[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 11, 2020]
Nos. 20-5204, 20-5205, 20-5209

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee,

AHTNA, INC., et al.,

Intervenors for Defendant-Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF FEDERAL GOVERNMENT APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The plaintiffs-appellants in these consolidated cases are 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, Navajo Nation (No. 20-cv-1002); Cheyenne River Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Nondalton Tribal Council, Arctic Village Council, Native Village of Venetie Tribal Government (No. 20-cv-01059); and Ute Tribe of the Uintah and Ouray Indian Reservation (No. 20-cv-01070).

The defendant-appellee is Steven Mnuchin, in his official capacity as Secretary of the United States Department of the Treasury.

The intervenor-defendants-appellees are Ahtna, Inc., Alaska Native Village Corporation Association, Inc., Association of ANCSA Regional Corporation Presidents/CEO's Inc., Calista Corporation, Kwethluk Incorporated, Sea Lion Corporation, St. Mary's Native Corporation, Napaskiak Incorporated, and Akiachak Limited.

The following entities participated as amici curiae in district court: National Congress of American Indians, Affiliated Tribes of Northwest Indians, All Pueblo Council of Governors, Arizona Indian Gaming Association, California Nations Indian Gaming Association, California Tribal Chairpersons Association, Great Plains Tribal

Chairmen's Association Inc., Inter-Tribal Association of Arizona Inc., Inter-Tribal Council of the Five Civilized Tribes, Midwest Alliance of Sovereign Tribes, National Indian Gaming Association, United South and Eastern Tribes Sovereignty Protection Fund, Alaska Native Village Association, ANSA Regional Association, Ahtna Inc., Gila River Indian Community, Native American Finance Officers Association, Penobscott Nation, Nottawaseppi Huron Band of the Potawatomi, and Alaska Federation of Native Inc.

The following entities are participating as amici curiae in this Court: All Pueblo Council of Governors, Alaska Federation of Natives, California Tribal Chairperson's Association, Great Plains Tribal Chairmen's Association, Inc., Midwest Alliance of Sovereign Tribes, United South and Eastern Tribes Sovereignty Protection Fund, National Indian Gaming Association, Arizona Indian Gaming Association, and California Nations Indian Gaming Association. Additionally, Cook Inlet Region, Inc., has a pending motion to participate as an amicus curiae.

B. Rulings Under Review

The plaintiffs-appellants are appealing from the June 26, 2020 judgment and decision issued by the Honorable Amit P. Mehta, United States District Court for the District of Columbia, in consolidated Case Nos. 20-cv-1002, 20-cv-1059, 20-cv-1030, Docs. 97 and 98. The district court's opinion and order are reproduced in the Joint Appendix at A179 and A215, respectively. No citation is yet available in the Federal Supplement. The district court's opinion can be found at 2020 WL 3489479.

C. Related Cases

This case has not previously been before this or any other court. Several other suits have been brought challenging the distribution of the same $8 billion appropriation at issue in this appeal. Those cases are: *Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-cv-1136 (D.D.C.) (voluntarily dismissed on July 2, 2020); *Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-cv-1491 (D.D.C.) (voluntarily dismissed on July 9, 2020), *appeal* No. 20-5171 (D.C. Cir.) (appeal voluntarily dismissed on July 16, 2020); and *Shawnee Tribe v. Mnuchin*, No. 20-cv-1999 (D.D.C.).

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GLOSSARY

A	Appendix
ANC	Alaska Native Corporation
ANCSA	Alaska Native Claims Settlement Act
APA	Administrative Procedure Act
CARES Act	Coronavirus Aid, Relief, and Economic Security Act
Confed. Br.	Brief of the Confederated Tribes Appellants, et al.
ISDEAA	Indian Self-Determination and Education Assistance Act
Navajo Br.	Brief of the Navajo Nation Appellants, et al.

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BRIEF OF FEDERAL GOVERNMENT APPELLEE

JURISDICTIONAL STATEMENT

The plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1361. The district court entered final judgment for the federal government on June 26, 2020. A179-214, 215-216. Plaintiff filed timely notices of appeal on July 13 and July 14, 2020. A31; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The Coronavirus Aid, Relief, and Economic Security Act directed the Department of the Treasury to allocate and disburse $8 billion of emergency assistance within 30 days to "the recognized governing bod[ies]" of "Indian Tribe[s]," with the term "Indian Tribe" given the meaning it is given in the Indian Self-Determination and Education Assistance Act (ISDEAA). 42 U.S.C. § 801(a)(2)(B), (b)(1), (g)(1) & (5). That statute 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). The questions presented are:

1. Whether it is fairly discernable from the statutory scheme that judicial review of the payment of this emergency assistance is precluded.
2. Whether the Treasury Department properly concluded, consistent with the longstanding interpretation of ISDEAA, that Alaska Native Corporations, which are established pursuant to the Alaska Native Claims Settlement Act, are "Indian tribes" under the statutory scheme.
3. Whether the direction to pay funds to the "recognized governing body" allows payment to the governing bodies of Alaska Native Corporations, such as Boards of Directors, or refers only to governmental bodies.

PERTINENT STATUTES AND REGULATIONS

Pertinent provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Statutory and Factual Background

A. Alaska Native Corporations

When Alaska became a state in 1958, the United States sought to settle a diverse array of claims by Native Alaskans and to address the serious economic, education, and health needs of Native Alaskans, most of whom lived in "widely scattered settlements" in remote areas of the state. S. Rep. No. 91-925, at 69-72, 83-90 (1970). In 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA) to settle native claims and provide for the welfare of Native Alaskans. Pub. L. No. 92-203, 85 Stat. 688 (1971). ANCSA adopted an "experimental model." *Cohen's Handbook of Federal Indian Law* § 4.07[3][b][ii][B] (Nell Jessup Newton ed. 2017) ("Cohen's"); *see id.* § 4.07[3][a]. The Act sought to address "the real economic and social needs of Natives," to provide "maximum participation by Natives in decisions affecting their rights and property," and to do so "without establishing any permanent racially defined institutions." 43 U.S.C. § 1601(b). The Act extinguished native land claims and hunting rights and revoked most existing reservations. 43 U.S.C. §§ 1603, 1618(a). Instead of creating a reservation system and vesting settlement assets in existing tribal governments, however, the Act established Alaska Native corporations (ANCs) and

then vested lands and other assets in those corporations. Cohen's § 4.07[3][a]; *see* 43 U.S.C. §§ 1602(g) & (j), 1606, 1607, 1613.

In particular, ANCSA established "Regional Corporations" covering twelve geographic regions, which had to have their governing documents approved by the Department of the Interior, and a "Village Corporation" for each native village that was entitled to receive land and money under the Act. 43 U.S.C. §§ 1606, 1607.[1] These corporate forms were part of a "policy of self-determination" and intended to manage native land and perform "social welfare functions" for Alaska Native people. S. Rep. No. 92-581, at 37, 41-42 (1971) (Conf. Rep.); *see also* S. Rep. No. 91-925, at 89-90 (corporations intended to serve as vehicles for economic development and self-sufficiency); H.R. Rep. No. 92-523, at 6, 19 (1971) (corporations "will very rapidly become an important element in the economic development of the natives in Alaska" and funds used "to improve the health, education, and welfare of the Natives of the region"). Alaska Natives received stock in the corporations based upon where they resided, and the stock was initially inalienable for 20 years. *See* 43 U.S.C. §§ 1604, 1606, 1607, 1613.[2]

[1] ANCSA also authorized the Department of the Interior to establish a thirteenth regional corporation for non-resident Alaskan natives, if they requested to do so by majority vote. 43 U.S.C. § 1606(c).

[2] Subsequent amendments extended the alienability restrictions. *See* 43 U.S.C. § 1629c.

The newly-created ANCs took ownership of approximately 45 million acres of land and received $962.5 million, which they were responsible for administering to their shareholders. Cohen's § 4.07[3][b][ii][B]; *see* 43 U.S.C. §§ 1605-1613. As Congress later "confirmed," the ANCs were also charged with providing benefits that "promote the health, education, or welfare" of their Alaska Native shareholders and shareholders' family members. 43 U.S.C. § 1606(r); *see* 144 Cong. Rec. S12,589 (daily ed. Oct. 14, 1998) (statement of Sen. Murkowski) (this "confirms the original intent of ANCSA").

B. Indian Self-Determination and Education Assistance Act

In 1975, in response to President Nixon's calls to address the poor "employment, income, education, [and] health" conditions of Indians with a policy of self-determination, H.R. Doc. No. 91-363, at 1, 3 (1970), Congress passed the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 3(a), 88 Stat. 2203, 2203 (1975) (currently codified at 25 U.S.C. § 5301 *et seq.*) (ISDEAA). ISDEAA authorizes the Departments of the Interior and of Health and Human Services to contract with "tribal organization[s]" to provide various economic, infrastructure, health, and education services to Indians. 25 U.S.C. § 5321. A "tribal organization" is,

in pertinent part, "the recognized governing body of any Indian tribe." 25 U.S.C. § 5304(*l*).[3] Directly relevant here, ISDEAA defines the term "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).

