IHS and BIA guidance, ANCs are not treated as the ISDA equivalent of federally recognized Alaska Native villages; rather, each village *always* has preeminent authority to approve an ISDA contract within its tribal area. *See supra* at 9. And even if an agency were to permit an ANC to authorize an ISDA contract because the contract did not serve *any* Alaska Native village area, as in Anchorage,

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[4] IHS, *COVID-19 Response, 100 Day Review* 14, https://bit.ly/3874Pk2.

supra at 16-17, a village would have no basis to dispute the contract. *See Shalala*, 166 F.3d at 988; 25 C.F.R. § 900.8(d)(1).

In sum, the ANCs' claim that the decision below will spawn dozens of dueling, bicoastal declaratory-judgment actions—with the Ninth Circuit deeming ANCs eligible for ISDA tribal status, but the D.C. Circuit preventing the disbursement of funds to them in that capacity—is eye-catching but entirely illusory.

4. Even if a conflict were to develop, this Court would benefit from the analysis of other courts. Given the widespread nature of ANCs' business holdings, cases involving their privileges and immunities have been (or could be) litigated in multiple circuits. *See*, *e.g.*, *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 213 (4th Cir. 2007). And ISDA issues involving Alaska Native entities are frequently adjudicated in the Federal Circuit. *See*, *e.g.*, *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 699 F.3d 1289, 1290–91 (Fed. Cir. 2012), *abrogated by Menominee*, 136 S. Ct. 750; *Council for Tribal Emp't Rights v. United States*, 112 Fed. Cl. 231, 246–47 (Fed. Cl. 2013), *aff'd*, 556 F. App'x 965 (Fed. Cir. 2014). Review is not needed or warranted to maintain uniformity in the law. If an actual conflict does eventually arise, this Court can review it then.

D. The Practical Consequences of the Decision Below Are Overstated

Although the ANCs complain that the decision below will have a "devastating and unsettling effect on Alaska Natives," ANC Pet. 34, the government has conspicuously not endorsed that position. And with good reason: the United States' obligation to fund services for Alaska Natives (as for Indians in the lower 48 states) does not depend on whether the federal government provides those services directly or contracts with Indian tribes and tribal organizations for their provision through ISDA. *See Menominee*, 136 S. Ct. at 753. In all cases, federal law entitles Alaska Natives to the same services at the same funding levels. *See* 25 U.S.C. § 5325(a)(1); 25 C.F.R. §§ 900.244, 900.256.

Accordingly, the claim that the court of appeals' decision will eliminate or reduce federally funded services for Alaska Natives—or exclude ANCs from any role in their delivery—is categorically incorrect. ANCs' ability to direct ISDA contracting on par with federally recognized Indian tribes presents an entirely distinct question from the federal government's obligations to Alaska Natives. The ANCs cannot justify further review by conflating the two.

II. The Decision Below Is Correct

Unable to identify a legitimate circuit conflict, petitioners seek little more than error correction. But there is no error to correct. The court of appeals'

unanimous opinion carefully assesses the relevant text and applies this Court's bedrock edict to "enforce plain and unambiguous statutory language … according to its terms." *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) (quotation marks omitted).

A. The Recognition Clause Squarely Applies to ANCs

1. Title V defines a "Tribal government" as "the recognized governing body of an Indian Tribe." 42 U.S.C. § 801(g)(5). "Indian Tribe," in turn, is defined by reference to the definition of that term in ISDA. *Id.* § 801(g)(1). For purposes of the CARES Act, then, an "Indian tribe" is:

> [A]ny Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA], *which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians*[.]

25 U.S.C. § 5304(e) (emphasis added). The court of appeals correctly held that, under an ordinary reading of the statute, the italicized recognition clause applies to all the listed entities, including ANCs. Gov't Pet. 11a–13a. As the court explained, "the government['s] conten[tion] that the adjectival clause must be read to modify *every* listed noun *except*

its immediate antecedent…. produces grammatical incoherence[.]" *Id.* at 18a.

The court of appeals' interpretation hews faithfully to the "cardinal" principle of statutory interpretation set forth by this Court: a court "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253–54 (1992). The plain language of this statute makes quick work of petitioners' claims.

