

Nos. 20-543 & 20-544

**In the
Supreme Court of the United States**

JANET L. YELLEN, 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 Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

**AMICI CURIAE BRIEF
OF FIVE INDIAN TRIBES
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE AMICI CURIAE¹

The amici curiae are federally recognized Indian tribes:

- Bear River Band of Rohnerville Rancheria
- Cachil Dehe Band of Wintun Indians of the Colusa Indian Community
- Cahuilla Band of Indians
- Confederated Salish and Kootenai Tribes of the Flathead Reservation
- Morongo Band of Mission Indians

Each of these amici Tribes received Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") funding due to their tribal status. Since the beginning of the pandemic, these tribes have endured tremendous losses to their communities measured by illness, death, and crushing unanticipated expenditures, coupled with depleted revenues due to the closures of tribal enterprises. Through the CARES Act, Congress earmarked funding for tribal governments to maintain services for their members and their communities. The CARES Act incorporates the definition of "Indian Tribe" from the Indian Self-Determination and Education Assistance Act ("ISDA"). The Department of the Treasury

¹ The parties have consented to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no one other than the amici curiae has made any monetary contribution for the preparation or submission of this brief.

misinterpreted this definition, leading to the proposed allocation of CARES Act funds to unintended entities such as Alaska Native Corporations ("ANCs"). The amici tribes have a direct interest in the proper distribution of the balance of CARES Act Title V funds because distributions to ineligible, non-federally recognized entities mean less funding for the governments of federally recognized tribes (including the amici tribes themselves). Amici also have an interest in the self-determination matters presented in this case.

Amicus Bear River Band of Rohnerville Rancheria has contracted with BIA under ISDA for over 20 years. The Tribe contracts for social services, higher education, tribal court funding, Indian Child Welfare Act support and for the Coordinated Tribal Government Program. For health care, the Tribe has authorized a tribal consortium, United Indian Health Services, to act on its behalf for ISDA purposes. The Tribe's CARES Act distributions were spent on direct support of Tribal members in the form of general welfare assistance based on financial hardship created by COVID impacts, food and other household items, protective personal equipment, emergency shelter for homeless Tribal members and those needing to quarantine and self-isolate, modification to the government offices that included sanitation and specialized cleaning equipment. The Tribe also incurred overtime staff expenses in law enforcement and other staff necessary to maintain "residents only" status on the reservation, and to deliver public health

notifications for "shelter in place" orders. The Tribe also purchased additional computer equipment, and other technology, to facilitate distance learning for students and telework by staff. The Tribe purchased a variety of emergency equipment and services such as a reservation-wide alert system to notify Tribal membership of COVID-related information.

Amicus Cachil Dehe Band of Wintun Indians of the Colusa Indian Community utilized their CARES Act distribution to care for their members, their reservation community, their employees, and their local community. The Tribe has used its direct and indirect CARES Act funds to support its Health Clinic which repurposed a storage unit into a COVID testing, treatment, and vaccination site to limit exposure of patients and staff to potentially infected tribal citizens. The Clinic also purchased two COVID rapid test machines, replaced carpeting with flooring that could be cleaned more easily, installed plastic barriers at work stations, and purchased special dental equipment to reduce the risk of aerosolized emissions. The Tribe installed HEPA air purifiers and MERV 13 air filters in governmental and enterprise offices and the Clinic, and each tribal home received purifiers. Due to a lack of connectivity in rural areas such as this Reservation, the Tribe invested in a stronger Wi-Fi network to support distance learning by children and remote Council business meetings. The Tribe also installed a state-of-the-art extruder at its wastewater treatment plant to remove liquid from waste by-product because research indicated COVID is found in waste

by-product. This installation protected employees who previously raked dry by-product.

The Tribe has participated in ISDA contracting for over twenty years and currently has a Title I self-determination contract with the Indian Health Service and a Consolidated Tribal Government Program contract under Title I of ISDA with the Bureau of Indian Affairs.