Since ISDEAA's enactment, the agencies that administer ISDEAA have understood that ANCs are "Indian tribes" under the statute. *See, e.g.*, *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1474 (9th Cir. 1987) (describing the "consistent" administrative interpretation and agreeing with it); *see infra* pp. 33-34. Shortly after Congress passed ISDEAA, the Department of the Interior observed that the "regional and village corporations find express mention in the definition" but have never been "recognized as eligible for BIA [Bureau of Indian Affairs] programs and services." A137-138; *see generally* Cohen's § 3.02[3] (recognition is "a formal political act" confirming a group's "existence as a distinct political society," "institutionalizing the

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[3] The term "tribal organization" alternatively includes:

> any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities.

25 U.S.C. § 5304(*l*).

government-to-government relationship," and "determining eligibility for programs and services created by Congress"). Interior reasoned that if the recognition modifier "operate[d] to disqualify [ANCs]" from ISDEAA, it would render ANCs' listing in ISDEAA "superfluous." A138. Accordingly, Interior concluded that the best reading of the statute is that the recognition modifier does not apply to the listed native corporations. *Id.*

As discussed in greater detail below, the agencies that administer ISDEAA have consistently adhered to this understanding and treated ANCs as "Indian tribes" under the statute. *See infra* p. 33. Congress has substantially copied or incorporated this same definition of "Indian tribe" into dozens of statutes and has enacted other statutes that are premised on the interpretation that ANCs are "Indian tribes" under the ISDEAA definition. *See infra* pp. 36, 38-39. And agencies that administer many of these later statutes have similarly viewed ANCs as "Indian tribes" under that statutory definition. *See infra* pp. 33-34. As a result, various government agencies regularly provide funding for a diverse array of purposes including housing, health, social services, and economic development. *See infra* pp. 33-34, 36.

C. Coronavirus Aid, Relief, and Economic Security Act

By early March 2020, a viral disease known as COVID-19 was spreading throughout the United States, resulting in an "ongoing public health emergency and economic crisis." H.R. Rep. No. 116-420, at 2-3 (2020). On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L.

No. 116-136, 134 Stat. 281 (2020).

The CARES Act directs the Department of the Treasury to distribute $8 billion of emergency relief to "Tribal governments," and defines that term to mean "the recognized governing body of an Indian Tribe," with "Indian tribe" having "the meaning given that term" in ISDEAA. 42 U.S.C. § 801(a)(2)(B), (g)(1) & (5). The CARES Act directs the Treasury Department to engage in consultations with the Interior Department and stakeholders, to determine payment amounts, and then to make payments within 30 days of the Act's passage—all by April 26. *Id.* § 801(b)(1), (c)(7). All funds must be used for purposes related to the COVID-19 emergency and for expenses incurred by December 30. *Id.* § 801(d).

II. The Present Controversy

A. Lawsuits and Preliminary Injunction

Before the Treasury Department determined who would receive funds, three groups of federally recognized tribes sued to enjoin any payments that might be made to ANCs. A183. Although some of the plaintiffs did not dispute that ANCs are "Indian tribes" under the ISDEAA definition, others contended that ANCs are excluded from that definition because they are not and cannot be recognized. A189-190. All of the plaintiffs contended that even if ANCs are tribes under ISDEAA, they are nonetheless ineligible for coronavirus relief because the CARES Act directs funds to "the recognized governing body" of an Indian tribe, 42 U.S.C. § 801(g)(5), and ANCs are not federally recognized tribes and do not have governments. A191-192.

On April 23, 2020, after consulting with the Department of the Interior and consistent with longstanding practice in administering ISDEAA, Treasury determined that ANCs are eligible for CARES Act emergency assistance. A141-145. The district court consolidated the three cases and set a highly-expedited briefing schedule. A15-17.

On April 27, the day before Treasury intended to begin disbursing funds, the district court entered a preliminary injunction barring the government from distributing any funds to ANCs pending further proceedings. A86-121. Applying the so-called "sliding scale" standard for preliminary, injunctive relief, the district court concluded that plaintiffs would suffer irreparable harm if any of the limited funds went to ANCs and that the plaintiffs had a sufficient likelihood of success on the merits to warrant preliminary relief. A98-119. "For purposes of this preliminary injunction," the court tentatively concluded that ANCs are ineligible to receive funds. A105-116.

B. Intervention by ANCs and Summary Judgment

A number of ANCs intervened, and the district court set an expedited schedule for further proceedings. A22. After additional briefing and argument, on June 26, 2020, the district court dissolved the preliminary injunction and granted summary judgment for the federal government. A179-216.

The district court initially concluded that the Treasury Department's decision to distribute funds to ANCs is subject to APA review. A186-189. The court acknowledged the government's argument that the 30-day statutory deadline to distribute emergency funds and absence of any requirement to announce recipients

before making payment are incompatible with judicial review. The court, however, observed that short deadlines do not always, themselves, preclude APA review. A187-188. And the court stated that while the CARES Act requires no pre-payment announcement, that may have been a congressional oversight. A188-189.

The district court then addressed the merits and held that ANCs are eligible to receive funds. A189-214. First, the court held that ANCs are "Indian Tribe[s]" under the cross-referenced ISDEAA definition. A192-206. The court observed that this definition contains a list of entities—including ANCs—followed by the recognition modifier. A189. The court explained that while such a modifier would often be read as applying to every listed entity, this presumption "'can assuredly be overcome by other indicia of meaning'" and is particularly "'sensitive to context.'" A193-194 (quoting *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016), and Scalia & Garner, Reading Law: the Interpretation of Legal Texts § 19, at 150 (2012) ("Scalia & Garner")). In particular, the court explained that "[i]t is 'the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute.'" A194-195 (quoting *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019)). Yet plaintiffs' reading of the statute, the court observed, "would render Congress's purposeful inclusion of ANCs in the ISDEAA definition 'wholly superfluous.'" A195. The court noted that "ANCs never have, and almost certainly never will, satisfy the eligibility clause" because that clause refers to formally recognizing a nation of Indians and thus granting them "a distinct political and legal status." A195-196. Indeed, the court observed that ANCs

could never, as the clause requires, be recognized as eligible "because of their status as Indians," because unlike the other listed entities, ANCs are not groups of Indians but rather are "corporations established by Congress." A195 (emphasis omitted). And "while the first ANC shareholders were required to be Alaska Natives," the court explained that ANCs could convey land and stock to non-Natives. A195. To read the eligibility clause as applying to ANCs would therefore render the inclusion of ANCs "surplusage." A196. The court concluded that although it "gives rise to an odd grammatical result," the government's interpretation is the better reading of the text. A198.

The district court found that "ISDEAA's drafting history lends support to this conclusion." A199. That drafting history, the court explained, shows that the express inclusion of ANCs in the statutory text was not "a drafting error" or misunderstanding, but rather "reflects a conscious decision on the part of Congress to make ANCs eligible to contract with the United States to deliver public services to Alaska Native populations." A198. The court observed that Congress both expressly amended the definition of "Indian tribe" to add ANCs and recognized that ANCs are "established by the Alaska Native Claims Settlement Act," thus confirming that Congress understood ANCs are corporations specially established pursuant to federal law. A199-200 (quotation marks omitted). "It would be an odd result," the court reasoned, "for Congress to include ANCs in one breath only to negate their inclusion in the very next breath through the eligibility clause." A200.

The district court found unpersuasive plaintiffs' suggestion that perhaps it only became clear "over time" that ANCs could not be formally recognized. A200. The court noted the lack of evidence to support that view as well as plaintiffs' own concession that within three years, by 1978, "'the door was closed on [the] possibility' that ANCs could meet the eligibility clause." A200-201.

The district court also credited the importance of the longstanding government view of ANCs as tribes under ISDEAA. The court observed that by the time Congress incorporated the ISDEAA definition into the CARES Act in 2020, the treatment of ANCs under that definition was well settled. A193, 200-201, 206. "By importing ISDEAA's definition into the CARES Act," the court concluded, "Congress carried forward that same treatment." A206.

The district court additionally concluded that even were there any true ambiguity, *Skidmore* deference would overcome that ambiguity. A201-205. The court explained that virtually every factor weighing in favor of *Skidmore* deference applies. The government's interpretation dates back to 1976, shortly after ISDEAA was passed; it has "been the position of the agency in charge of Indian affairs for nearly 45 years"; and the government reached that conclusion after wrestling with the competing textual concerns and other indicia of the statutory meaning. A202-204.

Finally, the district court rejected plaintiffs' contention that by directing Treasury to distribute funds to the "recognized governing bod[ies]" of Indian tribes, Congress created an additional requirement that disqualified ANCs, which are not formally

recognized tribes and do not have governments. A207-213 (alteration in original). The court explained that the term "recognized governing body" does not mean "Tribal governments in the traditional sense," and that it would be anomalous to impute that meaning here. A210-212. The court also noted that the same term appears in ISDEAA, which directs the government to contract with "the recognized governing body of any Indian tribe." A207-208 (quoting 25 U.S.C. § 5304(*l*)). "It would be passing strange," the court reasoned, for Congress to make ANCs eligible by incorporating the ISDEAA definition of "Indian tribe" and then "to exclude ANCs so obliquely." A212. The court observed that all of the plaintiffs concede that ANCs can enter ISDEAA contracts, and the court rejected as atextual the claim by some plaintiffs that ANCs contract under a different ISDEAA provision. A208-211.

