No. 20-544

In the
Supreme Court of the United States

ALASKA NATIVE VILLAGE CORPORATION ASSOCIATION, INC., et al.,

Petitioners,

JANET L. YELLEN, in her official capacity as Secretary of the Treasury,

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al.,

Respondents.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

The Indian Self-Determination and Education Assistance Act (ISDEAA) defines "Indian tribe" as:

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

25 U.S.C. §5304(e). Consistent with Congress' express inclusion of "Alaska Native … regional [and] village corporation[s]" (ANCs) in the text, the Executive has long treated ANCs as "Indian tribes" under ISDEAA and the dozens of statutes that incorporate its definition. The Ninth Circuit, home to all ANCs, likewise has long held that ANCs are "Indian tribes" under ISDEAA. Thus, for decades ANCs have played a critical role in distributing federal benefits to Alaska Natives. Accordingly, when Congress earmarked $8 billion in Title V of the CARES Act for Indian tribes and incorporated the ISDEAA definition, the Treasury Secretary quite naturally obligated part of those funds to ANCs. Yet in acknowledged conflict with the Ninth Circuit and long-settled agency practice, the decision below holds that ANCs do not satisfy the ISDEAA definition that the CARES Act incorporates.

The question presented is:

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

PARTIES TO THE PROCEEDING

Petitioners, intervenor-defendants below, are the Alaska Native Village Corporation Association, the Association of ANCSA Regional Corporations Presidents/CEOs, Ahtna, Inc., Akiachak, Ltd., Calista Corporation, Kwethluk, Inc., Napaskiak, Inc., Sea Lion Corporation, and St. Mary's Native Corporation.

Respondents, plaintiffs below, are Ute Tribe of the Uintah and Ouray Indian Reservation, Cheyenne River Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Nondalton Tribal Council, Arctic Village Council, Native Village of Venetie Tribal Government, Confederated Tribes of the Chehalis Reservation, Tulalip Tribes, Houlton Band of Maliseet Indians, Akiak Native Community, Asa'carsarmiut Tribe, Aleut Community of St. Paul Island, Pueblo of Picuris, Elk Valley Rancheria California, San Carlos Apache Tribe, Quinault Indian Nation, and Navajo Nation.

The defendant below was Steven T. Mnuchin, whom the plaintiffs sued in his official capacity as Secretary of the United States Department of the Treasury. The defendant is now Janet L. Yellen, the current Secretary of the Treasury, who is substituted as the proper party by operation of law.

CORPORATE DISCLOSURE STATEMENT

Each petitioner certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

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INTRODUCTION

Alaska and Alaska Natives have a unique history that is reflected in an equally unique statute, the Alaska Native Claims Settlement Act of 1971 (ANCSA). ANCSA eschewed the reservation approach that prevailed in the Lower 48 in favor of establishing novel entities—Alaska Native corporations (ANCs)—to receive the proceeds of a comprehensive settlement of Native land claims and to play an ongoing role in the lives of Alaska Natives. ANCs were innovative Native entities with no direct analog in the lives of Natives in the Lower 48. Accordingly, when Congress enacted the Indian Self-Determination Education and Assistance Act of 1975 (ISDEAA) just a few years after ANCSA to shift responsibility for providing a wide range of special-federal-Indian benefits from federal agencies to Native entities, the question arose whether to include ANCs in that statute and its definition of "Indian tribe." Congress answered that question in the affirmative by expressly including "any … regional or village corporation … established pursuant to the Alaska Native Claims Settlement Act" in ISDEAA's definition of "Indian tribe." The Executive Branch promptly confirmed that ANCs are "Indian tribes" under ISDEAA, the Ninth Circuit—home to every ANC—affirmed that view in 1987, and Congress reenacted ISDEAA's definition without change the following year.

ANCs' status as "Indian tribes" under ISDEAA has been a fact of life for Alaska Natives in receiving federal services, for ANCs in participating in special-federal-Indian programs, and for Congress in defining "Indian tribe" in new federal statutes. Indeed,

Congress has incorporated ISDEAA's ANC-inclusive definition of "Indian tribe" into dozens of federal statutes whenever it has wanted to include ANCs among the eligible participants. And Congress did so again last year in the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

Consistent with the long-settled understanding that ISDEAA's definition includes ANCs, the Treasury Secretary allocated some of the relief funds available under the CARES Act to ANCs. That decision was challenged by three sets of tribes, some of which contended that, by virtue of the use of the word "recognized" in its subordinate "eligibility clause," ISDEAA's definition (and therefore the CARES Act's definition) is limited to tribes formally recognized pursuant to the Federally Recognized Indian Tribe List Act of 1994 (List Act), or FRTs, a category that excludes ANCs. And in the decision below, the D.C. Circuit agreed, concluding that because no ANC is an FRT, no ANC is an "Indian tribe" under either ISDEAA or the CARES Act. In other words, it concluded that a statutory definition that expressly "include[s]" ANCs actually excludes every ANC.

As the Ninth Circuit observed in rejecting that argument decades ago, that conclusion "def[ies] common sense." *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1474 (9th Cir. 1987). It violates the cardinal rule of statutory construction that every word in a statute must be given effect, and the even more basic rule that when Congress acts to add something to a statute expressly, its actions must be given effect, not be defeated by implications drawn from a

subordinate clause. It overrides the long-settled position of the Executive Branch—views that Congress confirmed as correct by reenacting ISDEAA's definition after the Executive Branch position was not only clearly announced but also endorsed by the Ninth Circuit. And it rests on a fundamentally flawed "term-of-art" construction of the word "recognized."

Worst of all, by upending the long-settled legal landscape, the decision below shatters the basic infrastructure of Native life in Alaska, threatening to leave tens of thousands of Alaska Natives excluded from scores of special-federal-Indian-law programs in which Congress intended them to partake via ANCs. In doing so, it effectively punishes Alaska Natives for Congress' choice in ANCSA to eschew reservations in favor of unique, innovative, but distinctly Native, entities. Simply put, there is "no reason that the Congress would exclude ANCs (and thus exclude many remote and vulnerable Alaska Natives) from receiving and expending much-needed [CARES Act] funds," Pet.App.28 (Henderson, J., concurring), let alone from providing all the many critical services and benefits that ANCs have been providing Alaska Natives for decades pursuant to ISDEAA. The contrary conclusion reached below defies text, context, and common sense. This Court should reverse.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 976 F.3d 15 and reproduced at Pet.App.1-28. The district court's summary judgment opinion is reported at 471 F.Supp.3d 1 and reproduced at Pet.App.33-79.

JURISDICTION

The D.C. Circuit issued its opinion on September 25, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of ANCSA, ISDEAA, and the CARES Act are reproduced at Pet.App.132-77.

STATEMENT OF THE CASE

A. Legal Background

1. Congress' unique approach vis-à-vis Alaska Natives

"Alaska is often the exception, not the rule." *Sturgeon v. Frost*, 136 S.Ct. 1061, 1071 (2016). That statement is particularly apt than when it comes to Alaska's Natives. For most of the nineteenth century, the prevailing federal policy vis-à-vis Native peoples in the Lower 48 was to isolate them on reservations. William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. Kan. L. Rev. 415, 458 (2016). That policy never found its way to Alaska, which the United States acquired from Russia in 1867. In part because of the vastness, remoteness, and harshness of the territory, Alaska's white settlers took little action to claim or conquer most Native lands. *See Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 51 (1962). As a result of those geographical dynamics and changing views on reservations in general over time, "[t]here was never a [coordinated] attempt in Alaska to isolate Indians on reservations." *Id.* Nor did the United States enter into treaties with "Alaska Native groups designating lands which Natives were entitled to

occupy or defining their rights to the taking of fish and game." *United States v. Atl. Richfield Co.*, 435 F.Supp. 1009, 1015 (D. Alaska 1977).

In 1884, Congress provided that Alaska Natives "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them," but "reserved" "the terms under which [they] may acquire title to such lands … for future legislation by Congress." Act of May 17, 1884, §8, 23 Stat. 24, 26; *see also* Act of June 6, 1900, §27, 31 Stat. 321, 330 (similar). That "future legislation" was long in coming. Although it was settled by the early-twentieth century that Alaska Natives' "status is in material respects similar to that of the Indians of the United States" for purposes of federal Indian law, *Status of Alaska Natives*, 53 Interior Dec. 593, 605 (Feb. 24, 1932); *see also id.* ("[T]he natives of Alaska … are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States."), uncertainty regarding their status, rights, and land claims persisted even after Alaska entered the Union as a state in 1958. *Sturgeon*, 136 S.Ct. at 1065.

The issue finally came to a head in the 1960s after the discovery of oil at Prudhoe Bay, and it culminated with the enactment of the highly innovative ANCSA in 1971. *See* 85 Stat. 688 (codified as amended at 43 U.S.C. §§1601-24). Like all federal "Indian legislation," ANCSA was "enacted … pursuant to [Congress'] plenary authority … to regulate Indian affairs." 101 Stat. 1788, 1789 (1988) (codified at 43 U.S.C. §1601 note). Indeed, because ANCSA involved the resolution and relinquishment of Native claims to

nearly all of Alaska's land and resources, it represented a quintessential exercise of that power. But ANCSA broke sharply from the usual mold. Rather than borrow concepts that were neither wholly successful in the Lower 48 nor well-suited for Alaska's unique history and geography, Congress adopted an inventive and sui generis approach.