Amicus Cahuilla Band of Indians declared a State of Emergency early in the pandemic and, in the days immediately following implemented their Emergency Operations Plan, established a command center for COVID response operations, established food and personal protective equipment distribution programs for Reservation households and a General Welfare Assistance program for affected members. The Tribe has used its CARES Act distribution to cover those unbudgeted costs as well as to provide general welfare assistance to members with demonstrated needs, testing for the tribal community and employees, funding for a Critical Transportation Access Project to repair medical access roads, hazard pay for essential workers and to purchase an ultracold freezer for the Pfizer vaccine. Because of poor connectivity in remote areas, the Tribe established hotspots for mobile internet in support of children participating in distance learning.

The Cahuilla Band of Indians has participated in ISDA contracting for health care since 1987, currently by authorization to a tribal consortium, Riverside-San Bernardino County Indian Health, Inc.,

which has a Title V compact with the Indian Health Service. The Tribe contracts for Bureau of Indian Affairs programs such as road maintenance, tribal transportation planning, and tribal court funding, among others. The Tribe engages in Aid to Tribal Government contracting as a part of this process.

Amicus Confederated Salish and Kootenai Tribes of the Flathead Reservation ("CSKT") are a federally recognized tribe located in northwest Montana. The CSKT are a self-governance tribe that enter into funding agreements with the United States in order to carry out programs, services and functions normally delivered through the Bureau of Indian Affairs and Indian Health Service, including education, law enforcement, and health care delivery. As one of the ten original tribes that began participating in the Tribal Self-Governance Demonstration Project in 1988, the CSKT have been implementing self-governance compacts for more than 30 years. The CSKT join this amicus brief with an interest focused on maintaining the clear and reliable definition of what entities are eligible for funding as an "Indian Tribe" under ISDA.

Amicus Morongo Band of Mission Indians expended their CARES Act funding to implement an on-going weekly employee testing program and a testing program for tribal members along with medical equipment for those afflicted and telemedicine services for both groups. In addition, the Tribe supported distance learning by providing children with laptops and with Wi-Fi hotspots. The Tribe hired additional

security and facilities services workers to address screening and cleaning of premises and provided an on-reservation food store to limit off-reservation travel for necessities.

The Tribe contracted all services from the Bureau of Indian Affairs in 2004, including realty and title services, social services, environmental programs, tribal administrative programs and Aid to Tribal Government contracting. The Tribe became a Title V self-governance compactor in 2015.

Each of the amici Tribes participates in ISDA contracting or compacting directly or through a tribal organization authorized by tribal resolution. They know that nothing in ISDA alters the trust responsibility of the federal government to provide all services not contracted or compacted for by the tribe or tribal organization. Likewise, the Tribes recognize and appreciate that the federal government's trust responsibility to provide such services may be accomplished directly through the provisions of ISDA, or otherwise such as through the authority of other programs and statutes.

BACKGROUND AND OVERVIEW

Since our country's founding, the federal government has exerted power over Indian tribes and people without acknowledging or respecting inherent tribal sovereignty. The federal government has assumed an obligation to provide certain services to Indian tribes and their members, such as health care,

education, law enforcement, and social services. Over time, the government has met its obligations in different ways.

Historically, the federal government provided services and programs to tribes and their members administered in a paternalistic manner through direct operation and control by federal agencies and officers. In the 1950s, Congress began to enact statutes intending to end its obligations to provide services to tribes and Indian people. This "Termination Era" was marked by laws purporting to end the government-to-government relationship with specific tribes, promoting relocation programs, and transferring jurisdiction over Indians and Indian lands from the federal government to state governments. *See* Chehalis Response Brief at 25-26.

In the 1970s, the federal government moved towards a new era of self-determination, based on respect for tribal sovereignty. This era of self-determination, which remains the current policy, centers on respecting and advancing the sovereignty of tribal governments. It is marked by federal action aimed at strengthening the government-to-government relationship between federally recognized Indian tribes and the agencies of the federal government with trust and statutory responsibilities towards tribes and Indian people. This era was characterized by President Nixon as a time for "the Indian policies of the Federal government ... to recognize and build upon the capacities and insights of the Indian people." President Richard Nixon, *Special Message on Indian*

Affairs, 116 Cong. Rec. 23258 (July 8, 1970).