On July 7, 2020, following further expedited briefing, the district court entered an injunction pending appeal until September 15, conditioned on the plaintiffs expediting their appeal. A217-222. The Treasury Department has accordingly held back funds designated for ANCs but otherwise endeavored to disburse the available funds.

SUMMARY OF ARGUMENT

I. The decision to distribute the emergency assistance at issue here is not subject to review under the APA. The CARES Act established a series of short, rigid deadlines incompatible with judicial review and authorizes assistance to address a calamitous and ongoing health and economic emergency, underscoring the significance of the statutory

deadlines. The CARES Act also establishes a detailed process but requires no pre-payment announcement of who will be paid. This means that judicial review would ordinarily be impossible until the money has been spent and shows that judicial review would invite speculative lawsuits seeking to enjoin possible payment options. Taken together, these features of the Act show that APA review is unavailable here.

II. In all events, the district court correctly rejected plaintiffs' arguments on the merits. The CARES Act authorized the Treasury Department to distribute $8 billion of emergency assistance to any "recognized governing body of an Indian Tribe," with the term "Indian Tribe" given the meaning it is given in ISDEAA. 42 U.S.C. § 801(a)(2)(B), (b)(1), (g)(1) & (5). Consistent with longstanding government practice and applicable precedent, the Treasury Department determined that ANCs are eligible to receive funds. As the district court properly recognized, ANCs meet the statutory definition of "Indian tribe," and can have a "recognized governing body."

A. The district court correctly held that ANCs are "Indian tribes" under the statutory definition, which expressly includes ANCs and uses other ANC-specific language. Plaintiffs' interpretation would wrongly read the express inclusion of ANCs as a nullity. Plaintiffs' reading is particularly anomalous because it would mean that ISDEAA expressly lists ANCs and then nullifies them in the very next clause of the sentence, which requires federal recognition. The district court properly rejected plaintiffs' insistence that the statute be read as self-defeating, and that the recognition

clause must apply in a context where it makes no sense, based on grammatical rules of thumb that even plaintiffs must acknowledge are flexible.

ISDEAA's drafting history makes clear that the inclusion of ANCs reflects a deliberate decision on the part of Congress to make ANCs eligible as "Indian tribes." Subsequent actions of Congress also ratify that understanding. Against the background of the executive branch's longstanding interpretation, as confirmed by the Ninth Circuit, Congress has not only declined to amend the pertinent ISDEAA definition of "Indian tribe," but also reenacted that definition, incorporated it into numerous additional statutes, and in some cases even expressly signaled, in other statutes, that ANCs are "Indian tribes" under ISDEAA. Were there any ambiguity, moreover, the government's longstanding interpretation would be entitled to deference.

B. There is likewise no merit to plaintiffs' suggestion that despite incorporating ISDEAA's definition of "Indian Tribe," which includes ANCs, the CARES Act nonetheless categorically excluded them by directing funds to "the recognized governing body," 42 U.S.C. § 801(g)(5), which, according to plaintiffs, ANCs cannot have. The term "governing body" is a generic term that describes any leadership structure. And, in this context, the modifier "recognized" simply makes clear that the body to which payments are made must be the known and accepted governing body. Given the myriad ways that an entity may be structured and the possibility of leadership disputes, this modifier ensures that the money is sent to the correct governing body.

The plain meaning of the term "recognized governing body" should come as no surprise. The district court correctly observed that ISDEAA uses the same term and that, applying the term, the government has long understood that it can contract with ANCs. Plaintiffs' claim that courts have interpreted the term as limited to the governments of federally recognized tribes rests on a misunderstanding of the cited cases. And plaintiffs' contention that ANCs enter ISDEAA contracts under another statutory definition misunderstands those contracts and the alternative definition.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed de novo. *Stoe v. Barr*, 960 F.3d 627, 629 (D.C. Cir. 2020).

ARGUMENT

I. The Distribution Of These Emergency Assistance Funds Is Not Subject To Review Under The Administrative Procedure Act

A. As a threshold matter, the decision to distribute the emergency assistance at issue here is not subject to review under the Administrative Procedure Act. The presumption favoring judicial review of administrative action "is just that—a presumption." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984); *see* 5 U.S.C. § 701(a)(1). It is "overcome[] whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Block*, 467 U.S. at 351 (quotation marks omitted). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of

the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 345. In particular, "the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole." *Id.* at 349. Three interrelated features of the statutory scheme show that the emergency relief payments at issue here are not subject to APA review.

First, the CARES Act establishes a series of rigid time limits, including a short, 30-day deadline to distribute funds, which passed on April 26. 42 U.S.C. § 801(a), (b)(1), (c)(7), (d)(3). In those 30 days, the Treasury Department had to gather extensive data, determine who will be paid, confer with Interior and stakeholders, determine how funds will be allocated, and then execute $8 billion in payments. *Id.* § 801(b)(1), (c)(7); *see also id.* § 801(a), (d)(3) (setting the appropriation to expire on September 30 and restricting the use of funds to expenses incurred by December 30). The required expedition reveals a judgment that there should be "no dragging out" of the wait for much needed funds. *Morris v. Gressette*, 432 U.S. 491, 504 (1977) (delay in changing state voting rules). And it establishes a timetable that is incompatible with judicial review. *See id.* at 503-505 (review of federal approval of voting procedures is unavailable, because Congress intended the approval to be "expeditious," and reviewability "would unavoidably extend this period" a state must wait to effect its change); *Dalton v. Specter*, 511 U.S. 462, 480-481 (1994) (Souter, J., concurring in part and concurring in the judgment, joined by Blackmun, Stevens, Ginsburg JJ.) ("It is unlikely that Congress would have insisted

on such a timetable" if the decision "would be subject to litigation," in which case the final decision "would either have to be delayed in deference to the litigation, or the litigation might be rendered moot."); *Specter v. Garrett*, 971 F.2d 936, 960 (3d Cir. 1992) (Alito, J., concurring in part and dissenting in part) ("In the vast majority of cases, judicial review could not be completed within the short time limits imposed by the Act.").

Indeed, although the district court and this Court expedited the litigation, the district court entered judgment nearly two months after the 30-day deadline had passed, and the case will be argued before this Court nearly three more months after that and shortly before the time-limited appropriation expires. All the while, every potential recipient of funds must plan and execute their ongoing 2020 spending—the time-limited expenditures for which funds may be used, 42 U.S.C. § 801(d)(3)—without knowing whether they will receive aid at all or how much aid they will receive.[4]

Second, and relatedly, the CARES Act authorizes assistance to address a calamitous and "ongoing public health emergency and economic crisis." H.R. Rep. No. 116-420, at 3. In determining whether a statute precludes judicial review, courts must consider the "nature of the administrative action involved," *Block*, 467 U.S. at 345, the

[4] Despite Treasury's best efforts, it was unable to meet the statutory deadline initially because of difficulties accessing necessary information. Nonetheless, Treasury has been working diligently to disburse the payments and, were it not for this ongoing litigation, the balance of funds would have been disbursed months ago (save a small amount for which Treasury is encountering technical difficulties making the wire transfer).

statute's "objectives," *id.*, and "[t]he disruptive practical consequences" of litigation, *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979). The ongoing COVID emergency underscores the significance of the statutory deadlines and shows that the statute is designed so that recipients of funds can use the money quickly. *Cf. Morris*, 432 U.S. at 501-505 (stressing the "unusual" and "severe" effect of delaying a state's ability to change voting rules); *Dalton*, 511 U.S. at 480-481 (concurring opinion) (noting that after the base closing decision, further steps to close bases must happen "promptly"). The statute directs the government to "act quickly" to minimize harm, and "[j]udicial intervention" would blunt the government's "ability to respond" to this emergency. *American Bank, N.A. v. Clarke*, 933 F.2d 899, 903 (10th Cir. 1991) (considering "the nature of the agency action" in deciding that response to bank emergency is committed to agency discretion). Additionally, although this case moved quickly, the health crisis being addressed by the statute increases the likely delays inherent to litigation, despite the best efforts of all involved.

Third, and finally, the CARES Act establishes a multi-step process that would ordinarily be incompatible with judicial review. The Act requires Treasury to consult with Interior and other stakeholders, to determine payment amounts, and then to make payments. 42 U.S.C. § 801(c)(7). But the statute provides for no public announcement of who will receive funds (or allocation methodology or payment amounts). Unless Treasury added a pre-payment, public-notice step—an improbability given the 30-day time limit—parties would not ordinarily be in a position to know what to challenge until

payments had been made and litigation was difficult, if not impossible. *See City of Houston v. Department of Hous. & Urban Dev.*, 24 F.3d 1421, 1424 (D.C. Cir. 1994) ("[W]hen an appropriation has lapsed or has been fully obligated, federal courts cannot order the expenditure of funds that were covered by that appropriation."). If anything, the availability of judicial review would invite speculative lawsuits based on possible payment options, as occurred here—a particularly anomalous result given the 30-day deadline and emergency context.