ANCSA mandated the "fair and just settlement" of all Alaska Native land claims to be effectuated "with maximum participation by Natives." 43 U.S.C. §1601. It accomplished that by providing clear title in fee to over 40 million acres of land and substantial funds in exchange for the settlement of vast Native land claims. *Id.* §§1605, 1608. Because of Alaska's unique history and geography, many of the existing Native tribes were centered in relatively small coastal villages far removed from much of the land conveyed in ANCSA. To address that problem and to equitably distribute the land and settlement funds, ANCSA mandated the creation of 12 "regional corporations" and 200-plus "village corporations" that would take title to and manage the lands, administer the settlement funds, and act for the benefit and welfare of Alaska Natives in perpetuity. *Id.* §§1606-1607.[1] Indeed, "the only active role assigned to the 'Native villages' in the implementation of ANCSA was to organize Village Corporations as a prelude to receiving lands or benefits under the Act." Solicitor's Op. M-36975, at 77 (Jan. 11, 1993),

[1] The village corporations received surface rights; the regional corporations received subsurface rights to all village land within their respective regions, plus surface and subsurface rights to non-village land acquired by the regional corporation.

https://on.doi.gov/2ZxJTyW; *see generally Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523-24 (1998).[2]

In keeping with their creation by Congress and unique role in implementing ANCSA, ANCs are no ordinary corporations. Whereas a typical corporation exists to maximize shareholder value for a constantly shifting set of shareholders, ANCs are distinctly Native entities (established pursuant to an exercise of the Indian Commerce Clause) that exist to provide benefits and services to promote Natives' welfare and to manage lands and funds provided in exchange for the settlement of Native land claims. *See* 43 U.S.C. §1601(b) (requiring ANCs to act in service of "the real economic and social needs of Natives"); *see also, e.g.*, Ahtna, Inc., *Articles of Incorporation of Ahtna Inc.*, art. 3(C) (June 3, 1972) (explaining that Ahtna Inc.'s purpose is to "promote the economic, social, cultural and personal well-being of all Natives" in the region). To that end, ANCSA mandates that all ANCs "shall be considered … controlled by Natives" "[f]or all purposes of Federal law." 43 U.S.C. §1626(e)(1).

ANCSA further vests ANCs with substantial responsibilities traditionally exercised by FRTs in the Lower 48. The establishment of both regional and village ANCs reflected that many Alaska Native villages were small and remote and that some problems are better tackled on the regional level. For instance, "the village corporations [a]re charged with managing the land transferred by the United States

[2] The term "Native village" (rather than "tribe") comes from, and is defined in, ANCSA. *See* 43 U.S.C. §1602(c).

not on behalf of their shareholders, but 'on behalf of a Native village,'" and "the regional corporations [must] 'promote the health, education, [and] welfare'" of Natives in their region." Pet.App.21 (quoting 43 U.S.C. §1602(j), (r)). ANCs accordingly perform a range of "functions that would ordinarily be performed by tribal governments" in the Lower 48, Pet.App.21, including everything from healthcare and housing services to scholarships, youth education, and elder care, Pet.App.27 (Henderson, J., concurring). In fact, while ANCs often work shoulder-to-shoulder with the villages, they administer many critical services on their own, especially in urban areas where there are many Alaska Natives without any FRT affiliation.

Finally, while Congress wanted to establish distinct native entities to address Alaska's unique geography and history, it did not intend the creation of those unique entities to shortchange Alaska Natives when it came to special-federal-Indian benefits. Indeed, Congress specifically amended ANCSA to clarify that "Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans," "[n]otwithstanding any other provision of law." 101 Stat. 1788, 1812 (1988) (codified at 43 U.S.C. §1626(d)).

2. ISDEAA and ANCs

In service of its substantial trust responsibilities vis-à-vis America's indigenous peoples, the federal government has long provided special programs and services to Indians, including Alaska Natives. The federal government historically administered these programs and services itself, acting through the Indian Health Service (IHS) and the Bureau of Indian

Affairs (BIA). But that began to change "in the early 1970's," as "federal policy shifted toward encouraging the development of Indian-controlled institutions." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 840 (1982); *see* President Richard M. Nixon, *Special Message to the Congress on Indian Affairs* (July 8, 1970) (introducing a new federal policy of tribal self-determination), https://bit.ly/2MpkbJZ.

ANCSA was the first major enactment of the new era. In addition to the provisions focused on Alaska and creating ANCs discussed above, ANCSA "directed" the Interior Secretary "to make a study of all Federal programs primarily designed to benefit Native people and to report back to the Congress with his recommendations for the future management and operation of these programs within three years of the date of enactment." 43 U.S.C. §1601(c). That direction emanating from ANCSA culminated in ISDEAA.

Just as ANCSA aimed to promote the self-determination of Alaska Natives, ISDEAA sought to "help Indian tribes assume responsibility for aid programs that benefit their members." *Menominee Indian Tribe of Wis. v. United States*, 136 S.Ct. 750, 753 (2016). To that end, ISDEAA directs the Interior Secretary, "upon the request of any Indian tribe, … to enter into a self-determination contract … to plan, conduct, and administer' health, education, economic, and social programs that the Secretary otherwise would have administered." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 186 (2012) (alterations in original) (quoting 25 U.S.C. §450f(a)(1) (transferred to 25 U.S.C. §5321)). ISDEAA further authorizes Indian tribes to "compact" with the government and thereby

assume full funding and control over federal Indian programs. *See* 25 U.S.C. §5322. A tribe with an ISDEAA compact is in a "government-to-government relationship" with "the United States" as a matter of federal law. *Id.* §5384; *see also* 25 C.F.R. §1000.161.

In ISDEAA, Congress did not exclude the sui generis entities it had just established in ANCSA from playing a critical role in Alaska Native life. Instead, it expressly included the "regional or village corporation[s] … established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688)," in ISDEAA's definition of the "Indian tribe[s]" entitled to receive ISDEAA contracts and compacts. 25 U.S.C. §5304(e). Consistent with their express inclusion, ANCs have entered into scores of ISDEAA contracts and at least one compact over the past 45 years. *See, e.g.*, Dist.Ct.Dkt.43-1 ¶17 (Ahtna); Dist.Ct.Dkt.45-6 ¶¶10-13 (CIRI); Dist.Ct.Dkt.45-7 ¶15 (NANA); Dist.Ct.Dkt.45-14 ¶4 (Koniag); *see also A Quick Look*, U.S. Dep't of Health & Hum Servs. Indian Health Serv. (Apr. 2017) ("Through [ISDEAA] Self-Determination contracts, American Indian Tribes and Alaska Native corporations administer 19 hospitals, 284 health centers, 79 health stations, and 163 Alaska village clinics."), https://bit.ly/3dwNUfl.

ANCs were expressly added to ISDEAA's definition of "Indian tribes" after the definition's basic structure had already taken shape. The initial draft did not use the language of ANCSA, but instead defined "Indian tribe" to mean "an Indian tribe, band, nation, or Alaska Native community for which the Federal Government provides special programs and services because of its Indian identity." H.R. 6372,

93d Cong., 1st Sess., §1 (1973). Later versions defined "Indian tribe" to mean "any Indian tribe, band, nation, or other organized group or community, including an Alaska Native village as defined in [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." S. 1017, 93d Cong., 2d Sess., §4(b) (1974). While that latter formulation referenced ANCSA and plainly included the Alaska Native villages "defined in" ANCSA, it did not mention ANCs and suggested that they might be excluded.

That raised a red flag for Alaska Natives and Alaska legislators. Even though ANCs were still quite new in 1974, they had already become fundamental components of Native life and had already proven useful in conveying federal-Indian-law benefits to Alaska Natives. Excluding ANCs from ISDEAA thus made no sense to Alaskans, including the Native peoples the ANCs served. *See Hearing before the Subcommittee on Indian Affairs: H.R. 6371, H.R. 6493, H.R. 10562, and S. 1341,* 93d Cong., 169-70 (Oct. 12, 1973).

To address such concerns, the existing definition was amended to expressly include ANCs. *See Hearings before the Subcommittee on Indian Affairs: S. 1017 and Related Bills*, 93d Cong., 118 (May 20, 1974). In particular, ISDEAA was amended to read as follows:

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village *or regional or village corporation* as defined in or *established*

> *pursuant to* the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.]

88 Stat. 2203, 2204 (1975) (newly added language italicized). Congress thus added ANCs to a definition that already included the so-called "eligibility clause"—*i.e.*, "which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." That amendment was clearly intended to make ANCs eligible for ISDEAA programs and funding. As the House Report explained the change: "The Sub-committee amended the definition of 'Indian tribe' to include [the] regional and village corporations established by [ANCSA]." H.R. Rep. No. 93-1600, at 14 (1974). ISDEAA was ultimately enacted with that amended definition.

