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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 801(g) provides:

(1) Indian Tribe

The term "Indian Tribe" has the meaning given that term in section 5304(e) of Title 25.

. . .

(5) Tribal Government

The term "Tribal government" means the recognized governing body of an Indian Tribe.

STATEMENT OF THE CASE

On March 27, 2020, Congress passed the CARES Act, to respond to a public health emergency and the resultant economic harm caused by COVID-19. The CARES Act contained six titles. Title V of the CARES Act solely provided funds "to States, Tribal governments, and units of local government." 42 U.S.C. § 801(a)(1). The recipient governments could only use the funds to cover previously unbudgeted "necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19)[.]" *Id*. § 801(d)(1).

Other titles of the CARES Act provided hundreds of billions of dollars of relief to corporations and

individuals. Alaska Native Corporations (ANCs) received money under those titles. [1]

Of the 150 billion dollars of relief to governments under Title V of the CARES Act, 139 billion dollars was earmarked for states. That money was allocated based upon state population, but with a minimum payment of 1.25 billion dollars to each of the 21 states with the smallest populations. Enrolled Indians and those who are racially Indian who live in Alaska and in other states were included in determining the state population. *Id.* § 801(b)(4). As the state with the third smallest population, Alaska received more money per capita than 47 other states. https://crsreports.congress.gov/product/pdf/R/R46298.

Congress directed that eight billion dollars of funds for governments had to be provided to the recognized governing bodies of Indian tribes. *Id.* § 801(a)(1), (2).[2] There are 574 recognized governing bodies of Indian tribes, www.bia.gov/tribal-leaders directory, one for each of the 574 recognized Indian tribes. 221 of these recognized tribes are in the State of Alaska. 85 Fed. Reg. 5462 (Jan. 30, 2020).

For the eight billion dollars allocated to federally recognized tribal governments, Congress did not

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[1] https://www.alaskapublic.org/2020/07/08/wealthy-and-well-connected-alaska-firms-among-those-gaining-most-from-ppp/

[2] In addition to the 139 billion for states and 8 billion for recognized governing bodies of tribes, the remaining 3 billion under Title V was for the governments of the District of Columbia and federal territories.

provide a specific allocation formula, and instead directed the Secretary of the Treasury to divide that money between the federally recognized governing bodies of the tribes "based on increased expenditures of each such Tribal government (or a tribally owned entity of such Tribal government) relative to aggregate expenditures in fiscal year 2019 by that Tribal government (or tribally owned entity) and determined in such manner as the Secretary determines appropriate. . . ." *Id.* ¶ 801(c)(7).

The Secretary decided that he would allocate 4.8 billion dollars based upon tribal population, and 3.2 billion dollars based upon tribal "employment and expenditure data." https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf. For the 4.8 billion allocated by population, the Secretary decided that he would use the tribal population statistics from the Indian Housing Block Grant program, with a minimum payment to a tribe of $100,000. *Id.*

Each of the federally recognized tribes in Alaska that applied for funds received funds based upon its population, using the above methodology. As the United States explains in its brief to this Court, the tribes in Alaska, like the tribes in the Lower 48, can use the money that they receive to provide economic assistance to businesses in their communities. U.S. Pet. at 7.

But the Secretary also decided that he would give an estimated 535 million dollars earmarked for

governing bodies of Indian tribes to for-profit ANCs, with each ANC receiving at least $100,000, and with larger corporations receiving millions of dollars. The ANCs are chartered under Alaska state law. 16 U.S.C. § 1606. ANCs are not federally recognized Indian tribes. 85 Fed. Reg. 5462 (Jan. 30, 2020) (the BIA list of all federally recognized tribes does not include any ANC). ANCs do not have a government-to-government relationship with the United States. *Id.* ANCs have numerous shareholders who are not Indians as that term is used in federal Indian law, and the ANCs owe fiduciary duties, as defined by Alaska state law, to their Indian and non-Indian shareholders. Alaska Stat. § 10.06.450(b); https://www.gao.gov/assets/660/650857.pdf.