B. In finding plaintiffs' claims reviewable, the district court described the government's "burden" as one of "'clear and convincing evidence.'" A187 (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)). The Supreme Court has explained, however, that its references in this context to "clear and convincing evidence" are not to an "evidentiary test" but are just as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block*, 467 U.S. at 350-351. Where it is "fairly discernible" that Congress "simply did not intend" for judicial review, the presumption is overcome. *Id.* at 351.

The district court also failed to evaluate the "statutory scheme as a whole," *Block*, 467 U.S. at 349-350, and to recognize that the pertinent indicia "differ[] from statute to statute," *Morris*, 432 U.S. at 505 n.20. In particular, the court considered whether a short statutory deadline "by itself" and "without more" shows that judicial review is unavailable, and failed to consider the ongoing emergency being addresses by the

statute. A187-188. The court's observation that the government's cases are not on all fours with this one (A187-188) only confirms that every statute is different and must be considered on its own terms. Thus, while exceeding the short statutory deadline here does not burden a state's election procedures, as in *Morris* (A187), or hold up a further expedited process of base closures, as in *Dalton* (A188), it does delay the provision of much-needed assistance in the midst of an unprecedented health and economic emergency.

Regardless of whether the absence of a pre-publication requirement was an oversight, as the district court suggested (A188-189), it is nonetheless a feature of the statutory scheme that is incompatible with judicial review. *See Block*, 467 U.S. at 345, 349 (presumption of reviewability overcome by "inferences" based on text, structure, objectives, and nature of administrative action). And if Congress "did not even consider" the difficulties of litigating about payments (A189), that may be because Congress did not believe that this form of emergency relief would be subject to review in the first place. Indeed, "[t]he allocation of funds from a lump-sum appropriation is . . . traditionally regarded as committed to agency discretion." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

C. Taken together, the short statutory deadlines, emergency context, and incompatibility of the delineated steps with judicial review show that the statutory scheme precludes review. This case should have been dismissed at the outset, and the

hundreds of millions of dollars tied up by this litigation should have been put to use months ago.

II. The District Court Correctly Concluded That ANCs Are Eligible For CARES Act Funds

The CARES Act authorized the Treasury Department to distribute $8 billion of emergency assistance to any "recognized governing body of an Indian Tribe," with the term "Indian Tribe" given the meaning it is given in the Indian Self-Determination and Education Assistance Act. 42 U.S.C. § 801(a)(2)(B), (b)(1), (g)(1) & (5). Consistent with longstanding government practice and applicable precedent, the Treasury Department determined that Alaska Native Corporations are eligible to receive funds. As the district court properly recognized, ANCs meet the statutory definition of "Indian tribe," and can have a "recognized governing body."

A. The District Court Correctly Held That ANCs Are "Indian Tribes" Under The Statutory Definition

1. ISDEAA's text indicates that ANCs are "Indian tribes" under the statutory definition

ISDEAA defines the term "Indian tribe" to mean:

> 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). The definition expressly includes ANCs, *i.e.,* any "regional or village corporation as defined in or established pursuant to the Alaska Native Claims

Settlement Act." It also uses ANC-specific language; of the listed entities, only ANCs are "established pursuant to" ANCSA.

Plaintiffs urge that although the statute expressly includes ANCs, it renders ANCs categorically ineligible in the very next clause. That interpretation is misguided. It is "the 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) (quotation marks omitted); *see also King v. Burwell*, 576 U.S. 473, 502 (2015) (Scalia, J., dissenting) ("the rule against treating [a term] as a nullity is as close to absolute as interpretive principles get"). But as plaintiffs acknowledge, ANCs have never been "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), and "almost certainly" never can be. A195-196.

That is because "recognition" of an Indian Tribe is "a formal political act" acknowledging an "Indian group's legal status" as a "distinct political society," "institutionalizing the government-to-government relationship," and "determining eligibility for programs and services created by Congress." Cohen's § 3.02[3].[5] An ANC is a corporation specially established pursuant to federal law. *See* 43 U.S.C. §§ 1606, 1607. It is not a group of Indians, a political society, or capable of forming a

[5] The Cohen treatise is commonly cited by federal courts as "the leading treatise on federal Indian law." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 226 (2012).

government-to-government relationship. *See* Procedures For Establishing That An American Indian Group Exists As An Indian Tribe, 43 Fed. Reg. 39,361, 39,361-39,364 (Sept. 5, 1978) (explaining that for purposes of recognition, "a political relationship" is "indispensable," and that "corporations . . . formed in recent times" are not covered); 83 C.F.R. §§ 83.4(a), 83.11, 83.12 (similar).[6]

As the district court observed (A195-196), the statute's text confirms that plaintiffs' reading would render the express listing of ANCs a nullity. The statute refers to entities that are "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). In contrast to the other listed entities, ANCs are not groups of Indians and therefore could not be eligible for special programs provided to Indians because of their status as Indians.

Plaintiffs' reading is particularly anomalous because it would mean that ISDEAA expressly lists ANCs and then nullifies them in the very next clause, defying the rule that "[o]ne part is not to be allowed to defeat another." Scalia & Garner § 27, at 180 (explaining that "[t]he imperative of harmony among provisions is more categorical than most other canons"). As the district court explained, "[i]t would be an odd result

[6] The Intervenor ANCs have argued that ANCs' participation in certain federal programs constitutes recognition under this clause. The federal government respectfully disagrees with that understanding of ISDEAA's recognition requirement. If that interpretation were correct, however, it would provide an alternate basis for treating ANCs as "Indian tribes" under the statutory scheme.

indeed for Congress to include ANCs in one breath only to negate their inclusion in the very next breath." A200.[7]

There is no merit to plaintiffs' footnote suggestion that Congress intended to account for the possibility that ANCs might, based on some as-yet-unknown concept of recognition, qualify as recognized Indian tribes and become eligible for special programs "because of their status as Indians." *See* Confed. Br. 24 n.4; *cf. id.* at 17-18, 26-27. Recognition and eligibility for such programs has always been understood, as ISDEAA's text indicates, in terms not applicable to ANCs. *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) ("domestic dependent nations"); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552-559 (1832) ("distinct, independent political communities"); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 (1st Cir. 1975) ("a particular Indian community as a dependent tribe under [federal] guardianship"); *see also* Cohen's § 3.02[3]. In fact, in 1975, when Congress passed ISDEAA, recognition decisions were "based merely on precedent—whether at some point in a tribe's history it established a formal political relationship with the Government of the United States." 1 American Indian Policy Review Commission, Final Report Submitted to Congress

[7] Contrary to plaintiffs' claim (Confed. Br. 26-27), the "disjunctive" listing—*i.e.,* use of the word "or"—does not make the express inclusion of ANCs any less superfluous. There would be no reason to specify that ANCs can qualify as Indian tribes if, in fact, they cannot.

462 (1977). Of course, no ANC had much of a history or had established such a "formal political relationship."[8]

When the Department of the Interior codified procedures for recognition in 1978, it made clear that it has long considered the group's "tribal character" and deemed "[m]aintenance of tribal relations—a political relationship" as "indispensable." 43 Fed. Reg. at 39,361-39,364. Interior also made clear that "corporations . . . formed in recent times" are not covered. *Id.* at 39,361-39,362. And when Congress enacted the List Act in 1994, directing Interior to publish annually a list of all recognized tribes, Congress made clear that ANCs had never qualified and could not qualify. And it did so by declining to include the language specifically referencing ANCs that appears in the statute here. *See* 25 U.S.C. §§ 5130(1), 5131(a). Plaintiffs' assertion that the List Act uses "the same eligibility clause appearing in ISDEAA" (Confed. Br. 17) only underscores the degree to which they seek to read words out of the statute.

[8] Plaintiffs' observation (Confed. Br. 24 n.4) that recognition once lacked formal procedures does not mean that recognition was potentially available to entities like ANCs. *See* 42 Fed. Reg. 30,647-01, 30,647-30,648 (June 16, 1977) (proposing formalized process for "Indian groups" to seek recognition). If anything, the newly-formed procedures slightly expanded the criteria for recognition, albeit still adhering to the long-established concept of recognition that could not include ANCs. Plaintiffs are on no firmer footing when they cite two opaque comments submitted two years after Congress passed ISDEAA by "private enterprises" that appear to have been seeking to establish their own eligibility for ISDEAA contracting by any available means. *See* A200 (dismissing the comments' "probative value" for ascertaining Congress's 1975 view of recognition).

Plaintiffs' primary contention is that the statute must be read as self-defeating because the recognition modifier must be read to apply to the last item in the list that precedes it. While modifiers are usually read that way, the question of which items in a list are affected by a modifier is determined by context and other indicia of meaning, not by rigid grammatical rules. *See, e.g.*, *Lockhart v. United States*, 136 S. Ct. 958, 965-966 (2016) (considering "fundamentally contextual questions," such as whether applying the modifier "would require accepting 'unlikely premises,'" or "would risk running headlong into the rule against superfluity"); *United States v. Hayes*, 555 U.S. 415, 425-426 (2009) (declining to apply modifier to the immediately preceding phrase because doing so would require accepting "unlikely premises" and render a term "superfluous"); *see also* Scalia & Garner § 19, at 150 ("Often the sense of the matter prevails."). Plaintiffs properly acknowledge that no rigid rules apply here; they urge that the "series-qualifier" canon should apply here (such that the modifier would apply to all items in the list) but that the canon "is not absolute and can yield to the last antecedent rule" (under which the modifier would apply only to the last item in the preceding list), "depending on the context." Confed. Br. 16. In short, the question presented here is not one of grammar, but one of statutory interpretation, where the "fundamental" rule is that "the words of a statute" must be read "in their context" and "as a whole." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). While the formulation Congress used would be "hardly the way an average person, or even an average lawyer, would set about to describe the relevant [category] if they had started from scratch," *Lockhart*, 136 S. Ct. at

966, that is all the more reason to adopt an interpretation that does not render the statute at war with itself.