3. Post-ISDEAA developments

Consistent with ISDEAA's plain text, all three branches of government have consistently treated ANCs as "Indian tribes" under ISDEAA. The Executive Branch took that position from the outset, *see* U.S.Cert.Pet.6, No. 20-543 (Oct. 23, 2020) ("[T]he Department of the Interior—the 'agency in charge of Indian affairs'"—and "[t]he Indian Health Service (IHS), which is part of [HHS] and which also administers ISDA," have "consistently adhered to the view that ANCs qualify as Indian tribes as defined in ISDA" since the 1970s.); *see also* JA.44-48 (Soler memorandum), and has maintained it ever since, *see, e.g.*, JA.49-52 (2020 letter); 58 Fed. Reg. 54,364-01,

54,366 (Oct. 21, 1993). The Ninth Circuit, home to every ANC, endorsed that view more than 30 years ago, *see Bowen*, 810 F.2d at 1472-76, and has adhered to it ever since, *see*, *e.g.*, *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 988-89 (9th Cir. 1999). And Congress itself has consistently made clear in enacted statutory text its understanding that ANCs are and always have been ISDEAA "tribes."

For example, Congress reenacted ISDEAA's definition of "Indian tribe" unchanged in 1988, while adding and revising other ISDEAA definitions. *See* 102 Stat. 2285, 2286 (1988). That was a decade after the Executive Branch confirmed its view that the definition fully embraces ANCs and just one year after the Ninth Circuit issued *Bowen*. Congress has borrowed or cross-referenced the ISDEAA definition in dozens of statutes. *See* Delegation.Cert.Amicus.Br. App.B-1; AFN.Cert.Amicus.Br.15-19 & n.30. In doing so, it has often made clear in the statutory text its understanding that the use of ISDEAA's definition means that ANCs are eligible for statutory benefits. *See, e.g.*, 132 Stat. 4445, 4459-61 (2018) (codified at 25 U.S.C. §3115b note) (establishing new "biomass demonstration project for federally recognized Indian tribes *and Alaska Native corporations*," while using ISDEAA definition of "Indian tribe"(emphasis added)).

In addition, Congress has enacted a handful of statutes that expressly *exclude* ANCs from definitions otherwise identical to ISDEAA's, including its eligibility clause. *See, e.g.*, 100 Stat. 1613, 1617 (1986) (codified as amended at 42 U.S.C. §9601(36)) ("The term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community,

including any Alaska Native village *but not including any Alaska Native regional or village corporation*, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." (emphasis added)). Such statutes confirm that Congress understands the ISDEAA definition to embrace ANCs; after all, there would be no need to carve out ANCs from such a definition if the eligibility clause already did that work.

Notably, many of these statutes recognizing in their text that ANCs qualify as "Indian tribes" under ISDEAA came after Congress formalized the process for officially "recogniz[ing] the sovereignty of [ ] tribes" in the List Act, 108 Stat. 4791, 4791 (1994) (codified as amended at 25 U.S.C. §5130 note). Thus, while Congress continued to include ANCs in special-federal-Indian programs and employ ISDEAA's ANC-inclusive definition after 1994, it was not because they were FRTs (or because there was any lingering confusion about whether they could recognized under the List Act). Formal recognition of a tribe constitutes "legal recognition that [the tribe's] sovereignty is at least partially inherent and not federally derived." Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 Colum. L. Rev. 657, 697 (2013). Because ANCs were created by a federal statute in 1971, *that* sort of recognition has always been off the table for ANCs. ANCs were thus not included in the List Act's definition of "Indian tribe," *see* 25 U.S.C. 5130(2), even as Congress continued to employ the quite different (and ANC-inclusive) ISDEAA definition and other ANC-inclusive definitions in other statutes.

For example, just two years after the List Act, Congress enacted the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), which includes the following ANC-inclusive definition:

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

25 U.S.C. §4103(13)(B) (emphases added). Thus, two years after making clear that ANCs are not FRTs under the List Act, Congress confirmed that they can still be tribes and can still participate in special-federal-Indian programs "pursuant to [ISDEAA]" by using a definition materially identical to the ISDEAA definition of "Indian tribes." *Id.* Congress has likewise continued to employ the ANC-inclusive ISDEAA definition itself, with clear recognition that employing it made ANCs eligible for special-federal-Indian programs as recently as 2018. *See* 25 U.S.C. §3115b note. And that is the definition it chose to employ in the CARES Act in 2020.

4. The CARES Act

Congress enacted the CARES Act in response to the COVID-19 crisis. Title V of the Act appropriates $150 billion "for making payments to States, Tribal governments, and units of local government" to cover

"necessary expenditures incurred due to the public health emergency," $8 billion of which is reserved for "Tribal governments." 42 U.S.C. §801(a), (d)(1).

Congress had a number of statutory definitions from which to choose in defining "Indian Tribe" for purposes of Title V's references to "Tribal governments." Rather than use a definition limited to FRTs, such as one cross-referencing the List Act or one that includes Alaska Native *villages* but not ANCs, *see, e.g.*, 20 U.S.C. §4402(5); 25 U.S.C. §1903(8); 34 U.S.C. §10389(3), Congress selected ISDEAA's definition, which expressly references ANCs and ANCSA, and which has long been understood to include ANCs. Specifically, Congress defined "Tribal government" to "mean[] the recognized governing body of an Indian Tribe," 42 U.S.C. §801(g)(5), and defined "Indian Tribe" for that purpose (and that purpose alone) to have "the meaning" it has "in section 5304(e) of title 25"—*i.e.*, in ISDEAA, *id.* §801(g)(1).

Title V thus reserves $8 billion in relief funds for "the recognized governing body of" "any Indian tribe, … 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." *Id.*; 25 U.S.C. §5304(e).

Title V delegated to the Treasury Secretary the authority to "determine[]" the "manner" of disbursals and the responsibility "to ensure that" the $8 billion is "distributed to Tribal governments." 42 U.S.C. §801(c)(7). Consistent with the Executive Branch's longstanding interpretation of ISDEAA and Congress'

selection of that definition, the Treasury Department issued guidance on April 23, 2020, confirming ANCs' eligibility for Title V funds. JA.53-54.

B. This Litigation

1. Before the Treasury Secretary could implement that guidance and disburse any funds to ANCs—which by then had already expended considerable resources providing aid to Alaska Natives affected by the crisis—three sets of tribes sued, challenging ANCs' eligibility for the funds on varying theories.

Consistent with ANCs' long-recognized status as ISDEAA "Indian tribes," some plaintiffs conceded that ANCs satisfy the ISDEAA/Title V definition of "Indian tribe." *See, e.g.*, Dist.Ct.Dkt.76-2 at 4, 11, 14, 18. They nonetheless argued that ANCs were not "Tribal governments" under Title V because they purportedly lack "recognized governing bodies." *Id.* at 5-12. In other words, these plaintiffs claimed that even though Congress selected a definition of "Indian tribe" that they conceded includes ANCs for the sole purpose of defining "Tribal government," ANCs were nonetheless Title-V "Indian Tribes" without Title-V "Tribal governments." Other plaintiffs argued that, notwithstanding the decades of consistent federal practice recognizing ANCs as ISDEAA "Indian tribes," ANCs are not "Indian tribes" under ISDEAA because they purportedly have not been "recognized as eligible for" special-federal-Indian programs. In other words, they argued that ANCs are expressly and categorically included in ISDEAA's primary clause only to be implicitly and categorically excluded by ISDEAA's "eligibility" clause.

After hearing only from the plaintiffs and the Secretary (who opposed both arguments), but not ANCs as parties, the district court entered a preliminary injunction prohibiting the Secretary from disbursing any Title V funds to ANCs. Pet.App.89-131. At that point, petitioners, several ANCs and the associations that represent them, successfully intervened to explain that the historical and statutory record confirm that ANCs qualify as "Indian tribes" under ISDEAA and have participated in special-federal-Indian programs pursuant to ISDEAA for decades.

Upon considering full briefing and a more complete record, the district court changed course, dissolved the injunction, and entered judgment for petitioners. As the court explained, "Congress took pains to include ANCs in the ISDEAA definition," adding them to a definition that already included the eligibility clause. Pet.App.52, 56-58. Reading the eligibility clause to implicitly exclude the ANCs that Congress expressly added to the statute would render that congressional effort nugatory. Pet.App.59-61. Accordingly, the court concluded—consistent with the longstanding positions of the Executive Branch and the Ninth Circuit—that ANCs are "Indian tribes" for purposes of ISDEAA. The court also rejected the argument that ANCs lack a "Tribal government," finding "nothing inconsistent with treating ANCs alongside tribal governments for these limited purposes." Pet.App.78. The court accordingly concluded that ANCs are eligible for Title V funds and entered summary judgment for the Treasury Secretary and the ANCs. Pet.App.79. The court

stayed the effect of that decision pending appeal. Pet.App.81-87.