ISDA, enacted in 1975, most explicitly embodies that goal:

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. 5302(b) (citation omitted). The "self-determination" in ISDA refers to the sovereign authority of tribes to chart the best course for their members and communities through assumption of, and hence control over, programs historically administered by the federal government, specifically the

Departments of the Interior ("Interior") and Health and Human Services ("HHS") (contemporaneously Health, Education & Welfare). While "Indian people" are named therein, the statute provides a role only for Indian tribes, not individuals, as it is tribes that have the governmental responsibility towards their members and tribes that possess the sovereign government-to-government relationship memorialized in the Act.

In 1983, President Ronald Reagan issued a statement on Indian policy reaffirming the federal government's goals to explicitly and concretely support tribal self-determination and self-governance. President Ronald Reagan, *Statement on Indian Policy*, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983).

President Reagan noted that "responsibilities and resources should be restored to the governments which are closest to the people served" including Tribal governments. *Id.* He acknowledged that "[t]he Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States." *Id.* He called upon Congress to pass legislation to overcome the barriers to full implementation of ISDA, namely federal agency reluctance to fully transfer responsibilities to tribal governments. Characterizing his administration's policy as "dealing with Indian tribes on a government-to-government basis," he set the tone for a renewed move to the self-governance goals of ISDA. *Id.*

The history of the amendments to ISDA

demonstrates a singular intention to bolster Indian tribes' autonomy through their assumption and administration of federal programs. Title I of ISDA, which authorizes tribal governments or their duly authorized tribal organizations to enter into self-determination contracts with Interior and HHS, was a part of the original 1975 Act. ISDA's two self-governance provisions, Titles IV and V, which permit compacting with Interior and HHS respectively were originally a demonstration project with Interior pursuant to the 1988 amendments and were made permanent with the 1994 and 2000 amendments. *See* Geoffrey D. Strommer and Stephen D. Osborne, "The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act," 39 American Indian Law Review No. 1, at 1 (2015).

Federally recognized tribes, 25 U.S.C. 5304(e), and tribal organizations authorized by tribes, 25 U.S.C. 5304(l), are the only entities under ISDA which may engage in contracting or compacting with the federal government. Those authorized tribal organizations may take many forms, including the form of state-chartered corporations, like ANCs. *See, e.g., Gilbert v. Weahkee*, 441 F.Supp.3d 799, at 811 (D.S.D. 2020) (tribally designated state-chartered organization); *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003) (state-chartered corporation was "tribally sanctioned" for ISDA purposes.); *E.E.O.C. v. Navajo Health Foundation-Sage Memorial Hospital, Inc.*, No.

CV-06-2125-PCT-DGC, 2007 WL 2683825 (D. Ariz. Sept. 7, 2007) (tribally authorized and state-chartered organization); *Wright v. Prairie Chicken*, 579 N.W.2d 7 at 8-9 (S.D. 1998) (state chartered corporation was tribally authorized for ISDA contracting.) These cases illustrate that state-chartered entities are "tribal organizations" when tribal governments approve them to enter into ISDA contracts.

Any tribe or tribal organization that enters into a Title I "self-determination contract" or a Title IV or V "self-governance compact" is required to provide services on the same basis as the federal government. As an example, the Indian Health Service is mandated to provide medically necessary direct health care services to eligible beneficiaries as defined by statute and regulation. Unless specifically provided in the contract or compact, no specific population may be excluded from the Tribe's provisions of services, nor prioritized, as direct services must be provided to all eligible beneficiaries.

If a tribe does not contract or compact to take over a federal government program or service—or decides to retrocede control over the program or service—the federal government must continue to provide that program or service. All of this is as true in Alaska as it is in the Lower 48 states.

SUMMARY OF THE ARGUMENT

The CARES Act definition of "Indian tribe," which is borrowed from ISDA, must be analyzed

within the context of the text and structure of ISDA as a whole. *Sullivan v. Strop*, 496 U.S. 478, 482 (1990) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." (citation omitted)). That analysis compels the conclusion that only federally recognized Indian tribes are encompassed by the definition. Many of its provisions and implementing regulations would be unworkable for any other type of entity.