More generally, the recognition clause cannot be read to modify the listed ANCs because, while a natural fit for the other listed entities, the clause is a misfit for ANCs. As discussed, recognition distinguishes between groups of Indians that merely self-identify (or are identified by others) as Indian tribes, and those that the federal government chooses formally to acknowledge as distinct political societies entitled to a government-to-government relationship and the special programs and services provided by the United States. *See*, *e.g.*, Cohen's § 3.02[3]. That is presumably why plaintiffs read the recognition clause as modifying all listed entities even though, under the rule of the last antecedent, the recognition clause would "typically" be read as modifying only the last item in the list—ANCs. *See Lockhart*, 136 S. Ct. at 962. But ANCs are not groups of Indians and cannot simply self-identify. They are a limited set corporations provided for in federal law. It therefore makes no sense to apply the recognition clause to ANCs.

No rule of English usage requires applying a modifier to a term to which it is plainly inapposite. Consider a hypothetical directive to recruit for a baseball team. If a manager is told to find "first basemen, second basemen, outfielders, and any other players, including designated hitters, coaches, or trainers, with a .300 batting average," the manager would correctly understand that batting average does not matter for the coaches or trainers he is to recruit. Although one could grammatically read the directive

as limited to coaches with excellent hitting skills, anyone with basic knowledge of baseball would understand in context that the batting-average modifier applies to—and distinguishes among—players, not coaches. Indeed, that is so even were it possible for a coach who formerly played baseball to have such a batting average. Here, similarly, the recognition modifier applies to—and distinguishes among—groups of Indians, not corporations established pursuant to federal law.

ISDEAA's use of the word "including" before introducing ANCs does not override the other contextual evidence of meaning. *Cf.* Confed. Br. 13-14. Contrary to plaintiffs' contention that the word "including" necessarily introduces a subset, "[i]n definitiive provisions of statutes . . . 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration." *American Sur. Co. of N.Y. v. Marotta*, 287 U.S. 513, 517 (1933); *see New York v. Department of Justice*, 951 F.3d 84, 102 (2d Cir. 2020) ("Depending on context, the word 'including' can be either illustrative or enlarging."); *United States v. Flores*, 901 F.3d 1150, 1157 (9th Cir. 2018) (similar); *Adams v. Dole*, 927 F.2d 771, 777 (4th Cir. 1991) (similar). The Dictionary Act, for example, uses the term in precisely this fashion, repeatedly using the word "include" to expand the meaning of the preceding language. *See* 1 U.S.C. § 1 (explaining, for example, that "words importing the masculine gender include the feminine as well"). And regardless of how Congress chose expressly to include ANCs, the very next clause should not be read to mean that ANCs, in fact, are excluded.

In all events, plaintiffs' repeated appeals to rules of grammar cannot overcome other indicia of plain meaning. Grammatical rules are "a valuable starting point," but they are "violated so often by so many of us that they can hardly be safely relied upon as the end point." *Payless Shoesource, Inc. v. Travelers Cos., Inc.*, 585 F.3d 1366, 1372 (10th Cir. 2009) (Gorsuch, J.) (interpreting a list of terms followed by a limiting clause). In fact, ISDEAA's recognition clause appears to reflect a common practice of separating a "relative pronoun ('that,' 'which,' 'who')" from the term or terms it modifies, which is rejected by many grammarians, Garner, Modern English Usage 784-786 (4th ed. 2016), but accepted by some others so long as context makes the meaning clear, Greenbaum, Oxford English Grammar 222 (1996). Here, the drafters who added ANCs may have believed that because the recognition clause is about groups of Indian and not corporations, this was a permissible construction. While perhaps grammarians could debate the prudence of that decision, it does not change the meaning of the sentence.

As plaintiffs observe (Confed. Br. 20-21), the ISDEAA definition certainly could have been written in clearer terms. But "the mere possibility of clearer phrasing cannot defeat the most natural reading of a statute." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012) (relying on context to interpret the operation of a statutory term). And plaintiffs' interpretation, which reads out the express listing of ANCs and accompanying ANC-specific language, is subject to the same criticism.

2. ISDEAA's drafting history confirms that ANCs are "Indian tribes" under the statutory definition

The district court properly recognized that "ISDEAA's drafting history lends support" to the court's reading of the text, by making clear that the inclusion of ANCs reflects a deliberate "decision on the part of Congress to make ANCs eligible to contract with the United States to deliver public services to Alaska Native populations." A198-199. That history underscores the error of plaintiffs' effort to nullify that decision by effectively reading the express reference to ANCs out of the statute.

The Senate version of the legislation referred to "Alaska Native village[s]" (a term defined in ANCSA, distinct from ANCs), but not to ANCs. S. 1017, 93d Cong. 4-5, 29-30 (Mar. 28, 1974); 120 Cong. Rec. 8962-8972 (Apr. 1, 1974). The first reference to ANCs came eight months after the Senate passed the bill, when the House Committee on Interior and Insular Affairs added the language emphasized in the following passage: "including any Alaska Native village *or regional or village corporation* as defined in *or established pursuant to* the Alaska Native Claims Settlement Act." S. 1017, 93d Cong. 4, 18 (Dec. 16, 1974) (emphasis added); 120 Cong. Rec. 41,396-41,397 (Dec. 19, 1974). The Committee Report explained that the House had "amended the definition of 'Indian tribe' to include regional and village corporations established by the Alaska Native Claims Settlement Act." H.R. Rep. No. 93-1600, at 14 (1974). The House and Senate then passed that final version of the bill. 120 Cong. Rec. 41,396-41,397 (Dec. 19, 1974); 120 Cong. Rec. 41,123-41,124 (Dec. 19, 1974).

This drafting history confirms that Congress made a deliberate choice to include ANCs as "Indian tribes," as opposed to having made a casual drafting error or having thoughtlessly substituted all conceivable Alaskan entities in a "sweeping statute." Confed. Br. 24 n.4. "That Congress went out of its way to add ANCs to the statutory definition of 'Indian tribe' is compelling evidence that Congress intended ANCs to meet that definition." A200.

Surrounding context confirms the significance of this change. In the same amendment where the House added ANCs, the House also added language acknowledging that ANCs are "*established pursuant to* the Alaska Native Claims Settlement Act." S. 1017, 93d Cong. 4, 18 (Dec. 16, 1974) (emphasis on addition). As the district court observed (A199-200), this conforming change correctly acknowledges that ANCs are corporations established pursuant to federal law. That Congress not only inserted ANCs expressly ("regional or village corporation") but also included this ANC-specific language ("established pursuant to") underscores that Congress understood the unique origin of ANCs and specifically intended to include ANCs within the definition of "Indian tribe."

3. Subsequent action by Congress confirms that ANCs are "Indian tribes" under the statutory definition

The propriety of the government's interpretation is confirmed by subsequent actions of Congress. Against the background of the executive branch's longstanding interpretation, as confirmed by the Ninth Circuit, Congress has not only declined to

amend the pertinent ISDEAA definition of "Indian tribe," but affirmatively reenacted that definition, incorporated it into numerous other statutes, and in some cases even expressly signaled that ANCs are "Indian tribes" under ISDEAA.

Since its enactment, the agencies that administer ISDEAA have consistently treated ANCs as "Indian tribes." In 1976, shortly after Congress passed ISDEAA, the Department of the Interior, which administers the statute, concluded that ANCs constitute "Indian tribes" under the statutory definition. A137-138. Five years later, the Indian Health Service (part of the Department of Health and Human Services), which also administers ISDEAA, issued guidelines that likewise confirmed that ANCs are "Indian tribes" under ISDEAA. *See* Alaska Area Guidelines for Tribal Clearances for Indian Self-Determination Contracts, 46 Fed. Reg. 27,178, 27,179 (May 18, 1981). In the nearly 45 years since ISDEAA was passed, Interior and HHS have consistently interpreted ISDEAA as the government interprets it here. *See, e.g., Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1474 (9th Cir. 1987) (describing the "consistent" administrative interpretation and citing various public materials including a BIA bulletin and manual); 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993); *Central Council of Tlingit and Haida Indian Tribes v. Chief Branch of Justice Services*, 26 IBIA 159, 163 (1994); 60 Fed. Reg. 9250, 9250 (Feb. 16, 1995). These agencies maintain that position to this day. *See, e.g.*, A142-143 (Letter of April 21, 2020). And applying statutory definitions that incorporate or substantially mirror the ISDEAA definition, *see infra* p. 36, numerous

other agencies, including the Department of Housing and Urban Development,[9] the Department of Energy,[10] and the Small Business Administration,[11] treat ANCs as "Indian tribes."