3. The court of appeals reversed. It began by recognizing that "ANCs are eligible for Title V funding only if they qualify as an 'Indian tribe' under [ISDEAA]." Pet.App.11. Despite acknowledging that "ANCSA charged the new ANCs with … functions that would ordinarily be performed by tribal governments" in the Lower 48, Pet.App.21, and that the Executive Branch and Ninth Circuit have long held that ANCs are ISDEAA "tribes," Pet.App.25, the court held that ANCs are not ISDEAA "tribes" because they do not satisfy ISDEAA's eligibility clause. In the court's view, the word "recognized" is a "term of art" reference "to a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." Pet.App.13-14. The court thus concluded that an entity cannot satisfy the eligibility clause—*i.e.*, cannot be "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)—unless it is formally recognized by the Secretary of the Interior as sovereign pursuant to the List Act. And despite giving the eligibility clause that narrow, term-of-art meaning that only a FRT could satisfy, the court concluded that the eligibility clause modified each entity in ISDEAA's primary clause and, thus, that ANCs were categorically excluded from ISDEAA's definition. *See* Pet.App.13 ("Because no ANC has been federally 'recognized' as an Indian tribe, … no ANC satisfies the [ISDEAA] definition."). The net effect was to read each and every

ANC out of a definition that expressly includes them and to render every aspect of the ISDEAA definition besides the eligibility clause irrelevant: Since the eligibility clause was limited to FRTs, the entire definition was limited to FRTs no matter how clearly the primary clause included ANCs.

The court waved away that glaring superfluity problem by claiming that "it was highly unsettled in 1975, when [ISDEAA] was enacted, whether Native villages or Native corporations would ultimately be recognized" as sovereigns, which the court concluded meant that ANCs' inclusion "d[id] meaningful work" by keeping the door to sovereign recognition open, "even though, as things later turned out, no ANCs were recognized." Pet.App.19. The court did not cite any contemporaneous sources showing such confusion with regard *to ANCs*, which ANCSA itself makes clear are not sovereign, as opposed to Native *villages* (the sovereign status of which was unsettled post-ANCSA). Nor did it address post-1975 developments—such as Congress' reenactment of ISDEAA after the Executive Branch and the Ninth Circuit affirmed ANCs' ISDEAA-eligibility and its enactment of other post-List-Act statutes expressly including ANCs—making clear that Congress has long understood ANCs to be ISDEAA "Indian tribes."

Judge Henderson concurred. "It is indisputable," she acknowledged, "that the services ANCs provide to Alaska Native communities—including healthcare, elder care, educational support and housing assistance—have been made only more vital due to the pandemic." Pet.App.27. She therefore could "think of no reason that the Congress would exclude ANCs (and

thus exclude many remote and vulnerable Alaska Natives) from receiving and expending much-needed Title V funds." Pet.App.28. Indeed, in her estimation, Congress "must have had reason to believe" that ISDEAA's definition "would include ANCs"; otherwise Congress would not have expressly incorporated it into Title V. Pet.App.28. Yet she nonetheless "join[ed her] colleagues in full," while acknowledging the "harsh result" the decision produced. Pet.App.27-28.[3]

SUMMARY OF ARGUMENT

This case begins and ends with the statutory text. When Congress defined the term "Indian tribe" for purposes of identifying which entities may enter into contracts and compacts under ISDEAA to provide special-federal-Indian services to Natives, it expressly included ANCs "established pursuant to" ANCSA in that definition. Indeed, ANCs were *added* to that definition (which already included the eligibility clause) during the drafting process, in response to

[3] Title V appropriates funds "for fiscal year 2020," 42 U.S.C. §801(a)(1), which ended September 30, 2020. While all parties agreed that the Treasury Secretary could still expend Title V funds after that date, *see, e.g.*, *City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994), in an abundance of caution, the D.C. Circuit entered an order "suspend[ing]" "any expiration of the appropriation … set forth in 42 U.S.C. 801(a)(2)(B) … until seven days after final action by [this Court]," on the condition that the government or the ANCs file "a petition for … a writ of certiorari" by October 30, 2020. Pet.App.30. Both the government and the ANCs did so. The D.C. Circuit subsequently issued the mandate but denied a motion for the government to promptly comply with the mandate, with the net effect that the status quo—funds appropriated but not distributed—persists. *See* Per Curiam Order, No. 20-5204 (D.C. Cir. Dec. 21, 2020), Document #1876648.

concerns that the earlier iteration might not include ANCs. Consistent with Congress' express inclusion of ANCs in ISDEAA's definition, the federal government has treated ANCs as ISDEAA "Indian tribes" since ISDEAA's inception. The Ninth Circuit, home to every ANC, confirmed their eligibility early on. And ANCs have entered into scores of ISDEAA contracts over the past 45 years, firmly cementing their role as eligible providers of special-federal-Indian services and benefits to over one hundred thousand Alaska Natives (nearly 20% of Alaska's total population). That role is particularly indispensable in urban areas with large populations of Alaska Natives, many of whom have no FRT affiliation or are far removed from their home villages. Accordingly, in 2020, when Congress chose to use ISDEAA's definition of "Indian tribe," rather than a definition expressly cross-referencing the List Act or otherwise limited to FRTs, it did so fully understanding that ANCs were ISDEAA tribes and to render ANCs eligible for the funds the CARES Act makes available to "Tribal governments."

Respondents nonetheless successfully urged the court of appeals to conclude that ANCs not only are not "Indian Tribes" under the CARES Act, but are not "Indian tribes" under ISDEAA, despite decades of contrary understanding. That conclusion is deeply flawed. While the decision purports to be based on the statutory text, it negates the single most obvious feature of the text—Congress' express inclusion of ANCs. ANCs are unique Native entities that Congress itself established just four years before it enacted ISDEAA. It defies logic and sound statutory construction to negate Congress' express inclusion of ANCs by reading a subsidiary clause as requiring a

formal recognition of sovereignty that is unavailable to ANCs. If Congress simply wanted to limit ISDEAA to FRTs, it would have written a very different, much shorter definition that omitted any mention of ANCs or ANCSA. Instead, Congress not only deliberately added ANCs to ISDEAA, but has incorporated ISDEAA and its ANC-inclusive definition in statute after statute long after ANCs' eligibility for ISDEAA contracts and ineligibility for List-Act recognition was settled, often textually indicating its intent to include ANCs. The decision below largely ignores those subsequent developments, offers no persuasive answer to the massive superfluity problem it creates, and ousts ANCs from a statute that expressly includes them, incorrectly rendering them ineligible for dozens of federal programs, including desperately needed CARES Act funds.

The decision below rests on a fundamentally mistaken premise, as the term "recognized" is not a "term of art" in Indian law that always and everywhere refers to formal recognition as a sovereign tribe. One need look no further than NAHASDA—a statute enacted just two years after the List Act that explicitly defines the term "federally recognized tribe" *to include ANCs*—to confirm the point. And if ISDEAA's eligibility clause is given its ordinary meaning, rather than a term-of-art meaning limited to FRTs, then ANCs plainly satisfy the clause, as they have been eligible for special-federal-Indian programs since their establishment in ANCSA. By contrast, if the eligibility clause really has a term-of-art meaning that usefully weeds out state-recognized tribes or other groups with unrecognized pretensions to sovereign status, then it is plainly inapplicable to

ANCs. Either way, Congress did not explicitly add ANCs to the first half of ISDEAA's definition only to categorically exclude them in the very next breath.

Because ANCs are plainly "Indian tribes" under ISDEAA, they are just as plainly "Indian Tribes" with "Tribal governments" under Title V of the CARES Act. Respondents' contrary argument, which the D.C. Circuit did not embrace, makes little sense. Title V cross-references the ISDEAA definition of "Indian tribe" for the sole purpose of informing the scope of "Tribal governments" eligible to receive Title V funding. The notion that ANCs are Title-V Tribes without Title-V Tribal governments has nothing to recommend it. If Congress wanted to exclude ANCs from Title V, it had numerous available definitions that would have done so expressly. It instead employed a definition that had been uniformly understood to include ANCs for 45 years.

That conscious choice makes eminent sense, as ANCs have been among the providers of critical services and benefits to Alaska Natives ever since Congress established them. Indeed, as Judge Henderson candidly acknowledged, there is simply "no reason that the Congress would exclude ANCs (and thus exclude many remote and vulnerable Alaska Natives) from receiving and expending much-needed Title V funds." Pet.App.28. In reality, Congress did not take that inexplicable step, but rather expressly included ANCs among the "Indian Tribes" that are eligible to receive CARES Act funds and ISDEAA contracts and compacts. The Court should reverse the decision below and fulfill Congress' promise, dating back to ANCSA, that Congress' adoption of a unique

approach to Alaska Natives would not cause them to be excluded from the special-federal-Indian benefits available to the rest of the Nation's Native peoples.

ARGUMENT

I. ANCs Are "Indian Tribes" Under ISDEAA And The CARES Act.

A. Congress Plainly Meant What It Said When It Expressly "Includ[ed]" ANCs in ISDEAA's Definition of "Indian Tribe."

Congress answered the basic statutory interpretation question in this case when it expressly included ANCs in ISDEAA's definition of "Indian tribe." ISDEAA defines "Indian tribe" as:

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

25 U.S.C. §5304(e) (emphasis added). That definition plainly and straightforwardly includes ANCs.

First, the definition explicitly includes ANCs in its primary clause. Indeed, no one has ever disputed that the phrase "regional or village corporation … established pursuant to" ANCSA refers to ANCs and nothing else. Thus, any construction of the statute that treats all ANCs as failing to satisfy the ISDEAA definition renders those words nugatory and defeats Congress' evident intent. Congress expressly included

ANCs knowing full well that they were unique and sui generis Native entities that Congress itself "established" just four years earlier in ANCSA. The express inclusion of ANCs in ISDEAA's definition of "Indian tribe" and the equally express cross-reference to ANCSA are thus compelling evidence that ANCs are and always have been "Indian tribes" under ISDEAA.