ISDA was the signal piece of legislation in the shift towards self-determination in federal Indian policy. ISDA allows federally recognized tribes—or the tribal organizations authorized by tribes—to assume responsibility for implementing federal programs designed to benefit Indian tribes and their members. For example, in the field of health care, ISDA allows tribal governments to assume responsibilities owed by the Indian Health Service ("IHS"), an agency of the U.S. Department of Health and Human Services ("HHS") to Indian tribes, their members, and other beneficiaries determined by statute to be eligible for health care services. The IHS retains responsibility to provide health care services not otherwise assumed by a tribe or authorized tribal organization by contract or compact. In the instance of a contract or compact not being renewed, either by voluntary retrocession by the tribe or tribal organization or by involuntary reassumption by the IHS, the funding would revert to the agency. 25 U.S.C. 5324(e), 5365(e) (retrocession); 25 C.F.R. 900.240-245, 42 C.F.R. 137.245-251

(retrocession); 25 U.S.C. 5330,5366 (reassumption); 25 C.F.R. 900.246-256, 42 C.F.R. 137.255-265 (reassumption).

ISDA contracting in Alaska is the province of the 229 federally recognized tribes and their authorized organizations. BIA and IHS contract and compact in the same manner in Alaska as elsewhere, and, as everywhere, retain the federal responsibility to provide all services which are not assumed by tribes. Service delivery to Alaska would not be disrupted by upholding the Court of Appeals decision which accurately parsed the ISDA definition of Indian tribe.

ARGUMENT

I. OPERATION OF ISDA IS PREMISED ON A GOVERNMENT-TO-GOVERNMENT RELATIONSHIP BETWEEN INDIAN TRIBES AND THE FEDERAL GOVERNMENT.

Viewed as a whole, ISDA and its regulations indicate that the Act is clearly limited to federally recognized tribes. ISDA has three titles which are now the primary conduits for Indian tribes to engage in the assumption of federal programs administered by the Department of the Interior and the Department of Health and Human Services. Title I permits tribes and tribal organizations designated by tribes to enter into self-determination contracts to administer programs from the Departments. *See* 25 U.S.C. 5321-

5322. Title IV permits tribes and tribal organizations to enter into self-governance compacts to assume programs from the Department of the Interior. *See* 25 U.S.C. 5361-5377. Title V permits tribes and tribal organizations to enter into self-governance compacts to assume such programs from the Department of Health and Human Services.² *See* 25 U.S.C. 5381-5399. Although the subject programs may differ, the manner in which tribes and authorized tribal organizations contract or compact for programs is largely the same for both Departments as described herein. These operative titles of ISDA repeatedly speak in terms indicative of federally recognized tribes alone, referencing, for example, the government-to-government relationship with "Indian tribes" as defined in the Act and the trust relationship with "Indian tribes"—terms that only make sense if the definition is synonymous with federally recognized tribes.

A. Title I: Self-Determination Contracts.

Title I of ISDA is designed to provide Indian tribes with opportunities to enter into self-determination contracts with the Secretaries of Interior or HHS to "plan, conduct, and administer"

² Title II deals with programs from the Department of Education not germane to this discussion. Title III is a now-repealed section originally containing the demonstration project for self-governance compacts.

those "programs, functions, services, or activities" run by agencies within the Departments "for the benefit of Indians due to their status as Indians." 25 U.S.C. 5321. The policy underlying the program is set out in the regulations stating that "contracting under the Act is an exercise by Indian tribes of the government-to-government relationship between the United States and Indian tribes." 25 C.F.R. 900.3(b)(4). Likewise, the extension of such contracting to each Department demonstrates "[t]he Secretary's intent to support and assist Indian tribes in the development of strong and stable tribal governments capable of administering quality programs that meet the tribally determined needs and directions of their respective communities." 25 C.F.R. 900.3(b)(7).