The Ninth Circuit has adopted the same interpretation. *Bowen*, 810 F.2d at 1473-1476; *see also Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 988 (9th Cir. 1999). Like the district court here, the Ninth Circuit reasoned that "the words of a statute must be harmonized internally and with each other" and that ISDEAA "should not be interpreted to render one part inoperative." *Bowen*, 810 F.2d at 1474. The Ninth Circuit also described the government's "consistent" administrative interpretation and explained that the legislative history further supports this view by making clear that Congress specifically inserted ANCs into the statutory definition. *Id.* at 1474-1476.

By the time Congress passed the CARES Act, it was widely understood that ANCs are "Indian tribes" under ISDEAA. Beyond the government's longstanding

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[9] *See generally, e.g.*, Office of Native American Programs, U.S. Dep't of Housing, *About ONAP*, https://go.usa.gov/xfecz; *see Lender Section 184 Resources*, https://go.usa.gov/xfexb (indicating loans can be made to ANCs); *see also FY 2020 Final Allocation Sheets*, https://go.usa.gov/xftbM (including funds allocated to ANCs).

[10] *See* Office of Indian Energy Policy & Programs, Dep't of Energy, *Current Funding Opportunities*, https://go.usa.gov/xfexj; *see also Department of Energy Announces Up To $15 Million for Tribes to Deploy Energy Technology*, https://go.usa.gov/xfexW (listing ANCs as eligible).

[11] *See* U.S. Small Bus. Admin., *Office of Government Contracting & Business Development Resources*, https://go.usa.gov/xfexd (indicating ANCs are eligible to apply for the 8(a) Business Development Program); *see also* U.S. Gov't Accountability Office, GAO-16-113, *Alaska Native Corporations, Oversight Weaknesses Continue to Limit SBA's Ability to Monitor Compliance with 8(a) Program Requirements* 2 (2016).

practice and the interpretation of the Ninth Circuit, the leading treatise on Indian Law (*see supra* p. 23 n.5), cited ISDEAA and stated that "regional and village corporations are included as 'tribes' under some Indian legislation." Cohen's § 4.07[3][d][i]. The leading text on Alaskan natives reflected a similar understanding. *See* Case & Voluck, Alaska Natives and American Laws 233 (3d ed. 2012) ("[T]he inclusion of ANCSA corporations in the definition of 'Indian tribe' [in ISDEAA] allows such corporations to contract for services to deliver to their respective regions and villages."). And this Court even cited the ISDEAA definition and stated, albeit in slightly-imprecise dictum, that two ANCs are "federally recognized Indian tribes." *American Fed'n of Gov't Emps., AFL-CIO v. United States*, 330 F.3d 513, 516 (D.C. Cir. 2003).

During this nearly 45-year history of consistent interpretation by the agencies that administer ISDEAA and the courts, Congress has shown no indication that it disapproves the definition. To the contrary, despite revisiting ISDEAA and ANCSA numerous times, including five amendments to ISDEAA's definitional provisions and many more amendments to the provisions of ANCSA that establish and define ANCs, Congress has never sought to override this uniform interpretation.[12] Congress's "failure

[12] Pub. L. No. 100-472, § 103, 102 Stat. 2285, 2286 (1988); Pub. L. No. 100-581, § 208, 102 Stat. 2938, 2940 (1988); Pub. L. No. 101-301, § 2(a)(1)-(3), 104 Stat. 206 (1990); Pub. L. No. 101-644, § 202(1)-(2), 104 Stat. 4665 (1990); Pub. L. No. 103-413, § 102, 108 Stat. 4250, 4250 (1994); *see also* Pub. L. No. 96-487, § 1401(a)-(d), 94 Stat. 2371, 2491, 2492 (1980); Pub. L. No. 100-241, §§ 3, 4, 5, 6, 12(a), 101 Stat. 1788, 1789-1790, 1792, 1795, 1810 (1988); Pub. L. No. 102-415, §§ 4, 8, 106 Stat. 2112, 2113, 2114 (1992); Pub. L. No. 104-10, § 1(a), (b), 109 Stat. 155, 155-157 (1995); Pub. L. No. 104-

to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *see Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013) (upholding interpretation in light of "nearly 40 years" of agency interpretation, no judicial disagreement, and six amendments to the statute that left the relevant provision "untouched").

Congress's acceptance of the longstanding interpretation is indicated not merely by inaction, but action. In 1988, well after the prevailing interpretation was established, and nearly two years after the Ninth Circuit's decision in *Bowen*, in the course of amending ISDEAA, Congress enacted an entirely new definitions section that used the identical statutory definition of "Indian tribe." Pub. L. No. 100-472, 102 Stat. 2286 (1988). That is the ISDEAA definition applicable today. Congress has also carried forward the definition, or incorporated it by cross-reference, into dozens of other statutes relating to housing, education, health, energy, social services, economic development, infrastructure, and natural resources conservation—and, of course, into the CARES Act at issue here.[13] And this is no mere default definition of "Indian tribe." Congress has available to it other existing statutory definitions of "Indian tribe," such

42, § 109(a), 109 Stat. 353, 357 (1995); Pub. L. No. 105-333, §§ 8, 12, 112 Stat. 3129, 3134- 3135 (1998); Pub. L. No. 106-194, §§ 2, 3, 114 Stat. 239, 242-243 (2000); Pub. L. No. 110-453, § 206, 122 Stat. 5027, 5030 (2008).

[13] *See, e.g.,* 12 U.S.C. § 1715z-13a(l)(8); 15 U.S.C. § 637(a)(13); 25 U.S.C. § 4103(13); 28 U.S.C. § 524 note; 34 U.S.C. §§ 10631, 10701, 12291(a)(16), 12341(b), 12623 note, 60502(2); 42 U.S.C. §§ 290dd-4(c)(1), 1397g(4)(C), 15855(a)(2).

as the List Act definition, which substantially parallels the ISDEAA definition but makes no mention of ANCs. *E.g.,* 25 U.S.C. § 5130(2); *see, e.g.,* 18 U.S.C. § 841(t) (incorporating List Act definition into criminal provisions governing explosives).

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change" or "adopts a new law incorporating sections of a prior law." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n. 66 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978)). Indeed, the text of the CARES Act may be read to signal exactly that. *See* 42 U.S.C. § 801(g)(1) ("The term 'Indian Tribe' has *the meaning given that term* in section 4(e) of the Indian Self-Determination and Education Assistance Act") (emphasis added). The history here provides especially strong evidence. The administrative interpretation was adopted shortly after ISDEAA and has been consistently held ever since. *See, e.g.*, *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.,* 476 U.S. 426, 436-438 (1986) (relying on reenactment of statute against "longstanding [agency] interpretation" of predecessor statute adopted months after the statute was passed). Although this Court has never passed upon the meaning of "Indian tribe" under ISDEAA, the court of appeals that hears cases arising from Alaska has agreed with the longstanding interpretation. *See Lorillard*, 434 U.S. at 580 (relying on one court of appeals and one district court).

Legislative history likewise makes clear that Congress was repeatedly made aware that ANCs were treated as Indian tribes for purposes of ISDEAA's definition when

Congress carried forward that definition. *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys.*, 135 S. Ct. 2507, 2519-2520 (2015) (relying on discussion of relevant legal issue in legislative history). For example, the principal sponsor of the Indian Health Care Improvement Act stated that he was "conformi[ng]" the definition of "Indian tribe" to the ISDEAA definition to enable "regional corporations," which have "wider jurisdiction and more skilled manpower," to participate. 94 Cong. Rec. 28,343, 28,343 (Aug. 30, 1976) (statement of Sen. Jackson). When Congress reenacted the ISDEAA definitions section in 1988, shortly after the Ninth Circuit's decision in *Bowen*, the bill initially passed by the House added a group of non-profit associations to the definition of "Indian tribe," immediately adjacent to the ANC language, so that they would be "treated equally" to "Regional Corporations" in the government's decisions "award[ing] contracts under the Act." H.R. Rep. No. 99-761, at 1, 5 (1986); *see* 132 Cong. Rec. 20,605-20,606 (Aug. 11, 1986).

Congress has also enacted other statutes premised on the notion that ANCs meet the ISDEAA definition of "Indian tribe." The Indian Tribal Energy Development and Self-Determination Act, for example, cross-references ISDEAA's definition of "Indian tribe" but adds that, for certain purposes, "the term 'Indian tribe' does not include any Native Corporation." 25 U.S.C. § 3501(4)(A)-(B). And a statute addressing particular ISDEAA contracts in Alaska authorized contracting "without further resolutions from the Regional Corporations, Village Corporations," or traditional tribal governments. Pub. L. No. 105-83, § 325 (a), (d), 111 Stat. 1543, 1597-1598 (1997). Because only

"Indian tribes" pass such resolutions under ISDEAA, *see* 25 U.S.C. §§ 5304(*l*), 5321(a)(1), that statute presupposes that ANCs are "Indian tribes" under ISDEAA. Reading ISDEAA to exclude ANCs would "violate the canon against interpreting any statutory provision in a manner that would render another provision superfluous," which, "applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times." *Bilski v. Kappos*, 561 U.S. 593, 607-608 (2010); *see Branch v. Smith*, 538 U.S. 254, 281 (2003) ("[T]he most rudimentary rule of statutory construction" is that "courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes.").