The drafting history of ISDEAA's definition strongly reinforces the inclusive import of its text. The initial draft did not mention ANCs; it instead included only an "Alaska Native Community," an ambiguous term without an obvious parallel in ANCSA. H.R. 6372, 93d Cong., 1st Sess., §1 (1973). Later versions "included the eligibility clause but did not mention [ANCs]," *Bowen*, 810 F.2d at 1474-75; they instead expressly included only "an Alaska Native village as defined in ANCSA." S. 1017, 93d Cong., 2d Sess., §4(b) (1974). Thus, both "regional or village corporation[s]" and the reference to "established pursuant to" ANCSA were added by amendment to legislative language *that already included the eligibility clause*. The explanation for that change was straightforward. It was not for purposes of preserving the theoretical possibility that some subset of ANCs would someday qualify as FRTs (and only then satisfy the eligibility clause). Instead, "[t]he Sub-committee amended the definition of 'Indian tribe' to include [the] regional and village corporations established by [ANCSA]." H.R. Rep. No. 93-1600, at 14 (1974).

To be sure, ISDEAA's definition includes two clauses. ANCs unassailably satisfy the definition's primary clause. No one claims otherwise. But the

definition also includes a subordinate clause, the so-called eligibility clause—*viz.*, "which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. §5304(e). As noted, the legislative language already included that clause when ANCs were expressly added to the definition's primary clause. There is thus no reason to think that Congress understood or intended the second part of its definition to negate its express effort to include ANCs among the entities eligible to enter into ISDEAA contracts and compacts—and every reason not to.

Indeed, if Congress had expressly added "or regional or village corporations established pursuant to ANCSA" to the pre-existing legislative language *after* the eligibility clause, rather than inserting that language into the pre-existing reference to "Alaska Native villages defined in [ANCSA]," presumably respondents would concede that ANCs fully satisfy the definition. Thus, respondents' position boils down to the proposition that by grouping the various Alaska Native entities together and facilitating a single cross-reference to ANCSA, Congress categorically excluded ANCs from the statutory definition despite its express decision to add ANCs to it. There is no need to attribute such a bizarre and self-defeating intent to Congress.

To the contrary, Congress presumably understood when it added ANCs to legislative text that already included the eligibility clause that ANCs satisfied the eligibility clause by virtue of ANCSA (*i.e.*, the same statute Congress expressly cross-referenced in the definition). After all, the whole point of ANCSA was

to establish and recognize ANCs as distinctly Native entities designed to administer the lands and funds conveyed in settlement of Native land claims and to play a continuing role in the distribution of benefits available only "to Indians because of their status as Indians." ANCSA conveyed substantial settlement funds and clear title to millions of acres of subsurface and surface estate in consideration for the relinquishment by Alaska Natives of Native claims to most of Alaska. ANCSA did not convey that substantial consideration for even more substantial Native land claims to a non-Native entity. It conveyed that distinctly Native consideration to a distinctly Native entity that was charged with using those resources to serve "the real economic and social needs of Natives." 43 U.S.C. §1601(b); *see also Am. Fed'n of Gov't Emps. (AFL-CIO) v. United States*, 195 F.Supp.2d 4, 21-22 (D.D.C. 2002) (recognizing that ANCSA designated ANCs as "the vehicle[s] used to provide continuing economic benefits" to Alaska Natives). Accordingly, the idea that ANCs have not been recognized as eligible for special-federal-Indian programs blinks reality and ignores ANCSA. ANCSA even uses the language of "eligibility." *See, e.g.*, 43 U.S.C. §1606(d) (each "Regional Corporation … shall be eligible for the benefits of this chapter," which are themselves limited to Alaska Natives and Alaska Native entities).

That readily explains why Congress would have believed that ANCs satisfied the eligibility clause. But to the extent there were any doubt on that score, the answer would not be to read out of ISDEAA's definition distinct entities its text expressly includes. To the contrary, if the eligibility clause really

embodies a term-of-art reference to FRTs, then that clause would simply be inapplicable to the ANCs established by a distinct statutory scheme enacted just four years earlier. That reading gives meaning to Congress' express inclusion of ANCs in the definition's primary clause without rendering the eligibility clause meaningless. Unlike the language expressly including "regional or village corporation[s] established pursuant to" ANCSA—language that would be wholly without effect if the eligibility clause excludes all ANCs—the eligibility clause plainly has work to do even if it is inapplicable to ANCs. The eligibility clause excludes other Native groups or bands that may aspire to federal recognition, and may have already received state recognition, but have not yet been recognized as eligible for special-federal-Indian programs. Under that reading, Congress had no qualms about adding ANCs to legislative text that included the eligibility clause, because it viewed that clause as being simply inapplicable to the sui generis entities established by Congress four years earlier.

That reading may deviate from the series-qualifier canon, but it is far superior to one that renders much of the definition superfluous and suggests that Congress' deliberate effort to add ANCs to the statute produced a swing and a miss. Indeed, the reading of the eligibility clause as irrelevant for, and therefore inapplicable to, ANCs was embraced by the BIA early on. *See* JA.44-48. It also draws support from principles of statutory construction that warn against combinations of nouns and modifying phrases that create "'a contradiction in terms'" or a "linguistically impossible" result. *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1141 (2018) (quoting

Huidekoper's Lessee v. Douglass, 7 U.S. (3 Cranch) 1, 67 (1805) (Marshall, C.J.)); *see also Advocate Health Care Network v. Stapleton*, 137 S.Ct. 1652, 1658-60 (2017). If the eligibility clause is, in fact, a term-of-art reference to the List-Act process for sovereign recognition, then it creates just such an impossibility. There is no such thing as an ANC established pursuant to ANCSA, which is also eligible for List-Act recognition as a sovereign.

Ultimately, it makes little difference whether the eligibility clause is given a plain meaning, which ANCs readily satisfy, or a term-of-art meaning that renders it inapplicable to ANCs. Either result gives meaning to Congress' express inclusion of ANCs and prevents a reading of ISDEAA that puts its two clauses at war with each other, with the second subtly excluding what the first boldly purports to include.

B. The Court of Appeals' Contrary Construction is Untenable.

Rather than give Congress' express inclusion of ANCs its self-evident effect, the court of appeals held that ISDEAA's eligibility clause categorically ousts all ANCs from the statute and disqualifies them from receiving desperately needed pandemic-relief funds. According to the decision below, the word "recognized" in the eligibility clause is a "term of art" that "refers to a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." Pet.App.13-14. Thus, in the court's view, only an FRT can be "recognized as eligible for the special programs and services provided by the United States to Indians

because of their status as Indians." *Id.* While this view categorically precludes every ANC from eligibility as an ISDEAA "tribe," despite Congress' express inclusion of them in ISDEAA's primary clause, and renders the primary clause itself largely irrelevant, the court of appeals disclaimed any superfluity problem by positing that there was initial confusion over whether ANCs could qualify as FRTs. That reasoning fails at every turn.

1. The construction adopted below renders Congress' express inclusion of ANCs a nullity.

The court of appeals' view of recognition and the eligibility clause suffers from numerous problems, but perhaps the most obvious are that it renders at least nine words—"or regional or village corporation … or established pursuant to"—superfluous and renders Congress' decision to add ANCs to a definition that already included the eligibility clause a nullity. Indeed, even that understates the superfluity problem, because if the eligibility clause itself limits the ISDEAA definition to FRTs, then Congress could have dispensed with almost the entirety of the primary clause and simply defined "Indian tribe" as "any organized group which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Instead, Congress went out of its way to expressly include ANCs in ISDEAA's definition. That decision must be given effect.

It is a "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Parker Drilling Mgmt. Servs., Ltd.*

v. Newton, 139 S.Ct. 1881, 1890 (2019) (citation omitted); *accord Nielsen v. Preap*, 139 S.Ct. 954, 969 (2019); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012). And this is no ordinary superfluity problem. The court of appeals has read a modifying subordinate clause to completely excise one of the items in the primary clause and to render the primary clause largely irrelevant. Worse still, the excised item (a.k.a., ANCs) was deliberately added to legislative language that already included the supposedly incompatible subordinate clause. Thus, if the D.C. Circuit's reading of the eligibility clause were correct, then Congress' deliberate efforts would be wholly without effect. This Court has recognized that the rule against superfluity has particular force in a context like this. *See, e.g.*, *Burgess v. United States*, 553 U.S. 124, 132 (2008).