As the court of appeals explained, the definition of an "Indian tribe" first "sets forth five kinds of covered Indian entities—any 'tribe, band, nation, or other organized group or community.'" Gov't Pet. 11a. This list is followed by an "including" clause which "clarifies that three kinds of Alaskan entities are covered—'any Alaska Native village or regional or village corporation.'" *Id.*; *see also Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) ("To 'include' is to 'contain' or 'comprise as part of a whole.'" (quoting Webster's Ninth New Collegiate Dictionary 609 (1985))).

If Congress had stopped there, any entity on the list of covered entities would qualify as an "Indian tribe." But Congress instead added the recognition clause, which "restricts the definition to a subset of covered entities—those 'recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.'" Gov't Pet. 11a.

As a textual matter, the recognition clause "modifies all of the nouns listed in the clauses that precede it." *Id*. at 11a–12a. Any inquiry ends there. "[I]t is not grammatically possible for the recognition clause to modify *all* of the five nouns in the listing clause, *plus* the first noun in the more proximate Alaska clause ('village'), but *not* the one noun in the preceding two clauses that is its most immediate antecedent ('corporation')." Gov't Pet. 12a. And this conclusion accords with simple logic. If A ("any Indian tribe ... or other organized group or community") is subject to the recognition clause—as everyone agrees—and if A "includ[es]" B ("any Alaska Native … regional or village corporation"), then B is subject to the recognition clause. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658–59 (2017).

2. Petitioners' efforts to overcome the dictates of text and logic are unpersuasive. Petitioners suggest that "including" can be read as a term of enlargement. Gov't Pet. 29 n.5. But in normal usage, "[w]hatever follows the word 'including' is a subset of whatever comes before; any [entity] that comes within the 'including' clause comes, by definition, within the preceding clause as well." *Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, Office of Foreign Assets Control*, 857 F.3d 913, 922 (D.C. Cir. 2017). Formal ISDA regulations confirm this natural reading, as they also construe "including" in this way. *See* 25 C.F.R. §§ 900.6, 1000.2 (listing "pueblos, rancherias, [and] colonies" alongside Alaska Native villages and ANCs after the word "including" in the "Indian tribe" definition); 42 C.F.R. § 137.10 (same). The court of

appeals properly rejected petitioners' invitation to read the statute as if Congress had placed ANCs *after* the recognition clause, separate and apart from all other entities.

Petitioners further argue that the plain-text reading runs into the canon against surplusage. *See* ANC Pet. 27–29; Gov't Pet. 29. They deride the court of appeals for holding that ANCs do not satisfy the ISDA definition of "Indian tribe" when ANCs are explicitly named in that definition. Petitioners' argument ignores not only the restrictive force of the recognition clause but also the fact that the clause is not static: the universe of entities qualifying as "Indian tribes" expands and contracts over time based on congressional action and Interior acknowledgment. *See*, *e.g.*, Pub. L. No. 106-568, § 704, 114 Stat. 2868 (2000) (recognizing tribe and stating that it is now eligible for special services and programs); Pub. L. No. 115-121, 132 Stat. 40 (2018) (same for six tribes). Presently, more than 570 entities, including 229 Alaska Native villages (which, like ANCs, are defined in ANCSA, 43 U.S.C. § 1602(c)), have had their status vetted by the Interior Department and satisfy the clause. That number has continued to increase over the past several decades. *Compare, e.g.*, 65 Fed. Reg. 13298-01 (Mar. 13, 2000) *with* 85 Fed. Reg. 5462-01 (Jan. 30, 2020). Under the ISDA definition, ANCs retain the potential to qualify as Indian tribes, even if they do not qualify presently, and their mention is accordingly not without effect.

Petitioners' claim requires imputing to Congress in 1975 an understanding that ANCs could

never, under any circumstance, be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." But the court below detailed the relevant history in extensive fashion and concluded:

> [W]hen Congress enacted ISDA in 1975, it was substantially uncertain whether the federal government would recognize Native villages, Native corporations, both kinds of entities, or neither…. There is no surplusage problem simply because, almost two decades later, Interior chose to recognize the historic villages but not the newer corporations as the ultimate repository of Native sovereignty.

Gov't Pet. 22a–23a. Petitioners fail to make any credible claim of error regarding the court of appeals' careful assessment of the relevant history, let alone any claim that it conflicts with other authority in a manner that would warrant certiorari. It is not the circuit's adherence to plain text that renders ANCs a "null set," ANC Pet. 23, but choices made by Congress and Interior officials: to this day, Congress could act to recognize ANCs, but simply has not.