Against the backdrop of consistent administrative and judicial interpretations, Congress's subsequent actions, including its choice to reenact the ISDEAA definition and to incorporate the ISDEAA definition into numerous other statutes and in some cases expressly signal that ANCs are "Indian tribes," confirm that ANCs meet the statutory definition of "Indian tribe."

4. Any ambiguity should be resolved in favor of the government's longstanding interpretation

Not only is the government's longstanding interpretation correct as a matter of text, history, and broader context, but it also has considerable persuasive force under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Agency interpretations lacking the force of law may warrant deference "given the 'specialized experience and broader investigations and information' available to the agency, and given the value of

uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citation omitted).

Here, as the district court recognized (A202-204), virtually every relevant factor weighs in favor of deference. The government's interpretation was memorialized the year after ISDEAA by the Department of the Interior, which not only administers ISDEAA but also manages the federal recognition process and the Alaska settlement. Interior parsed the statutory text, including the recognition clause, and considered various indicia of meaning, including the express mention of ANCs and likely superfluity of reading the recognition clause to apply. A137-138. And this has remained "the position of the agency in charge of Indian affairs for nearly 45 years." A203; *see Davis v. United States*, 495 U.S. 472, 484 (1990) (Courts "give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use").

Plaintiffs suggest (Confed. Br. 29) that "no deference" is warranted because this case concerns a decision by the Treasury Department, which deferred to a position taken by the Department of the Interior in 1976. Plaintiffs cite no case, and the government is aware of none, to support the notion that *Skidmore* deference varies based on who is making the decision at issue. Indeed, courts often give *Skidmore* deference where the government is not even a party and no specific agency action is under review. And the fact that this interpretation is longstanding and arose shortly after ISDEAA's enactment counsels in favor of, not against, deference.

Plaintiffs similarly miss the mark when they fault the relevant memoranda for not comprehensively addressing all counterarguments. Agency interpretations are not detailed legal briefs. And as the district court observed, Interior's 1976 memorandum "recognized the interpretive challenge presented by Congress's drafting of the ISDEAA definition, identified the competing canons of statutory construction, and evaluated those canons in light of contemporaneous understandings of the statutory terms used and Congress's intent." A203.

B. The District Court Correctly Held That ANCs Have Recognized Governing Bodies

There is likewise no merit to plaintiffs' suggestion that despite incorporating ISDEAA's definition of "Indian Tribe," which includes ANCs, the CARES Act nonetheless categorically excluded them by directing funds to "the recognized governing body," 42 U.S.C. § 801(g)(5), which, according to plaintiffs, ANCs cannot have. Plaintiffs' view ignores the plain meaning of the term "recognized governing body" and the fact that the same term appears in ISDEAA and has never been understood to disqualify ANCs.

1. Plaintiffs do not dispute that ANCs have leadership structures, including boards of directors and management teams. *See, e.g.*, 43 U.S.C. § 1606(f) ("The management of the Regional Corporation shall be vested in a board of directors."). As a matter of plain text, these are the "recognized governing bod[ies]" of ANCs.

The term "governing body" is a generic term that describes any leadership structure, which may take many forms and use many labels. *See* Oxford English Dictionary ("group of people having formal responsibility for the direction and supervision of a group, institution, or field of activity, esp. a sport")[14]; Black's Law Dictionary (11th ed. 2019) (a "government" or "[a] group of (esp. corporate) officers or persons having ultimate control") (capitalization omitted). A "governing body" need not be a "government." Countless non-governmental entities, including ANCs, have leadership structures properly referred to as "governing bodies." *See, e.g.,* Black's Law Dictionary (defining "board of directors" as "[t]he governing body of a corporation, partnership, association, or other organization"); *id.* (a "fraternal benefit association" typically has "a governing body"); *Fischer v. United States*, 529 U.S. 667, 672 (2000) ("governing body" of a hospital); *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) ("governing body of any church, synagogue, or school"); *Chamber of Commerce v. Federal Election Comm'n*, 69 F.3d 600, 601-602 (D.C. Cir. 1995) ("governing body" of a "membership association") (describing and quoting 11 C.F.R. § 114.1(e)(2)). This capacious term captures the various structures that direct and control different sovereign tribes as well as ANCs; it does not operate to limit the eligible CARES Act recipients to exclude non-governments.

[14] https://www.oed.com/view/Entry/80319?redirectedFrom=governing+body#eid286850465 (list visited Aug. 17, 2020).

The modifier "recognized" simply makes clear that the body to which payments are made must be the "[a]cknowledged," "accepted," "known," or "identified" governing body. Oxford English Dictionary (defining "recognized")[15]; *see* Merriam Webster's Online (similar).[16] Given the many ways that an entity may be structured and the possibility of leadership disputes, this modifier ensures that the money is sent to the correct governing body. *See, e.g., Sac & Fox Tribe of the Miss. In Iowa Election Bd. v. BIA*, 439 F.3d 832, 833-834 (8th Cir. 2006) (describing dispute between two tribal councils); *Cayuga Nation v. Bernhardt*, 374 F. Supp. 3d 1, 4-6 (D.D.C. 2019) (describing dispute between two "faction[s]" of a tribe about who is the "recognized governing body" that may enter ISDEAA contracts); *California Valley Miwok Tribe v. Jewell*, 5 F. Supp. 3d 86, 92-94 (D.D.C. 2013) (noting that the Department of the Interior suspended the tribe's ISDEAA contract in light of an unresolved leadership dispute).

The plain meaning of the term "recognized governing body" should come as no surprise. The district court correctly observed that ISDEAA uses the same term. A207. ISDEAA directs the government to contract with "tribal organization[s]," 25 U.S.C. §§ 5321, 5322, and defines that term, in pertinent part, as "the recognized governing body of any Indian tribe," 25 U.S.C. § 5304(*l*). Applying that definition, the government has long understood that it can contract with ANCs. A209-210; *see, e.g.,* A138 (Interior

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[15] https://www.oed.com/view/Entry/159658 (last visited Aug. 17, 2020).

[16] https://www.merriam-webster.com/dictionary/recognized (last visited Aug. 17, 2020).

memorandum stating that an ANC's board of directors "is its 'governing body'") (quoting ISDEAA implementing regulations); *see also* 46 Fed. Reg. at 27,179 (creating order of precedence between potential "governing bod[ies]" in Alaska).

Reflecting the ordinary meaning of the term "recognized governing body," ISDEAA's legislative history suggests that the term operates to ensure that the federal government contract with the body that is authorized to act on behalf of the entity. Well before the House added ANCs to the statutory definition of "Indian tribe," Interior commented on a version of ISDEAA that used the term "elected governing body," suggesting that the word "elected" be replaced with "elected or otherwise recognized." Letter from Morris Thompson, Comm'r of Indian Affairs (May 17, 1974), *reprinted in* H.R. Rep. No. 93-1600, at 22, 32. Interior noted that this change would encompass the varied ways entities select their governing bodies and would enable Interior "to determine the body which is authorized to act as the 'governing body' for each specific tribal situation." *Id.* at 32. This usage, which focuses on identifying the body that controls and has authority to speak for the relevant entity, applies just as well to ANCs.

The background understanding of ISDEAA also confirms that ANCs are eligible to receive CARES Act funds. *See United States v. Davis*, 139 S. Ct. 2319, 2329-30 (2019) ("[W]e normally presume that the same language in related statutes carries a consistent meaning"). Indeed, as the district court observed, it would be "passing strange" if Congress "granted eligibility" to ANCs by using the ISDEAA definition of "Indian

tribe" but then "silently took it away" by using the term "recognized governing body"—a term that appears in ISDEAA and has long been understood to include ANCs. A212.

The fact that the CARES Act cross-references ISDEAA to define "Indian tribe" but not to define "recognized governing body" is unsurprising. *See* Navajo Br. 5-9. ISDEAA contains a definition of "Indian tribe" but not "recognized governing body." *See* 25 U.S.C. § 5304. And in contrast to the term "Indian tribe," which has varied definitions throughout federal law and a significant accumulated meaning under ISDEAA, the term "recognized governing body" simply carries its ordinary meaning.[17]

2. Plaintiffs seek to sidestep both the plain meaning of the text and its evident origin by declaring that "federal courts" have "uniformly" held that ANCs lack "recognized governing bodies." Navajo Br. 2-5. To the government's knowledge, the only court to have addressed this issue directly—the district court in this case—held otherwise. A207-213 (decision below); *see also Bowen*, 810 F.2d at 1476-1477.