The court of appeals acknowledged the obvious superfluity problem its reading created, but tried to explain it away by hypothesizing that while ANCs were not "recognized" as "sovereign Indian tribe[s]" when ISDEAA was enacted (and thus were not FRTs), there might have been some confusion about their status at the time, so Congress might have wanted to include them in the primary clause in the event that they might someday be recognized as FRTs (and thus could satisfy the eligibility clause). Pet.App.14-15. But the legislative record explains why Congress added ANCs to legislative text that already included the eligibility clause, and it was not to capture the subset of ANCs that someday might somehow qualify for List-Act-type recognition as sovereigns notwithstanding their establishment as sui generis

Native entities in 1971.[4] Instead, the House Report matter-of-factly explained that the change was made "to include [the] regional and village corporations established by the Alaska Native Claims Settlement Act." H.R. Rep. No. 93-1600, at 14 (1974). Congress was not trying to capture a unicorn that might one day be identified, but to include all the ANCs that had recently been established. The D.C. Circuit's reading renders that express effort "to include" ANCs for naught.

In reality, any confusion about the ability of Alaska Native entities to ultimately qualify as FRTs concerned Alaska Native *villages* (which long pre-dated ANCSA), *not* ANCs (which were established as new, non-sovereign entities by ANCSA). While Alaska Native villages were a defined term in ANCSA, they did not owe their existence to ANCSA, but rather had historical roots comparable to sovereign tribes in the Lower 48. *See generally Rosales v. Sacramento Area Dir.*, 32 IBIA 158, 165 (1998) (sovereign recognition has largely turned on a tribe's "historic" status since "at least 1936"). At the same time, sovereign control over land had often been considered an important attribute of sovereign tribal authority, *see Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-89 (2014);

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[4] Even the court of appeals' mistaken historical analysis would not solve the superfluity problem its reading creates. The legislative language to which ANCs were expressly added already captured an "organized group" that satisfied the eligibility clause. Thus, under the court of appeals' reading, any hypothetical ANC that somehow qualified as an FRT would have satisfied the definition as an organized group recognized as eligible for special-federal-Indian benefits even without the express addition of ANCs to the primary clause.

United States v. Wheeler, 435 U.S. 313, 323 (1978), and ANCSA left most villages without land (which was conveyed to ANCs in fee). That is the principal issue that created some initial uncertainty about the status of *villages*, which Congress finally resolved by making Alaska Native villages (but not ANCs) eligible for formal recognition as sovereign tribes in the List Act in 1994. *See* 25 U.S.C. §5130(2).

But while the D.C. Circuit could point to evidence of uncertainty over the status of Alaska Native *villages*, *see* Pet.App.19-22, there is no comparable evidence concerning ANCs. That is no surprise because, having established the ANCs as novel, sui generis entities in 1971, Congress was under no delusion in 1975 that these newly established corporate entities could qualify as full-blown sovereigns. After all, FRT status generally turns on two things—historical claims to sovereignty and sovereign control over land—and it would have been clear to the Congress that ANCs had neither.

As to historical status, as ISDEAA itself recognizes, ANCs were "established pursuant to" ANCSA in 1971. As to sovereign control over land, while Congress plainly required conveyance of substantial quantities of land to ANCs, it conveyed those lands in fee—a status that confirms the *absence* of sovereign or "plenary jurisdiction." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 328 (2008); *accord* Paul A. Matteoni, *Alaskan Native Indian Villages: The Question of Sovereign Rights*, 28 Santa Clara L. Rev. 875, 901 (1988) ("[B]y granting fee simple title in Native lands to regional and village corporations, sovereign powers were not

correspondingly granted."). Having just taken those innovative steps in enacting ANCSA in 1971, the notion that Congress would harbor doubts about ANCs' status as potential sovereigns just four years later in enacting ISDEAA is ahistorical and implausible. *Accord* Alaska.Cert.Amicus.Br.7; AFN.Cert.Amicus.Br.10.[5]

The difference between Alaska Native *villages* and ANCs in terms of history and sovereignty was not lost on Congress when it enacted ISDEAA. When Congress added ANCs, the legislative language already expressly included a reference to "any Alaska Native village as defined in [ANCSA]." Rather than simply add "or regional or village corporation" after "village," Congress also added the words "or established pursuant to" after "as defined in." 25 U.S.C. §5304(e); *see* pp.10-12, *supra*. The addition of those latter words underscores that the Congress that enacted ISDEAA had not lost sight of what it had wrought in ANCSA. To the contrary, Congress appreciated that while ANCSA defined the pre-existing Alaska Native villages, ANCs owe their very existence to ANCSA and were "established pursuant to" that statute. The Congress that understood and

[5] The court of appeals noted that ANCs were briefly included on an administrative list of Indian tribes recognized as eligible for special-federal-Indian benefits. Pet.App.22-23. That temporary listing did reflect a view that ANCs were FRTs, and the later removal from that list rendered ANCs no more or less sovereign. Instead, that experience simply underscores that ANCs' status as Alaska-specific entities that are not FRTs but nonetheless are eligible for special-federal-Indian benefits under ISDEAA (and dozens of other statutes) defies simple categorization.

incorporated that subtle distinction was not operating under any uncertainty about the sovereign status of ANCs. Instead, it plainly wanted to ensure that the ANCs it had established just four years earlier in an effort to promote the self-determination of Alaska Natives would not be excluded from a statute designed to promote the self-determination of all Native groups, "including any Alaska … regional or village corporation … established pursuant to the Alaska Native Claims Settlement Act."

2. Subsequent Acts of Congress confirm that ANCs are "Indian tribes" under ISDEAA.

The court of appeals erred not only in positing congressional confusion about ANCs' status as FRTs in 1975, but also in proceeding as if time stopped in 1975 notwithstanding that the ultimate issue here turns on Congress' intent in 2020. In reality, the subsequent actions of all three branches are relevant and make clear that ANCs were always included in ISDEAA's definition of "Indian tribe." The Executive Branch made clear as early as 1976 that it considered ANCs to be "Indian tribes" under ISDEAA. *See* JA.44-48.[6] And the Ninth Circuit—home to every ANC—

[6] Others quickly reached the same conclusion. *See, e.g.*, Office of the Alaska Att'y Gen., Op. No. 13, *Re: State of Alaska's Objection to Provisions of S. 1181* (May 21, 1980), 1980 WL 27980, at *3 (ANCs "are neither recognized units of municipal government under state law, nor sovereign 'tribes' or 'nations' under federal law."); 1 Am. Indian Pol'y Rev. Comm'n, *Final Report to 95th Cong., 1st Sess.*, 490-91 (Comm. Print 1977) (distinguishing the "historic and traditional tribal entities" it viewed as "domestic sovereigns" from "the Native corporations

embraced that same view in 1987. *See Bowen*, 810 F.2d at 1473-76. The very next year, Congress reenacted ISDEAA's definition of "Indian tribe" without alteration—even as it made other changes to ISDEAA's definitional section. *See* 102 Stat. 2285, 2286-87 (1988).

That alone is powerful evidence that ANCs are "Indian tribes" under ISDEAA, as a "uniform interpretation by inferior courts [and] the responsible agenc[ies]" "is presumed to carry forward" when (as here) Congress reenacts statutory text without change. Scalia & Garner, *supra*, at 322; *accord, e.g.*, *FDIC v. Phila. Gear Corp.*, 476 U.S. 426, 437 (1986) ("When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" (quoting *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974))). And when Congress reenacts statutory language without modification while altering other language in the same section, as it did here, the inference that it is aware of and endorses the shared administrative and judicial construction of that language is at its zenith.

Thus, even assuming (contrary to fact) that there were some reason to question whether Congress intended ANCs to categorically qualify as ISDEAA "tribes" in 1975, the reenactment of ISDEAA's

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organized under the Settlement Act"); 117 Cong. Rec. S46,964 (daily ed. Dec. 14, 1971) (statement of Sen. Stevens) (similar).

definition without change in 1988, after the Executive Branch and the Ninth Circuit had concluded that all ANCs were ISDEAA "tribes," should have removed all doubt. And subsequent enactments only reinforce that Congress has consistently understood the basic ISDEAA definition to include ANCs. Thus, by the time Congress employed the ISDEAA definition in the CARES Act in 2020, in lieu of alternative definitions clearly limited to FRTs, it is clear beyond cavil that Congress viewed ANCs as ISDEAA "tribes" and thus eligible for CARES Act funding.

As the Alaska Congressional Delegation has explained, *see* Delegation.Cert.Amicus.Br.1-2, 19, the ISDEAA definition has long been understood as the "gold standard" to be employed when Congress wants to include ANCs in a program designed to authorize particular special-federal-Indian benefits. That understanding is reflected not just in the dozens of instances when Congress has employed the ISDEAA definition, *see* AFN.Cert.Amicus.Br.15-19 (collecting examples), but also in those instances when Congress starts with the basic ISDEAA definition and then expressly carves ANCs out. For example, CERCLA employs a definition that is otherwise identical to ISDEAA's, but expressly *excludes* ANCs. *See* 42 U.S.C. §9601(36) ("The term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village *but not including any Alaska Native regional or village corporation*, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." (emphasis added)). Obviously, there would be no need to expressly carve ANCs out of an ISDEAA-like

definition *that included an identical eligibility clause* if the eligibility clause already did that work. Instead, the express carve-out underscores that Congress understood the ISDEAA definition, eligibility clause and all, to include ANCs.