Title I self-determination contracts are governed by 25 U.S.C. 5321-5332 and by the regulations at 25 C.F.R. Part 900. The process followed by Indian tribes seeking to contract is informative as to why the full text of ISDA and its regulations indicate ISDA contracting is limited to federally recognized tribal governments:

1. Tribes interested in contracting may apply for planning grants in order to gather information and draft a proposal. 25 U.S.C. 5322(d), (e); 25 C.F.R. 900.7. The purposes of these planning grants, as set out by statute is "the strengthening or improvement of tribal government" or "the planning, training, evaluation of other activities designed to improve the capacity of a tribal organization to enter

into a contract or contracts." 25 U.S.C. 5322(a)(1), (2).

In the course of this process, the federal agency is required to provide comprehensive information about the federal property used by the program under consideration for contracting so that the tribe may determine which property to include in its proposal. 25 C.F.R. 900.10. This entire process is predicated upon the assumption of a program currently administered by the federal agency. There is no statutory provision for creating a proposal on any other basis, *i.e.*, on the basis that a tribe would like to initiate a program not currently run by a Department.

2. Once a tribe decides to propose a contract, the proposal must include the following:

i. A resolution from the governing body of the tribe or, if authorizing a tribal organization, a resolution from each tribe to be served by the proposed contract. 25 U.S.C. 5321; 25 C.F.R. 900.8(d)(1).

ii. A general statement of the programs, functions, services or activities to be performed including the geographic area, if applicable. 25 C.F.R. 900.8(g). If any such programs would be redesigned, a description of that plan must be included. *Id.*

iii. A request for funding based upon the programs, functions, services, and activities to be assumed which is no less than the Department expended in running those programs. *See* 25 C.F.R. 900.8(h). The tribe is also entitled to contract support costs to pay for administrative costs. *See id.*

A proposal for a self-determination contract may include any contractible programs, functions, services or activities of a given program; the tribe is not required to contract for an entire program. For example, a tribal proposal might include all aspects of a hospital except the laboratory. The federal agency retains the responsibility to administer any program or portion thereof not contracted by the tribal organization. *See* 25 U.S.C. 5329(c) at Section 1(d)(3).

3. The Secretary has only 90 days to accept or decline a proposal. 25 C.F.R. 900.16. Any declination must be based on the criteria at 25 C.F.R. 900.22 and no other. The Secretary must enter into those portions of the contract which are not subject to declination. 25 C.F.R. 900.25.

4. All self-determination contracts must include the provisions in the Model Agreement contained in the statute. 25 U.S.C. 5329(c). The terms of this agreement emphasize the government-to-government nature of these contracts. The Model Agreement includes provisions stating, for example, that "the laws, policies, and procedures" of the tribe shall provide the administrative due process required for the administration of the contracted programs. *Id.* at Section 1(b)(13). Another provision states that "[t]he United States reaffirms the trust responsibility of the United States to the ____ [insert name] Indian tribe(s)"—a trust relationship that only exists with federally recognized tribes. *Id.* at Section 1(d)(1)(A).

5. After the negotiation of the contract, the parties enter into an Annual Funding Agreement

based upon the amount the Secretary would have otherwise provided for the operation of the program(s) at the local, area, and national levels of the given Department. 25 U.S.C. 5325(a).

6. The Secretary is obligated to renew the contract and the Annual Funding Agreement on an annual basis unless the declination criteria are implicated by any changes in the proposal or actions of the tribal contractor during the year. 25 C.F.R. 900.22.

ISDA provides that the employment preference laws of a tribe shall apply to the contract. 25 U.S.C. 5307(c). Section 5307 highlights the intention of ISDA to strengthen and support tribal governments; no other entity, such as a non-recognized ANC, could have employment preference laws since they are not governments and hence do not legislate. *Id.*

B. Titles IV and V: Self-Governance Compacts.

Titles IV and V of ISDA only further emphasize that Congress viewed the "Indian tribe" definition as synonymous with federally recognized tribes. Titles IV and V of ISDA permit Indian tribes and authorized tribal organizations to enter into compacts with the Secretary of Interior or Health and Human Services for "programs, functions, services, and activities (or portions thereof) that are carried out for the benefit of Indians because of their status as Indians." 25 U.S.C. 5363 (Interior); 25 U.S.C. 5385 (HHS). The