When the federally recognized tribes learned that the Secretary had decided to give the ANCs money which Congress had earmarked for federally recognized tribal governments, three sets of tribal plaintiffs brought suits challenging the Secretary's decision, and numerous other tribes and tribal organizations filed amicus briefs in support of the plaintiff tribes.

REASONS FOR DENYING CERTIORARI

This Court should deny the Petitions for a writ of certiorari because this case does not present any conflict between the circuits and does not present a question of substantial legal importance.

The issue in the current case is whether the ANCs are eligible for funding under the CARES Act. The legal issue is determined by the canons of construction of federal statutes, and the current case is the only case that will ever require application of those canons to the provisions of the CARES Act at issue in this case. The issue is not, as Petitioners claim, whether they are eligible for funding under the ISDEAA. Petitioners are not, in this case, seeking funding under the ISDEAA, nor do Petitioners claim that any ANC has been denied funding that it is eligible for under the ISDEAA. In fact, directly to the contrary, the ANCs acknowledge that some ANCs do receive federal funds under the ISDEAA.

The current case therefore is not a vehicle for determining whether any ANC would be eligible for funding under the ISDEAA.

In the operative language of the CARES Act as applicable to this case, Congress directed the Secretary of the Treasury to provide eight billion dollars of relief to the "*recognized governing body of an Indian tribe.*" 42 U.S.C. § 801(g)(5). The Circuit Court correctly held that ANCs are not recognized Indian tribes, and therefore are not eligible for funding under Title V of the CARES Act. ANC App. 13-14. It correctly held that "recognized" is a term of art in Indian law—it means the recognition by the United States of a government-to-government political relationship between the United States and a tribe. The District Court then held that this requirement of federal recognition, which is expressly stated in 42 U.S.C. § 801(g)(5), is part of the

definition of Indian tribe. It concluded its opinion by stating: "We hold that Alaska Native Corporations are not eligible for funding under Title V of the CARES Act." *Id.* at 26.

The Circuit Court's conclusion that ANCs are not recognized governing bodies of Indian tribes is uniformly supported by federal legislative and judicial acts. The United States maintains a list of federally recognized tribes, 85 Fed. Reg. 5462 (Jan. 30, 2020), and a list of federally recognized tribal governments, www.bia.gov/tribal-leaders directory. As all of the parties in this case acknowledge ANCs are not included in either list.

Petitioners' legal and logical flaw is apparent from the wording of their questions presented. The ANCs assert that the question presented is:

> Whether ANCs are "Indian tribes" under ISDEAA and *therefore* eligible for emergency relief under Title V of the CARES Act."

ANC Pet. at i (emphasis added).

The obvious logical error in the petition is that the conclusion simply does not flow from the premise, and that logical error eviscerates Petitioners" claim that this is one of the few cases that this Court should hear on the merits. Their unstated premise is that if they are deemed to be Indian tribes under the ISDEAA, then the are the recognized governing bodies of Indian tribes under the CARES Act. But as the Circuit Court correctly held, they are not recognized governing

bodies of Indian tribes, because "recognized" references the political relationship between a tribe and the United States—a political relationship which ANCs simply do not have.

Petitioners argue that "whether ANCS are Indian tribes under ISDEAA" is a substantial federal question for which there is sufficient divergence in the Circuit courts. Respondent agreed with other responding tribes that Petitioner is wrong; but more important, the Ute Tribe is not going to "take the bait" that Petitioners have set out. This Court also should not take the bait. The issue of whether some ANCs might qualify for federal funds under the ISDEAA is not presented in this case and Petitioners' clever attempt to hide this fundamental flaw in the petition for a writ of certiorari cannot change the fact.

Regardless of whether ANCs are Indian tribes under the ISDEAA, they are simply not eligible for relief under Title V of the CARES Act. ANCs are eligible for relief under other sections of the CARES Act, and they have received substantial emergency relief under those sections. Their attempt to also obtain relief that Congress provided for governments must be based upon the CARES Act, not the ISDEAA.

This case is not a vehicle for resolving whether ANCs are Indian tribes under the ISDEAA. It would only be a vehicle for resolving a run of the mill application of settled canons of statutory construction to a single, unique federal statute, that will not apply to any other case ever.