B. The Legislative History Confirms the Ordinary Meaning of the Text

This case should be resolved on unambiguous statutory language alone. But even if legislative history were considered, it suggests no intent contrary to the text.

The bill that became ISDA originally defined an "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native community as defined in [ANCSA], for which the Federal Government provides special programs and services because of its Indian identity[.]" S. 1017, 93d Cong. § 4(b) (1973). The second iteration of the bill replaced the final clause with the current recognition clause, thus subjecting "any Alaska Native community" to the recognition requirement. S. Rep. No. 93-682, at 2 (1974). Finally, Congress replaced the term "Alaska Native community" (which ANCSA does not use) with "any Alaska Native village," S. Rep. No. 93-762, at 2 (1974), and "or regional or village corporation," H.R. Rep. No. 93-1600, at 2 (1974). But neither the House nor the Senate changed the scope of the recognition clause, and each retained the placement of Alaskan entities before it.

Nothing in this drafting sequence (or in a House committee report simply noting the inclusion of ANCs, Gov't Pet. 16) reveals an intent to exempt ANCs, alone among all Indian entities, from the recognition clause. Congress's insertion of ANCs immediately before the clause would indeed be inexplicable had it meant to exempt them from its force.[5] And the clause is central to ISDA's scheme—it ensures that only those entities recognized as

[5] When Congress enacted ISDA, no comma separated ANCs from the recognition clause. It added the comma immediately preceding the clause as a technical amendment in 1990. Pub. L. No. 101-301, § 2(a)(1), 104 Stat. 206.

having a formal government-to-government relationship with the United States may take over the administration of federal programs for Indians, consistent with ISDA's policy of fostering tribal self-government. *See supra* at 5; *see also*, *e.g.*, 25 C.F.R. §§ 900.3(b)(4), (7), 1000.4.

C. No ANC Presently Satisfies the Recognition Clause

For their part, the ANCs contend that even if the recognition clause does apply to them, the court of appeals erred in concluding that they do not satisfy it. ANC Pet. 16. The government, however, "agrees that ANCs have not been 'recognized' as ISDA requires." Gov't Pet. 18a. The Ninth Circuit came to the same conclusion in *Bowen*, 810 F.2d at 1474, and the only other court of appeals to consider the meaning of the recognition clause has, like the court below, deemed it to be a term of art describing federal recognition. *Wyandot Nation of Kansas v. United States*, 858 F.3d 1392, 1398 (Fed. Cir. 2017).

The ANCs accordingly ask this Court to weigh in on a discrete issue on which no circuit conflict exists and for which there is no authority supporting their position—a position against which the government itself has vigorously and consistently advocated. *See*, *e.g.*, Gov't Pet. 24; Gov't Br. at *24, *35, *Wyandot Nation* (No. 2016-1654), 2016 WL 4442763.

Recognition is the touchstone of a Native entity's formal relationship with the United States.

See, *e.g.*, *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57 (2d Cir. 1994). By virtue of its recognized status, an entity becomes eligible for the special programs and services that the United States provides for Indians. *See*, *e.g.*, *Cal. Valley Miwok Tribe*, 515 F.3d at 1263; 25 C.F.R. § 83.2.

This relationship between recognition and eligibility for federal programs and services was cemented by the List Act, which requires that the Secretary of the Interior annually publish a list of all Indian tribes 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) (emphasis added); Gov't Pet. 15a–16a. Numerous agencies, including the Office of Management and Budget, the Department of Defense, and HHS, have accordingly promulgated regulations expressly linking "Indian tribe" status under the ISDA definition to an entity's inclusion on Interior's annual list. *See supra* at 10-11.

Sidestepping all of this, the ANCs contend that they satisfy the recognition clause simply because they participate in some federal programs. ANC Pet. 25–26. That contention cannot be reconciled with the text of ISDA, which refers to "the" specific special programs and services that tribes receive by virtue of their recognized status. Gov't Pet. 17a. The ANCs' rationale would extend recognition to *any* Indian group receiving *any* services, including *non*-federally recognized tribes. Federal officials could accordingly

grant and revoke tribal status with a tweak to program eligibility—precisely the ad hoc approach that Congress foreclosed in the List Act. *See supra* at 18. The court of appeals' rejection of that approach was consistent with the views of Congress, the government, and every other court to consider the issue.