self-governance Titles of ISDA represent the most significant provisions of the statute because they authorize tribes and authorized tribal organizations to assume full responsibility for the programs run by the agencies of these Departments. They differ from Title I contracts because they offer Tribes more autonomy to redesign programs and provide the compacted services in the ways most useful to their members. 25 U.S.C. 5365(d) (Interior); 25 U.S.C. 5386(e) (HHS). This authority recognizes the sovereignty of the tribe to act in the best interests of its members and others for whom it has assumed responsibility to serve. As noted in the self-governance Titles, the obligation to negotiate these compacts is based upon "the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States." 25 U.S.C. 5384(a), 5385(a); 25 U.S.C. 5363(a)(1), 5364(a), (b)(1). These are specific obligations that do not run to non-recognized entities. The compacts are governed by 25 U.S.C. 5361-5377 (Title IV) and 5381-5399 (Title V). The regulations are provided at 25 C.F.R. 1000 and 1001 and 42 C.F.R. 137.

Congressional statements of intent in the creation of self-governance compacting reflect that Congress viewed the "Indian tribe" definition as focused on federally recognized tribes. For example, the findings for Title IV and V emphasize that "the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations" and that the compacting process being added to ISDA was

"designed to improve and perpetuate the government-to-government relationship between Indian tribes and the United States" and was "an effective way to implement the Federal policy of government-to-government relations with Indian tribes." 25 U.S.C. 5361 note, 5381 note.

The Titles' operative provisions continue this language. The Titles state that the Secretaries "must negotiate and enter into a written compact" and "written funding agreement with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States." 25 U.S.C. 5384, 5385; 25 U.S.C. 5363, 5364 (similar). "Each compact shall set forth the general terms of the government-to-government relationship between the Indian tribe and the Secretary[.]" 25 U.S.C. 5384; 25 U.S.C. 5364 (similar).

The process followed by tribes seeking to compact is similar to that for Title I: A tribal resolution must be presented. 42 C.F.R. 137.18(b). The tribe must engage in the internal government planning process with grants available to support that process. 25 U.S.C. 5362(c); 25 U.S.C. 5383; 25 C.F.R. 1000.40-55; 42 C.F.R. 137.18, 137.20, 137.24-26. And a compact and a funding agreement must be negotiated.

Viewed as a whole, ISDA and its regulations are designed to strengthen tribal governments by

authorizing the assumption of federal programs which benefit their members. From the planning phases to increase tribal governmental administrative capacity through self-governance compacting which authorizes the highest level of autonomy for tribes, ISDA's intent is to support the government-to-government relationship between the United States and federally recognized tribes and no other entities.

All of the titles of ISDA, along with the findings, policies, and regulations, are designed to fulfill the trust responsibility of the United States to Indian tribes, a responsibility that only runs to federally recognized tribes. The repeated acknowledgment of the government-to-government relationship and of the federal government's ongoing responsibility to provide services supports the position that only federally recognized tribes and those organizations they designate by government action are eligible to participate in ISDA.

II. OPERATION OF ISDA IN ALASKA IS CONSISTENT WITH ITS OPERATION IN OTHER STATES.

A. Alaska Tribes and Tribally Designated Non-Profit Tribal Organizations Provide a Wide Variety of Social and Health Programs.

There are 229 federally recognized tribes in Alaska. 86 Fed. Reg. 7554 (January 29, 2021). Consistent with the text of ISDA and the operation of ISDA elsewhere, including for amici, it is the 229 federally recognized tribes in Alaska that direct ISDA contracting. As elsewhere, each of these tribes may contract or compact directly with Interior or HHS to provide services, or they may authorize a tribal organization to act on their behalf. The BIA's own plan for implementing ISDA in Alaska references dealing only with these 229 federally recognized tribes and their authorized tribal organizations. BIA, *Alaska Region Self-Determination Implementation Plan FY 2015*, at 1 (Jan. 2015), <https://tinyurl.com/pkxzkb83> (last visited March 30, 2021) ("It is the Policy of the Alaska Region, Bureau of Indian Affairs to provide for the maximum service delivery in the processing of Public Law 93-638 [ISDA] contracts submitted by the 229 Tribes/Tribal Organizations who are within the Region's jurisdiction[.]").