This case also is not a vehicle for resolving the alleged conflict between the circuits on interpretation of the ISDEAA. Instead, this case would only be a vehicle for interpreting the applicable provision of the CARES Act, and there is no conflict whatsoever on that issue of statutory interpretation because there is no other case, and never will be another case, seeking to interpret the statutory provision at issue.

I. There is no split of authority which can be resolved in this case.

A. There is no split of authority in the lower courts, and never will be a split of authority in the lower courts, on the interpretation on whether ANCs qualify for funds under Title V of the CARES Act.

As noted above, the operative provision of the CARES Act directs that eight billion dollars of funds had to be divided between the recognized governing bodies of Indian tribes.

The CARES Act provided one-time funding. The current case is the *only case* in which the federal courts will have to decide whether the ANCs are eligible for funding under that operative language. Therefore, there is no split of authority in the lower courts and there never will be.

B. The lower courts uniformly hold that ANCs do not have recognized governing bodies of an Indian Tribe.

In the CARES Act, Congress expressly allocated Title V funds to the recognized governing bodies of Indian tribes. It also included this same restriction to recognized tribes by incorporating a definition that an Indian tribe is one which is "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 2504(e).

Case law uniformly holds that ANCs do not have recognized governing bodies of an Indian tribe. *E.g.*, *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, ANC App. 1*; Seldovia Native Association v. Lujan*, 904 F.2d 1335 (9th Cir. 1990); *Eaglesun Systems Products, Inc. v. Association of Village Council Presidents*, No. 13-CV-0438-CVE-PJC, 2014 WL 1119726, at *6 (N.D. Okla. Mar. 20, 2014); *Pearson v. Chugach Government Services Inc.*, 669 F. Supp. 2d 467, 469 n.4 (D. Del. 2006). *See also* Alaska Am. Br. ¶I (discussing that ANCs are not federally recognized tribes).

These decisions are based upon one of the foundations of federal Indian law—that there is a government-to-government relationship between the United States and the tribal governments that predate the United States and had sovereignty over the lands that are now the United States. *E.g., Franks Landing Indian Cmty. v. N.I.G.C.*, 918 F.3d 610, 613 (9th Cir. 2019) (citing H.R. Rep. No. 103-781, at 2) ("'Federal

recognition' of an Indian tribe is a legal term of art meaning that the federal government acknowledges as a matter of law that a particular Indian group has tribal status."); *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 131 (D.D.C. 2015); *Stand Up for Ca.! v. U.S. D.O.I.*, 204 F. Supp. 3d 212, 288 (D.D.C. 2016). They are also consistent with the federally maintained list of federally recognized tribes and federally recognized tribal governments, discussed above.

No Court has ever held that ANCs have recognized governing bodies of Indian tribes. In fact, every court that has reached the issue has held that ANCs do not have recognized governing bodies of Indian tribes. Petitioners attempt to convince this Court that it should grant a writ of certiorari to resolve a difference between the Ninth Circuit and the D.C. Circuit. It is therefore notable that the Ninth Circuit is one of the courts that has as held that ANCs do not have recognized governing bodies of an Indian tribe. *Seldovia Native Association*, 904 F.2d 1335. In *Seldovia*, an ANC argued it was a recognized governing body of an Indian tribe and therefore could sue the State of Alaska in federal court under 28 U.S.C. § 1392. *Id.* at 1350-51. It argued that ANCSA had established ANCs, *see* 16 U.S.C. §§ 1606-1607, providing them certain benefits, and that ISDEAA treated them as Indian tribes. *See* 25 U.S.C. § 5303(e). The Ninth Circuit flatly rejected that argument: "Unlike the Native Alaskan Village in *Native Village of Noatak v. Hoffman*, [the ANC] is not a governmental unit with a local governing board organized under the Indian Reorganization Act[.] Because

[the ANC] is not a governing body, it does not meet one of the basic criteria of an Indian tribe." *Seldovia*, 904 F.2d at 1350 (citations omitted). Every court since *Seldovia* has reaffirmed that holding.