D. Congress Has Not Ratified Any Well-Settled Judicial or Agency Interpretation of the "Indian Tribe" Definition That Contravenes Its Plain Meaning

Undeterred, petitioners contend that Congress has subsequently ratified their reading of ISDA. They ask the Court to hold that Congress adopted the outdated, atextual interpretation endorsed in *Bowen* and the informal 1976 Soller memorandum because Congress has amended *other* ISDA provisions and has incorporated the "Indian tribe" definition in *other* statutes. Gov't Pet. 17–23; ANC Pet. 24. This invitation to apply the prior-construction canon is unpersuasive.

1. The prior-construction canon cannot override plain text and so is inapplicable here. "[W]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (quotation marks omitted).

Even if the statutory text were ambiguous, the canon applies only to "the reenactment of terms that had acquired a well-settled judicial interpretation."

Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc., 139 S. Ct. 628, 634 (2019); *see also Liu v. SEC*, 140 S. Ct. 1936, 1946–47 (2020). Here, there is no "well-settled" judicial or administrative interpretation that Congress might have ratified in lieu of the ordinary meaning of the words it used.

Petitioners suggest that Congress intended to ratify *Bowen*. Not only is petitioners' reliance on *Bowen* plagued by the infirmities discussed above, *supra* at 16-19, but a lone appellate decision cannot "settle" a statute's meaning. *Compare Jama v. Immigration and Customs Enf't*, 543 U.S. 335, 351 (2005) (decisions of two courts of appeals are insufficient), *and United States v. Garcia Sota*, 948 F.3d 356, 360 (D.C. Cir. 2020) ("a lone appellate case hardly counts"), *with Helsinn*, 139 S. Ct. at 633–34 (meaning was settled based on a "substantial body of law," including numerous Supreme Court and Federal Circuit opinions).

Nor can petitioners rely on any well-settled administrative interpretation. The government points to the single perfunctory paragraph in the Soller memorandum. Gov't Pet. 5–6. But the court of appeals correctly noted that the memorandum does "not address any of the textual or historical considerations" the court so thoroughly canvassed. Gov't Pet. 23a. And the government itself underscored the document's unreliability in disavowing its suggestion that Alaska Native villages need not satisfy the recognition clause. *See supra* at 9.

Petitioners, moreover, nowhere account for other authority that undermines their notion of a settled interpretation, including the IHS and BIA guidance permitting ANCs to authorize ISDA contracts only if a Native village does not have a government (a nonexistent condition today), and even then only on the village's behalf. *Supra* at 9. Nor do they mention recent regulations from Treasury (the agency charged with implementing Title V) and other agencies explicitly contradicting the Secretary's interpretation. *See supra* at 10-11. If Congress incorporated any prior construction when it passed the CARES Act, it surely was the interpretation proffered in these post-List Act regulations—not the countertextual interpretation included in a decades-old internal memorandum.

2. Petitioners also argue that because Congress amended other ISDA provisions in the late 1980s and early 1990s and did not *affirmatively reject Bowen* and the Soller memorandum, it can be said to have adopted their interpretation. Gov't Pet. 19–20; ANC Pet. 24. But again, there was no settled administrative or judicial interpretation "so broad and unquestioned" that the Court "would be justified in presuming Congress, by its silence, impliedly approved." *Jama*, 543 U.S. at 349, 351 (quotation marks omitted); *see also Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 299 (1995).

Petitioners attribute particular importance to Congress's action in 1988, when it purportedly "reenacted" the "Indian tribe" definition without change after the *Bowen* decision. Gov't Pet. 20; ANC

Pet. 24, 29, 32. But that amendment simply allowed tribes to recover indirect contract-support costs. Consistent with that limited purpose, Congress added new definitions and merely renumbered existing definitions, including the "Indian tribe" definition. *See*, *e.g.*, S. Rep. No. 100-274, at 16, 67–68 (1987).