As described above, tribal organizations may be

authorized by federally recognized tribes to contract or compact on their behalf. Tribes in Alaska may—and do—authorize regional non-profit tribal consortia to contract and compact to take advantage of efficiencies of scale and provide social and health services on a regional basis.

The state has twelve regional non-profit tribal consortia governed by representatives of tribes in the particular geographic area. These organizations pre-date the Alaska Native Claims Settlement Act ("ANCSA") and were created by tribes and Alaska Natives to press for resolution of land claims. The twelve regional non-profit organizations are named in ANCSA and the regions they correspond to are the regions along which the for-profit regional ANCs were formed. 43 U.S.C. 1606(a); *see* David Case & David Voluck, *Alaska Natives and American Laws* 178 (3rd ed. 2012) (explaining that it is these tribal non-profit organizations that "became the service delivery vehicles" under ISDA, not the ANCs). It is tribes and their duly authorized non-profit tribal consortia that conduct the overwhelming majority of ISDA contracting and provide social services and healthcare in Alaska.

In some regions, a single non-profit tribal consortia is authorized by its member tribes to contract with both Interior and HHS to provide region-wide services, while in other regions, there exist a regional non-profit tribal consortia and a regional tribal health organization ("THO"), the former focused on contracting with Interior while the latter provides

services pursuant to a contract or compact with HHS.

The twelve non-profit consortia and THOs by region are:

1. Copper River Region:
 - a. Regional Non-Profit and THO: Copper River Native Association
 - b. Additional THO for two tribes: Mt. Sanford Tribal Consortium
2. Aleutian and Pribilof Islands Region:
 - a. Regional Non-Profit and THO: Aleutians Pribilof Islands Association
3. Arctic Slope Region:
 - a. Regional Non-Profit and THO: Arctic Slope Native Association
4. Bering Straits/Norton Sound Region:
 - a. Regional Non-Profit: Kawerak, Inc.
 - b. Regional THO: Norton Sound Health Corporation
5. Bristol Bay Region:
 - a. Regional Non-Profit: Bristol Bay Native Association
 - b. Regional THO: Bristol Bay Area Health Corporation
6. Yukon-Kuskokwim Region:
 - a. Regional Non-Profit: Association of Village Council Presidents
 - b. Regional THO: Yukon-Kuskokwim Health Corporation
7. Chugach/Prince William Sound:

- a. Regional Non-Profit and THO: Chugachmiut
- 8. Southcentral/Cook Inlet Region:
 - a. Regional Non-Profit: Cook Inlet Tribal Council
 - b. Regional THO: Southcentral Foundation
- 9. Interior Region and THO:
 - a. Regional Non-Profit: Tanana Chiefs Conference
- 10. Kodiak Region:
 - a. Regional Non-Profit and THO: Kodiak Area Native Association
- 11. Northwest Arctic:
 - a. Regional Non-Profit & THO: Maniilaq Association
- 12. Southeast Region:
 - a. Regional Tribe: Central Council of Tlingit and Haida Indian Tribes of Alaska
 - b. Regional THO: Southeast Alaska Regional Health Corporation

The relevant federally recognized tribes in each region sit on the boards of each of these organizations. For example, Bristol Bay Native Association's board of directors is made up of one representative from each of the thirty-one federally recognized tribes in the region. See <https://bbna.com/our-programs/workforce-development/child-care-assistance/about-us/board-members/> (last visited on March 28, 2021). Maniilaq

Association's board of directors is made up of one representative from each of the twelve federally recognized tribes in the region. *See* <https://www.maniilaq.org/administration/> (last visited on March 28, 2021). The other regional tribal non-profit organizations and THOs have similar board compositions.³

These consortia are accountable to all the beneficiaries of their programs through this representative structure and, unlike ANCs, as organizations of tribes, they enjoy the privileges of their member Tribes such as immunity from suit. *See, e.g., 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. . . . Unlike an Alaska Native Corporation, [the non-profit tribal health consortium] is an entity created and controlled by Alaska Native tribes that promotes tribal self-determination and fulfills governmental functions." (footnotes omitted)).