Similarly, in *Eaglesun Systems Products,* the Northern Oklahoma District Court held that while ANCs "are recognized as tribes for limited purposes, . . . they do not possess key attributes of an independent and self-governing Indian tribe . . . [and] are not governing bodies." No. 13-CV-0438-CVE-PJC, 2014 WL 1119726, at *6 (N.D. Okla. Mar. 20, 2014) (citation omitted). In *Pearson*, the Delaware District Court observed, "ANCs are not federally recognized as a 'tribe' when they play no role in tribal governance." 669 F. Supp. 2d 467, 469 n.4 (D. Del. 2006) (citation omitted). That court was unable to "find [any] evidence to suggest[ ] that [ANCs] are governing bodies." *Id.*; *cf. Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1240 (D. Alaska 2019) ("While Alaska Native Corporations are owned and managed by Alaska Natives, they are distinct legal entities from Alaska Native tribes." (footnotes omitted)); *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 213 (4th Cir. 2007) ("While the sovereign immunity of Indian tribes 'is a necessary corollary to Indian sovereignty and self-governance,' Alaska Native corporations are not comparable sovereign entities[.]" (citations omitted)).

The leading treatises on Alaska Native and Federal Indian law agree: ANCs are not recognized governing bodies, are not tribal governments, and do not

possess any aspect of tribal sovereignty. DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 177 (3rd ed. 2012) ("At times the tribes and corporations have seemed at odds as the corporations are defined as 'tribes' in some post-ANCSA program and service legislation. It is clear, though, that as a matter of common law that the corporations are not tribes in the political sense of the term, nor are they recognized as such."); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3][d][i], at 353 (Nell Jessup Newton ed. 2012 ed. Sup. 2019) ("Tribal governments, as opposed to regional and village corporations, are the only Native entities that possess inherent powers of self-government . . . . The Native regional and village corporations are chartered under state law to perform proprietary, not governmental, functions.").

The Circuit Court decision that ANCs are not federally recognized tribal governments is consistent with these legal authorities, and consistent with the foundational requirement of federal Indian law. There is no divergence between the holding of the Circuit Court and decisions of other courts.

C. The current case is not a vehicle for resolving an alleged difference between the Ninth Circuit and the District of Columbia Circuit.

Faced with this uniform case law that ANCs are not recognized governing bodies of Indian tribes, Petitioners assert that the decision below conflicts with

the Ninth Circuit's decision in *Cook Inlet Native Association v. Bowen*, 810 F.2d 1417 (9th Cir. 1987). In *Cook Inlet Native Association*, the Ninth Circuit concluded that some ANCs can be considered Indian tribes under the ISDEAA.

Petitioners claim of a conflict is wrong. The District of Columbia Circuit Court issued a decision on 42 U.S.C. § 801 of the CARES Act. It held, consistent with all case law, that ANCs are not recognized tribal governments. It held that ANCs are not eligible because they are not recognized tribes. It held that this is established by the definition of Indian tribe, but it also repeatedly noted that definition of tribal government in the CARES Act includes that same restriction to recognized tribes. The Act defines "tribal government" as "the recognized governing body of an Indian Tribe." 42 U.S.C. § 801(g)(5).

One could contend that District of Columbia Circuit Court's interpretation of 42 U.S.C. § 801 might presage that the District of Columbia Circuit would hold that ANCs cannot obtain federal funds under the ISDEAA. Whether that is a legitimate concern is debatable, but the time for bringing such a case to this Court would be after there is such decision. Petitioners contend that the decision below and the decision in *Cook Inlet Native Association* "*could*" result in a conflict, and that if that were to occur only this Court could resolve that conflict. ANC Pet. 20-21, Petitioners then rely upon a parade of horribles that they claim would flow from such a conflict. In this case, as in all or nearly all other cases when a petitioner asserts that a petition

for writ of certiorari should be granted based upon conjectured or possible consequences, the Court's response should be to deny the petition. Respondent does not believe the parade of horribles predicted by Petitioners will occur. If it does, this Court could grant certiorari in a case that actually presents the legal issue.