3. Nor does the fact that Congress has employed the ISDA definition in other statutes, Gov't Pet. 20–21; ANC Pet. 9, connote an intent to accord ANCs per se tribal status in those statutes or in the CARES Act. To the contrary, many of the statutes have no possible application to ANCs at all, *e.g.*, 16 U.S.C. § 539p (Southeast Arizona Land Exchange); 7 U.S.C. § 2009bb-1 (Northern Great Plains Regional Authority), including because their subject matter is plainly limited to federally recognized tribes. For example, the Bulletproof Vest Partnership Grant Program provides "grants to States, units of local government, and Indian tribes to purchase armor vests for use by State, local, and tribal law enforcement officers and State and local court officers." 34 U.S.C. § 10531. ANCs, however, do not have such officers; only Tribal governments do.

The ANCs point to the Native American Housing Assistance and Self Determination Act (NAHASDA), which defines the term "federally recognized tribe" using the "Indian tribe" definition and by reference to ISDA. *See* ANC Pet. 29–31. But their argument assumes what it is trying to prove: that ANCs satisfy the ISDA definition regardless of the recognition clause. If one instead adheres to the plain text, the NAHASDA definition simply reinforces

the court of appeals' conclusion that "Indian tribe" status under ISDA is synonymous with federal recognition.

Petitioners also contend that Congress has "presuppose[d]" that ANCs meet the ISDA definition in enacting several statutes that explicitly *exclude* ANCs. Gov't Pet. 22; ANC Pet. 9–10, 25 (citing 25 U.S.C. § 3501(4) and 42 U.S.C. § 9601(36)). But those statutes are fully consistent with the court of appeals' interpretation because they can be understood to provide that ANCs are to be excluded from their ambit *even if* they come to satisfy the recognition clause. That is, Congress *forever* excluded ANCs from attaining "Indian tribe" status under those statutes–statutes that concern energy development and hazardous substances regulation, areas in which ANCs have extensive business dealings and where any role could be problematic. Nor can anything be gleaned from the biomass demonstration project, Pub. L. No. 115-325, § 202(c)(2), 132 Stat. 4445 (2018), which created an Alaska demonstration project that is open to both "Indian tribes" *and* "tribal organizations." *See supra* at 5, 20.

4. None of these statutes, of course, is at issue in this case. And petitioners' examples also fail to account for the host of statutes squarely at odds with their position. For example, Congress has enacted language placing ANCs separate and apart from the recognition clause, *e.g.*, 40 U.S.C. § 502(c)(3)(B); 44 U.S.C. § 3601(8); amended statutes that already used the ISDA definition to specifically add ANCs, *e.g.*, 33 U.S.C. § 2243(a); Pub. L. No. 114-322, § 1202(c)(1),

130 Stat. 1628 (2016); Pub. L. No. 113-121, § 2105, 128 Stat. 1193 (2014); and included ANCs by omitting the recognition clause altogether, *e.g.*, 16 U.S.C. § 470bb(5); 16 U.S.C. § 4302(4); 20 U.S.C. § 1401(13). None of this would have been necessary if petitioners' countertextual interpretation were correct.

III. The Court Should Also Deny Review Because Tribal Governments Urgently Need the Remaining Title V Funding To Combat the Pandemic

The decision below creates no circuit conflict and is indisputably correct. But beyond that, practical exigencies also counsel strongly in favor of denying the petitions. Tribal governments are in dire need of the remaining Title V funds now. Congress intended for Treasury to pay Tribal governments $8 billion by April 26, 2020, to fund emergency expenditures. *Supra* at 4. More than 570 federally recognized Indian tribes, including 229 Alaska Native villages, desperately need these funds as COVID-19 continues to ravage their communities. Respondent Navajo Nation alone has confirmed 19,766 positive cases with 722 confirmed deaths as of December 14.[6]

With regular sources of governmental revenue devastated, Tribal efforts to fight the pandemic have depended on CARES Act funding. Tribal governments have undertaken significant public health initiatives to stem the virus. But little to no money is left to meet the current surge. The government has indicated that approximately $533

[6] Navajo Nation COVID-19 Dashboard, https://bit.ly/3nofFbW.

million in Title V funds remain available for disbursement upon the resolution of this litigation. *See* Brief for Appellees, *Shawnee Tribe* v. *Mnuchin*, No. 20-5286 (D.C. Cir. Oct. 26, 2020), 2020 WL 6286986, at *7. Respondents and other Tribal governments, including Alaska Native villages, need those funds for immediate public health purposes, including test kits and PPE, vaccine dissemination, quarantine facilities, communicating and enforcing public health orders, and hiring additional contact tracers and first responders.