But perhaps most fatal to the D.C. Circuit's lingering-confusion-circa-1975 theory is the fact that Congress continued to express its understanding that ANCs were "Indian tribes" under ISDEAA in statutory text *even after it enacted the 1994 List Act*, which plainly foreclosed any possibility that Congress was confused about ANCs' status or believed that ANCs could qualify as FRTs. The whole point of the List Act was to establish a single, uniform process for the federal government to recognize a tribal entity as a sovereign tribe. And the List Act expressly defines the types of entities that are eligible for formal recognition as sovereigns—and ANCs are not among them. *See* 25 U.S.C. §5130(2); *see also* Delegation.Cert.Amicus.Br.16-17. Thus, it was clear by 1994 that ANCs would never be FRTs. Yet a mere two years after enacting the List Act, Congress enacted a statute (NAHASDA) confirming in the text that ANCs nonetheless qualify as "Indian tribes" under ISDEAA.

In particular, NAHASDA includes the following definition:

> The term "federally recognized tribe" means any Indian tribe, band, nation, or other organized group or community of Indians, *including any Alaska Native* village or *regional or village corporation* as defined in or *established pursuant to* [*ANCSA*], that is

> recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians *pursuant to* [*ISDEAA*].

25 U.S.C. §4103(13)(B) (emphases added). NAHASDA plainly gives the lie to the argument that "recognized" (or even "federally recognized") is a "term of art" that always means List-Act recognition. Not only does NAHASDA expressly define the term "federally recognized tribe" to include ANCs, it also treats ANCs as capable of being "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians *pursuant to* [*ISDEAA*]." In other words, two years after foreclosing once and for all any possibility that ANCs could be recognized as sovereign tribes, Congress made clear that it understood ANCs to be "Indian tribes" under ISDEAA and understood them to be recognized as eligible for special-federal-Indian programs.

That is not the only post-List-Act instance of Congress making its understanding that ANCs are ISDEAA "tribes" evident in statutory text. The Indian Tribal Energy Development and Self Determination Act (ITEDSDA), enacted as part of the Energy Policy Act of 2005, provides that "[t]he term 'Indian tribe' has the meaning given the term in [ISDEAA]." 25 U.S.C. §3501(4)(A). It also provides that, "[f]or the purpose of" some (but not all) of its provisions, "'Indian tribe' *does not include any Native Corporation*." *Id.* §3501(4)(B) (emphasis added). That limited carve-out would make no sense if ANCs were not ISDEAA "tribes." Congress' subsequent amendments to

ITEDSDA would make even less sense if ANCs were not ISDEAA "tribes." When Congress amended ITEDSDA in 2018 for the textually enumerated purpose of establishing a new "biomass demonstration project for federally recognized Indian tribes *and Alaska Native corporations*," it defined "the term 'Indian tribe'" to "ha[ve] the meaning given the term in [ISDEAA]." *Id.* §§3115a(a)(3), 3115b note (emphasis added). Congress could not possibly accomplish its textually enumerated purposes unless it understood that the ISDEAA definition, eligibility clause and all, includes ANCs.

The court of appeals' decision thus violates several times over the cardinal rule that courts must "make sense rather, than nonsense, out of the corpus juris." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100-01 (1991). Not only does its rule make Congress' express inclusion of ANCs in ISDEAA's definition pointless, but, by the D.C. Circuit's telling, Congress repeated that mistake several times a decade over the ensuing 45 years. While it is theoretically possible that Congress after Congress repeatedly produced nonsense, the far more natural way to make sense of both ISDEAA and the broader body of federal Indian law is by recognizing that ANCs are and always have been "Indian tribes" under ISDEAA.

3. The construction adopted below rests on a fundamentally mistaken "term-of-art" premise.

The D.C. Circuit's construction ultimately rests on a fundamentally mistaken premise—namely, that "recognized" is a "term of art" in federal Indian law that always and everywhere "refers to a formal

political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." Pet.App.13-14. As noted, even if that assumption were true, it would simply render the eligibility clause wholly inapplicable to ANCs. *See* pp.29-30, *supra*. In reality, however, that premise is mistaken. "Recognized" is just a word, not a heavily freighted "term of art." And if that word and the eligibility clause are given their ordinary meanings, then ANCs readily satisfy the clause and the superfluity problem and other difficulties with the D.C. Circuit's construction disappear.

The principal historical authorities the D.C. Circuit invoked for its term-of-art construction were "termination statutes enacted between 1954 and 1968" that disestablished reservations and distributed reservation assets to Native individuals. Pet.App.15 & n.1. Far from "confirm[ing] … an established connection between recognition and sovereignty," Pet.App.15, those statutes nowhere even used the term "recognized" (or any of its conjugates). They just stated that, as a consequence of termination, the Native individuals to whom the former reservation land was distributed were no longer "entitled to any of the services performed by the United States because of their status as Indians." Pet.App.15 & n.1.

That unsurprising consequence of termination is hardly compelling evidence that when Congress used different language years later, it embraced a term-of-art concept of eligibility that excluded ANCs. To be sure, Congress in ISDEAA did not want to extend

special-federal-Indian programs to members of terminated tribes or other groups with no previous eligibility for such programs. But neither ISDEAA nor ANCSA was in any respect a termination statute. To the contrary, the whole point of ISDEAA was to give tribes more control over existing benefits. And Congress could hardly have been clearer that ANCSA was not designed to disentitle Alaska Natives from special-federal-Indian benefits. In fact, Congress specifically added language to ANCSA to clarify that "Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans" "[n]otwithstanding any other provision of law." 101 Stat. 1788, 1812 (1988) (codified at 43 U.S.C. §1626(d)).

The D.C. Circuit also found it relevant that the List Act instructs the Interior Secretary to "'publish in the Federal Register 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,'" language that partially "parallel[s]" language in ISDEAA's eligibility clause. Pet.App.12 (quoting 25 U.S.C. §5131(a)). But the fact that all tribes recognized pursuant to the List Act are "recognized as eligible" for special-federal-Indian programs does not compel the conclusion that there is no other mechanism for a Native entity to be recognized as eligible for special-federal-Indian benefits. Rather, one might expect the eligibility of sui generis entities unique to Alaska to be recognized elsewhere, and ANCSA does just that. And, of course, ISDEAA not only expressly includes ANCs, but expressly cross-references ANCSA. Moreover, while Congress has

never seen fit to update the ISDEAA definition with an express cross-reference to the List Act (which would make eminent sense if the eligibility clause referred only to the List-Act process), it has continued to enact statutes that are premised on ANCs' status as ISDEAA "tribes" and to expressly incorporate ISDEAA's ANC-inclusive definition in dozens of statutes, including the CARES Act.

Conversely, the List Act itself underscores that when Congress *does* want to invoke the kind of formal recognition the D.C. Circuit had in mind, it does not content itself with simply using the words "recognized," or "recognized as eligible." It explicitly refers to the formal act by the Interior Secretary of "recognizing" or "acknowledging" a tribe under the List Act. *See, e.g.*, 42 U.S.C. §5122(6) ("The term 'Indian tribal government' means the governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994."); 25 U.S.C. §2703(5)(A) (same); *see also Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 918 F.3d 610, 616 (9th Cir. 2019) (reference to recognition/acknowledgment *by the Secretary of the Interior* is "a key qualifier" referencing recognition of sovereign status).[7]

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[7] The court of appeals also drew support for its term-of-art construction from the statutory reference to "the" special-federal-Indian benefits available to tribes. Congress' use of the definite article cannot bear any significant weight here. Congress used the definite article in NAHASDA, which plainly includes ANCs, and statutes that are limited to FRTs provide far clearer textual clues—such as referring to acknowledgement or recognition "by

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In sum, the court of appeals' conclusion that ISDEAA's eligibility clause embodies a term-of-art meaning that excludes ANCs does not withstand scrutiny. If that term is instead given its ordinary meaning, then ANCs—which have been eligible for special-federal-Indian benefits since their establishment in ANCSA—plainly satisfy both clauses of the ISDEAA definition. And even if the D.C. Circuit were correct that the eligibility clause includes a term-of-art reference that only a FRT could satisfy, that would not be sufficient to defeat Congress' decision to include ANCs in the definition's primary clause. An ANC which is recognized as an FRT is a "contradiction in terms." *Encino Motorcars*, 138 S.Ct. at 1141. That the D.C. Circuit's interpretation created such a statutory oxymoron should have been a clear warning that the court had seized upon the wrong interpretation of "recognized," especially given the existence of a readily available, ordinary meaning of "recognized" that eliminated the anomaly. But even if the term-of-art construction were ineluctable, it would not justify ousting ANCs from the statute entirely despite their express inclusion. A caretaker told "to feed the cats, dogs, and goldfish, which are barking," is defying her instructions if she leaves the cats and goldfish unfed for days out of an obsession with the

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the [Interior] Secretary." Moreover, the final text of the eligibility clause evolved from language that included groups "for which the Federal Government provides special programs and services because of its Indian identity." *See* pp.10-12, *supra*. There is no indication that the addition of either a definite article or a reference to "recognized" was intended to transform that clause into one excluding all but FRTs.

misplacement of the "which" clause. The decision below is no more faithful to Congress' will.