II. The arguments of Petitioners, the State of Alaska, and the Alaska delegation to Congress, that more money should flow to Alaska than to other states is legally immaterial and factually incorrect.

In their amicus brief to this Court, the State of Alaska and the three members of Alaska's delegation to Congress argue that as a matter of public policy, the CARES Act should be interpreted so that an additional 535 million dollars would flow to Alaska corporations, instead of to tribes throughout the United States.

Petitioners and amicus below made those same arguments, and the Circuit Court succinctly and correctly dismissed those arguments. ANC App. 26. The Court correctly responded that the issue presented is one of statutory interpretation, based upon the statutory text, not one of public policy. If Congress had decided to give Alaska 535 million dollars more, the court would enforce that, but here it decided to give that 535 million to the recognized governing bodies of Indian tribes, which includes tribes in Alaska and throughout the Lower 48 states. The arguments by one state or one state's congressional delegation that they should be

given more money was an issue for all of Congress. Every state and every tribe in the United States is being harmed by COVID-19. Congress decided to give Alaska more Title V CARES Act funds per capita than all but two other states. Alaska's assertion that they want more is not a reason for granting a writ of certiorari.

The policy arguments by the State, its congressional delegation, and the ANCs are also without merit because the arguments are factually incorrect. The ANCs and their supporters base most of their policy arguments upon an assertion that a large portion of people of Indian ancestry in Alaska are not enrolled in an Indian tribe and that a large percentage of enrolled Indians in Alaska live outside of their tribe's service area or tribal community.

Their policy argument regarding those who are unenrolled is legally immaterial. Federal Indian law is based upon a political relationship between the person and his or her tribe, and a federally recognized political relationship between that tribe to the United States. The relationship of the person to a tribe is based upon enrollment in the tribe or similar processes that demonstrate that a tribe recognizes a person as a member of its tribe. It is true that there are many people of Indian ancestry in Alaska who are not enrolled, but the same is equally true in the lower 48 states.[3]

[3] The BIA website states that its most recent statistical analysis showed that that only about 44% of those who identified as racially Indian were enrolled. https://www.bia.gov/frequently-asked-questions. https://www.bia.gov/frequently-asked-questions,

More importantly for current purposes, federal Indian law is not based upon racial ancestry. *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974).

Their policy argument that many enrolled or unenrolled Indians live outside of their tribal communities is also factually true, but contrary to their claim, that does not make Alaska unique. In fact, the percentage of enrolled Indians who live in their tribal communities is substantially higher in Alaska than it is in the Lower 48 states.[4]

In Alaska, just as in the Lower 48 states, tribes can and do provide assistance to Indians who do not live on their reservation. Tribes can and do provide assistance to those who are not enrolled members, but who live within the tribal community. Under the CARES Act, tribes in Alaska and in the Lower 48 states can provide funds to non-profit entities or even to for-profit corporations like the ANCs, where that money will then be used for the limited purposes defined by the CARES Act. U.S. Pet. at 7 (explaining how tribes can use CARES Act funds). ANCs are not unique. Tribes in the Lower 48 states have created or provided funding to numerous "tribal organizations." 25 U.S.C. § 5321(a)(1).

How Large is the national American Indian and Alaska Native population.

[4] Nationwide, 22 percent of Indians live within Tribal statistical areas. https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf at 13. In Alaska, over 50 percent live within their tribal statistical area (78,141 out of 138,312) their tribal statistical area. *Id.* at tables 2 and 5.

The ANCs assert this Court should grant a Petition for writ of certiorari, so that this Court can determine whether the ANCs would be better than the recognized tribes at providing COVID-19 related relief to Indians in Alaska. Instead of asking this Court, or attempting to get the United States to divert money that was earmarked for the recognized tribal governments, the ANCs should make their pitch for money to the State of Alaska and to the federally recognized tribes in Alaska—the actual governments in Alaska. Their policy argument that they should obtain money should be made to the policy setters, not the Court.

CONCLUSION

For the reasons stated above, this Court should deny the petition for a writ of certiorari.

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