While the government indicates that ANCs need Title V funds for economic stimulus, Gov't Pet. 7, 33, ANCs and their diverse subsidiaries in the oil, construction, and other industries have already received tens of millions of dollars for that purpose under the CARES Act Paycheck Protection Program,[7] not to mention other titles of the Act directed at private businesses. Congress can, of course, appropriate additional relief funds for ANCs if it so chooses.[8] But Congress enacted Title V to provide relief to *governments* to support the emergency governmental actions necessary to meet the public health crisis. 42 U.S.C. § 801(d)(1).

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[7] ProPublica, *Approved Loans for Alaska Organizations*, https://bit.ly/2IOwfCJ; AK Public Media, *Wealthy and Well-Connected Alaska Firms Among Those Gaining Most from PPP* (July 8, 2020), https://bit.ly/3aaH2mb.

[8] For example, a recently released draft bill, co-sponsored by Senator Murkowski, would provide relief funds to "Native Corporation[s]" in addition to "Tribal government[s]" and "Tribal organization[s]." Bipartisan State and Local Support and Small Business Protections Act, S.___, 116th Cong. § 602(a)(2), (f)(1) (Dec. 2020), https://bit.ly/37kJvs5.

The ANCs assert that Alaska Natives not enrolled in any federally recognized village "will never receive any federal emergency assistance at all" unless Treasury pays Title V funds directly to ANCs. ANC Pet. 35. That is simply incorrect. First, the ANCs misapprehend Title V's purpose, which is to provide budgetary relief to governments, not individual benefits to a limited class of persons, Native or otherwise. Second, the ANCs ignore that Alaska Natives, like all Indians in the United States, are citizens of the states and cities where they live, regardless of whether they are also tribal citizens. *See*, *e.g.*, 43 U.S.C. § 1626(a) (eligibility for services as state citizens). Those governments are bound to their citizens and communities, no less than Tribal governments.

Thus, as the court of appeals understood, Gov't Pet. 25a, the State of Alaska is providing Title V relief to Alaska Natives, including those not enrolled in any village. Of the $1.25 billion in Title V funds received by the State, it paid $331 million to the Alaska Department of Health and Social Services and $568 million to cities and towns to address the crisis.[9] Anchorage, for example, has devoted more than $150 million to its direct municipal response and to services such as rental, mortgage, and homelessness relief; family support; and public health and safety

[9] Anchorage Daily News, *Most of Alaska's $1.5 Billion Federal Pandemic Aid Package Remains Unspent* (July 22, 2020), https://bit.ly/2LqfVJh.

programs.[10] Non-enrolled Alaska Natives benefit from these State and city governmental actions, just as they benefit from the Tribal governmental response if they live in a Native village community. HHS has also provided tens of millions of dollars in emergency funding to Alaska Native health care facilities.[11]

In both the district court and the court of appeals, the parties agreed to highly expedited briefing and argument schedules, which the courts accommodated, because all understood the importance of resolving this litigation so that duly qualified Tribal governments can promptly receive and expend the disputed Title V funds. The result was a carefully considered, unanimous decision by the court of appeals. Granting discretionary review would only further delay Treasury's distribution of the remaining funds to the Alaska Native villages and other Tribal governments that so desperately need them.

To the extent that petitioners raise broader issues involving the interpretation of ISDA, the Court can comfortably wait for an actual circuit conflict, and

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[10] Anchorage Assembly, *CARES Act Funding Impacts*, https://bit.ly/2KjEsPL.

[11] Health Resources & Servs. Admin., *Alaska CARES Supplemental Funding Awards*, https://bit.ly/3qUS7O0 ($16 million in CARES funding alone); *see also* Cong. Research Serv., *COVID-19 and the Indian Health Service* (May 1, 2020), https://bit.ly/387mlok (IHS COVID funding efforts); U.S. Dep't of Health & Human Servs., *HHS Announces $500 Million Distribution to Tribal Hospitals, Clinics, and Urban Health Centers* (May 22, 2020), https://bit.ly/3gNzp6g.

a case actually involving ISDA, to address them. No compelling reason exists to grant review of the court of appeals' unanimous (and plainly correct) decision.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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