II. Because ANCs Are "Indian Tribes" Under ISDEAA, They Are Eligible For Relief Funds Under Title V Of The CARES Act.

The conclusion that ANCs are "Indian tribes" for purposes of ISDEAA resolves this case. While generic references to terms like "Indian tribes" and "Tribal governments" sometimes leave ambiguity as to whether (or which) Alaska Native entities they include, Congress eliminated any such ambiguity in Title V of the CARES Act by defining "[t]he term 'Indian Tribe'" to "ha[ve] the meaning given that term in section 5304(e) of Title 25," *i.e.*, ISDEAA. 42 U.S.C. §801(g)(1). Because ANCs are expressly included as "Indian tribes" under ISDEAA, they are "Indian Tribes" under Title V too, and hence are eligible for the CARES Act funds the Secretary of the Treasury set aside for them.

Some respondents resisted that conclusion below, insisting that even if ANCs *are* "Indian Tribes" under Title V (a point that several respondents affirmatively conceded below), they *still* are not eligible for CARES Act funds. Respondents grounded that argument in the fact that Title V instructs the Secretary to make payments to "Tribal governments," not "Indian Tribes" *simpliciter*. *See id.* §801(a)(2) (appropriating "$8,000,000,000 … for making payments to Tribal governments"). According to respondents, even if ANCs may be "Indian Tribes," they still lack "Tribal governments."

That argument defies common sense. The term "Indian Tribe" appears in Title V for one purpose and

one purpose alone: to inform the meaning of "Tribal government." When Congress defines a statutory term solely for the purpose of informing the scope of another term, those terms must be interpreted coherently and consistently. *See Burgess*, 553 U.S. at 130-33. No one would argue that a statute that defined "a state" to include the District of Columbia for the sole purpose of determining the universe of "state governments" eligible for funds excludes the District because, even if it is a "state" under the statute, it still lacks a "state government." Respondents' argument that ANCs may be "Tribes" under the CARES Act, but they still lack "Tribal governments," fares no better.

The text of the CARES Act provides no support for respondents' counterintuitive argument. After defining "Indian Tribe" to "ha[ve] the meaning given that term in" ISDEAA, 42 U.S.C. §801(g)(1), Title V goes on to state: "The term 'Tribal government' means the recognized governing body of an Indian Tribe." *Id.* §801(g)(5). Title V does not define the term "recognized governing body," so the ordinary meaning controls. *See Encino Motorcars*, 138 S.Ct. at 1140; *Burgess*, 553 U.S. at 130. The ordinary meaning of "governing body" is a "group of (esp. corporate) officers or persons having ultimate control." Governing Body, *Black's Law Dictionary* (11th ed. 2019); *see Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566-67 (2012) (consulting dictionaries, including *Black's*, to determine ordinary meaning). Far from excluding ANCs, that definition fits their boards of directors to a tee. The ANCs' boards of directors are recognized as their governing bodies by shareholders, *see, e.g.*, *Board of Directors—General Duties*, Calista Corp.,

https://bit.ly/2yYH8wQ (last visited Feb. 22, 2021), federal law, *see* 43 U.S.C. §1606(f), and state law, *see Ahmasuk v. Dep't of Com., Cmty. & Econ. Dev., Div. of Banking & Sec.*, 478 P.3d 665, 666-70 (Alaska 2021), and the principal example of a "governing body" in *Black's* is a "board of directors," *see* Governing Body, *Black's Law Dictionary* (11th ed. 2019). ANCs plainly have "Tribal governments" under Title V.

Respondents' contrary argument is just a rehash of their doomed argument that ANCs are not "Indian tribes" under ISDEAA. In their view, because Title V says that "'Tribal government' means the *recognized* governing body of an Indian Tribe," 42 U.S.C. §801(g)(5) (emphasis added), ANCs are tribes without tribal governments since their governing bodies are not recognized *as sovereigns*. But, as explained, *see* Part I.B.3, *supra*, "recognized" is *not* a universal term of art. It is a term that can, and often does, mean different things across the corpus of federal-Indian-law statutes.

And just as with the ISDEAA definition that Title V incorporates, there is no indication that Congress intended to use "recognized" in any term-of-art sense when explaining what "'Tribal government' means." To the contrary, the broader statutory context confirms exactly the opposite. That phrase is not a CARES Act innovation; Title V borrows it *directly from ISDEAA*, which uses it to define the "tribal organizations" with which the Secretary shall enter into the contracts or compacts for which ISDEAA makes an "Indian tribe" eligible. *See* 25 U.S.C. §§5304(*l*), 5321(a)(1). And that term has long been understood to include an ANC's board of directors.

See, e.g., BIA, *Village Self-Determination Workbook*, No. 1 (Nov. 1977) (clarifying when an ANC's board of directors "will be recognized" as the "village governing body for purposes of making self-determination decisions"), https://tinyurl.com/yc2sftzo. Respondents' claim that there is some universe of Title-V "Indian Tribes" that lack a Title-V "Tribal government" thus finds no support in law or logic.

III. Respondents' Construction Of ISDEAA And The CARES Act Would Be Disastrous For Alaska Native Communities.

Congress' decision to select a definition of "Indian Tribe" in Title V that expressly includes ANCs makes eminent sense given the realities on the ground in Alaska. As Judge Henderson candidly acknowledged, there is simply "no reason that the Congress would exclude ANCs (and thus exclude many remote and vulnerable Alaska Natives) from receiving and expending much-needed Title V funds." Pet.App.28.

More than 40 years ago, the federal government concluded that "limit[ing] benefits of programs only to Natives who could apply through a conventional tribal organization might disqualify certain Alaska Natives, who no longer adhere to such organizations but who are organized currently in other forms, such as regional and village corporations." 1 Am. Indian Pol'y Rev. Comm'n, *Final Report to 95th Cong., 1st Sess.*, 495 n.21 (Comm. Print 1977). That conclusion is even more true today. ANCs are the principal purveyors of benefits and services to more than a hundred thousand Alaska Natives, some of whom live in communities not accessible by road and cut off from basic necessities like running water, and some of

whom live in urban areas far removed from such remote villages. Many Natives in both camps may not have any FRT affiliation. And many of the FRTs in Alaska are both small and remote and not well-suited to distribute certain benefits that can be more efficiently distributed on a region-wide basis. Had Congress left ANCs out of CARES Act funding, it would have been leaving out large numbers of Alaska Natives—as some respondents have conceded. *See, e.g.*, Dist.Ct.Dkt.76-2 at 15 (admitting that "a significant number of" Alaska Natives "would be left without services" if ANCs were excluded from CARES funds).

And that is just the CARES Act. While Title V funds are undoubtedly important (particularly to the Native communities that have not yet received any Title V funds), the benefits ultimately at stake are orders of magnitude greater. As a practical matter, many of the services Congress makes available to Native peoples are available to Alaska Natives only through ANCs' eligibility as "Indian tribes" under ISDEAA. ANCs thus provide tens of thousands of Alaska Natives with vital services like "healthcare, elder care, educational support and housing assistance." Pet.App.27 (Henderson, J., concurring). If ISDEAA were to now suddenly exclude ANCs, nearly half a century after the fact, that would cripple ANCs' ability to contract with the federal government and leave many Alaska Natives cut off from the federal-Indian-law services that Congress has gone out of its way to make available to them. *See* 43 U.S.C. §1626(d). And that is to say nothing of "the many other statutes that incorporate [ISDEAA's] 'Indian tribe' definition." Pet.App.25.

The D.C. Circuit implicitly acknowledged that its decision would oust ANCs from all of those statutes, but suggested that maybe an ANC could still provide some aid to the Alaska Natives it serves if an Alaska Native village were willing to formally designate the ANC as a "tribal organization" under ISDEAA. *Id.* But, for decades, ANCs have participated in ISDEAA as ISDEAA "tribes," not as someone else's designee. And ANCs play their greatest role, in terms of sheer volume of Natives served, in areas where there are very few villages to do any designating. Simply put, the reality, as all of the Alaska-based amici have confirmed, is that ANCs play a critical role in distributing federal funds to Natives in Alaska because they are "tribes" under ISDEAA and have long been recognized as such.

The court of appeals expressed "confiden[ce] that, if there are Alaska Natives uncared for because they are not enrolled in any recognized village, either the State of Alaska or the Department of Health and Human Services will be able to fill the void." Pet.App.26. But that confidence is sorely misplaced, in both the short term and the long term. There simply is no mechanism for the Treasury Secretary to move funds initially earmarked for ANCs to the State or HHS. And the State itself has acknowledged that it lacks the capacity to fill the void that would be left if, after more than 40 years of consistent practice, ANCs were suddenly ineligible for federal benefits premised on ISDEAA "Indian tribe" status. Affirming the decision below would thus leave thousands of Alaska Natives out in the cold with nowhere to turn. Nothing in logic suggests that Congress intended that

untenable result, and nothing in law comes close to compelling it.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

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