These regional tribal non-profit organizations are authorized by their member tribes to assume formerly federal responsibilities to deliver services to tribal members in their regions in a variety of ways. To continue with the examples mentioned above,

³ The only exceptions are the two organizations in the Southcentral/Cook Inlet Region: Southcentral Foundation and Cook Inlet Tribal Council, which also include majority CIRI board members.

Bristol Bay Native Association's mission is "to maintain and promote a strong regional organization supported by the Tribes of Bristol Bay to serve as a unified voice to provide social, economic, cultural, educational opportunities and initiatives to benefit the Tribes and the Native people of Bristol Bay." <https://bbna.com/our-programs/workforce-development/child-care-assistance/about-us/mission-and-history> (last visited on March 28, 2021). Since 1975, BBNA has assumed programs from the BIA such that now it operates nearly all the programs BIA previously provided to the region. *Id.* Now, as a self-governance compactor on behalf of its member tribes, BBNA is able to exercise autonomy in designing services to meet local needs. *Id.*

Similarly, Maniilaq Association compacts with both Interior and HHS on behalf of its member tribes. Maniilaq Association provides health and social services to about 8,000 people within the Northwest Arctic Borough and the village of Point Hope and manages a 80,000 square foot, \$42 million hospital with a long-term care wing and clinics in all the villages. <https://www.maniilaq.org/about-us/> (last visited on March 28, 2021).

B. The Delivery of Social and Healthcare Services Will Not Be Disrupted by the Court of Appeals Decision.

Alaska Tribes and their duly-recognized tribal

non-profit organizations have longstanding and robust ISDA contracts and compacts. The BIA list of self-governance tribes/consortia in Alaska reflects the importance of the regional non-profit consortia to ISDA compacting. That list consists entirely of 21 tribal governments and 9 of the 12 regional non-profits listed above and one intergovernmental council. See <https://on.doi.gov/3mrk5h7> (BIA list of self-governance tribes/consortia) (last visited March 29, 2021). There are no ANCs on that list.

Health care for Alaska Natives and American Indians in Alaska who are eligible beneficiaries for IHS programs are provided through the previously-mentioned Tribal Health Organizations which are part of the Alaska Native Health System, a system based on a Title V self-governance compact known as the Alaska Tribal Health Compact (Compact) and a statutorily-authorized system for the management of a statewide hospital and related services. Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, §325, 111 Stat. 1543, 1597-1598. See <https://www.ihs.gov/Alaska> (last visited March 29, 2021) ("The Alaska Tribal Health Compact is a comprehensive system of health care" that serves all federally recognized tribes in Alaska). In addition, a number of tribes have Title I self-determination contracts. Through the Compact, federally recognized tribes and designated non-profit tribal consortia assume responsibility for delivering health care to Alaska Natives and American Indians in Alaska. At

this time, the Indian Health Service does not provide direct services in the state, maintaining staffing only for residual functions which may not be compacted.

Prior to the establishment of this system, the federal government had the obligation to provide direct health care to all beneficiaries wherever located and if any component of the current system stopped providing services, that obligation would revert to the federal government. This is true for all programs, functions, services, and activities provided by the federal government for whom the primary beneficiaries are Alaska Natives and American Indians due to their status. While the federal responsibility can be fulfilled through ISDA contracting and compacting between Interior or HHS and tribes or their tribal organizations, the responsibility for those services remains with the federal government. The responsibility can be fulfilled directly or through ISDA or through other statutory authority but it is a fundamental federal responsibility to tribes and eligible beneficiaries of those programs.

Petitioner ANCs overstate the effects of this case. In Alaska like elsewhere, ISDA contracting is the province of federally recognized tribes and their authorized organizations, in particular the non-profit tribal consortia. There is a statutorily-authorized role for one ANC, CIRI, and its authorized non-profit organization Southcentral Foundation in the Compact for health services, *supra* 28. Otherwise, BIA and IHS contract and compact in the same manner in Alaska as elsewhere, and, as everywhere, retain the federal

responsibility to provide all services which are not assumed by tribes. Service delivery to Alaska would not be disrupted by upholding the Court of Appeals decision which accurately parsed the ISDA definition of Indian tribe.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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