Plaintiffs instead rely on a series of cases that state only that ANCs do not have sovereign governments—"a proposition that is simply not at issue here." A211 (district court's dismissing the same set of cases). For example, in *Seldovia Native Association v. Lujan*, 904 F.2d 1335 (9th Cir. 1990) (discussed at Navajo Br. 2-3), the Ninth Circuit

[17] Although Congress could have attempted to use ISDEAA's definition of "tribal organization," that would have only created additional difficulties. As discussed below, that term has a multi-part definition that includes both "recognized governing bodies of Indian tribes" and other types of organizations, as well as a further procedural requirement where services are provided to multiple tribes. *See* 25 U.S.C. § 5304(*l*).

held that because an ANC is not a governmental unit, it could not avail itself of the principle that Eleventh Amendment immunity does not bar suits by sovereign "Indian tribes,"—"'non-foreign governmental units.'" *Id.* at 1349-1351 (quoting *Native Vill. of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990)). In explaining that an ANC is different from a Native Village (a sovereign tribe) that was previously allowed to sue the State, the court wrote that the ANC "is not a governmental unit" and because the ANC "is not a governing body, it does not meet one of the basic criteria of an Indian tribe" and may not sue the State. *Id.* at 1350-1351. The use in that context of the term "governing body" in the sense of being a governmental unit has no bearing on the interpretation of the term in the very different circumstances of this case.

Plaintiffs also contend (Navajo Br. 17-19) that the term "recognized" should be read as a "term of art" that requires formal recognition of a tribal sovereign. To the extent that "recognized governing body" is a term of art drawn from Indian law, it should be interpreted according to the most relevant source of Indian law—ISDEAA—where it has long been understood to apply to ANCs. Plaintiffs are also wrong to import the concept of formal federal recognition of tribes. As discussed above, recognition is well understood in Indian law. But in that context, the federal government recognizes Indian tribes and not just their governments. *See, e.g.,* 25 U.S.C. § 5131(a) (requiring Interior to publish a list of a recognized "tribes"); H.R. Rep. No. 103-781, at 2-3 (1993) (cited at Navajo Br. 18) ("'Recognized' . . . means that the government acknowledges as a matter of law that a particular Native American group

is a tribe by conferring a specific legal status on that group"). Formal recognition by the federal government of a tribe as a sovereign nation is not the same as determining what body is recognized by an entity as the entity's governing body. Indeed, even when a tribe has been formally recognized by the federal government, there can still be disputes about the identity of the recognized governing body. *See supra* p. 43.

Plaintiffs are on no firmer footing when they ask the Court to disregard the long held view that ANCs have "recognized governing bodies" that can enter contracts under ISDEAA. *See* Navajo Br. 10-17. Although plaintiffs suggest that these ISDEAA contracts could be premised on part of the ISDEAA definition of "tribal organization" that does not use the term "recognized governing body," they cite no evidence that the government has ever adopted that interpretation. Plaintiffs also misread the statute. Plaintiffs observe that the definition of "tribal organization" includes not only "the recognized governing body of [an] Indian tribe," but also a "legally established organization of Indians which is controlled, sanctioned, or chartered by [a recognized governing body] or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities." 25 U.S.C. § 5304(*l*). It is highly implausible, as the district court recognized, that ANCs would satisfy this definition. *See* A209-10. Plaintiffs do not explain why an ANC is properly described as a "legally established organization of Indians." *See* 43 U.S.C. §§ 1602 (g) & (j), 1606, 1607 (providing for establishment of ANCs); *see also id.* § 1601(b) (eschewing "permanently

racially defined institutions"). In addition, ANCs are not "democratically elected by the adult members of the Indian community" or "controlled, sanctioned, or chartered" by the governing body of an Indian Tribe. 25 U.S.C. § 5304(*l*). While ANCs may receive contracts that are sanctioned by another tribe, *see* Navajo Br. 11-15, the ANC itself is not sanctioned, 25 U.S.C. § 5304(*l*). *See also* A210 n.16 (explaining that plaintiffs' reading creates a statutory anomaly because there would be little reason to include ANCs in the definition of "Indian tribe"). The fact that ANCs must obtain consent from other affected tribes when contracting, *see* Navajo Br. 13-14, is just the application of the general rule applicable to all tribes in ISDEAA contracting. *See, e.g., Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 539 (D.D.C. 2014) (describing an ISDEAA contract in which one sovereign tribe authorized another to provide services to it); *see* 25 C.F.R. § 900.8(d)(1) (contract proposal must contain authorization from all tribes in area to be served); *see also* 25 U.S.C. §§ 5302, 5304(*l*), 5321(a)(1).[18]

3. Finally, plaintiffs can derive no support from the CARES Act's repeated use of the umbrella term "tribal government" or the fact that this section of the CARES Act also allots funds to state and local governments. *See, e.g.*, Navajo Br. 20-24; *see also* Confed. Br. 18-19. Congress made clear that "[t]he term 'Tribal government' means

[18] Plaintiffs appear to misunderstand the government filing in the case on which they principally rely. *See* Navajo Br. 13-14. The government explained that, "because [the ANC] want[ed] to provide services to the members of other Alaska Native tribal villages, [the ANC] must have authorizing resolutions from all these tribal villages that are within the geographic area." U.S. Resp. in Opp. to Mot. for Prelim. Injunct. 18, *Ukpeagvik Inupiat Corp. v. HHS*, No. 13-cv-73 (D. Alaska) (Doc. 22, filed May 4, 2013).

the recognized governing body of an Indian Tribe." 42 U.S.C. § 801(g)(5). And ANCs fall within that definition, as discussed above. Congress is "always" free to create statutory terms of art or to give terms in a statute "a broader or different meaning" than they otherwise have. *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 455 (2012). Thus, "[w]hen a statute includes an explicit definition," courts "must follow that definition, even if it varies from a term's ordinary meaning." *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 776 (2018) (quotation marks omitted); *see, e.g., Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 111 (1960) ("Congress was free and competent artificially to define the term 'reservations' for the purposes it prescribed in the Act"); *Western Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945) ("[S]tatutory definitions of terms used therein prevail over colloquial meanings."). Indeed, it is not unusual to define an umbrella "government" term as including ANCs. *See, e.g.*, 26 U.S.C. § 139E(c)(1). And, "as a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (alteration in original).

It is also unsurprising that the same section would authorize Treasury to fund ANCs, sovereign tribes, and other governments. As discussed, many federal programs, including ISDEAA contracting itself, have long been understood as encompassing both ANCs and sovereign entities. In fact, in allocating the CARES Act funds at issue here, Treasury used data from a housing program for which ANCs are not only eligible but are the sole unit to which many native Alaskans are assigned. *See* U.S. Dep't of Treasury,

Coronavirus Relief Fund Allocations to Tribal Governments 2-3 & n.9 (May 5, 2020)[19]; U.S. Dep't of Treasury, *Coronavirus Relief Fund Frequently Asked Questions on Tribal Population* (June 4, 2020).[20]

There is also nothing anomalous about distributing CARES Act funds to entities that engage in business functions. *See* Navajo Br. 21-22. Sovereign tribes are entitled to funds for use by tribally owned businesses. *See* 42 U.S.C. § 801(c)(7) (allocation based on, *inter alia*, COVID-related expenditures of "tribally owned entity"). In fact, as part of the required consultation with stakeholders, "Tribes made clear the importance of being able to maintain their tribally-owned businesses." U.S. Dep't of Treasury, *Coronavirus Relief Fund Allocations to Tribal Governments* 1 (June 17, 2020 update).[21] And Treasury "observed wide variability in expenditures reported by Tribal governments that appears to be related to differences in the extent to which Tribes and tribally-owned businesses engage in business activities." *Coronavirus Relief Fund Allocation to Tribal Governments* 1 (May 5, 2020). Treasury has considered the extent and nature of COVID-related expenditures when allocating funds. *Id.* at 1-2. But it is unsurprising that some amount of funds will go to entities engaging in business activities. That consideration bears on how much an entity will receive, not whether it is eligible in the first place.

[19] https://go.usa.gov/xfeCv. The referenced data set is available at https://go.usa.gov/xfeCw.
[20] https://go.usa.gov/xfeCs.
[21] https://go.usa.gov/xfeCM.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,637 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Adam Jed
Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2020, I electronically filed and served the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system and by causing an original and eight copies to be hand delivered to the Clerk of the Court.

/s/ Adam Jed

Adam C. Jed

ADDENDUM

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25 U.S.C. § 5304. Definitions (excerpts).

* * * *

(e) "Indian tribe" means 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

* * * *

(*l*) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant

42 U.S.C. § 801. Coronavirus relief fund (excerpts).

(a) Appropriation.

(1) In general. Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for making payments to States, Tribal governments, and units of local government under this section, $150,000,000,000 for fiscal year 2020.

(2) Reservation of funds. Of the amount appropriated under paragraph (1), the Secretary shall reserve—

(A) $3,000,000,000 of such amount for making payments to the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa; and

(B) $8,000,000,000 of such amount for making payments to Tribal governments.

(b) Authority to make payments.

> (1) In general. Subject to paragraph (2), not later than 30 days after the date of enactment of this section, the Secretary shall pay each State and Tribal government, and each unit of local government that meets the condition described in paragraph (2), the amount determined for the State, Tribal government, or unit of local government, for fiscal year 2020 under subsection (c).
>
> (2) Direct payments to units of local government. If a unit of local government of a State submits the certification required by subsection (e) for purposes of receiving a direct payment from the Secretary under the authority of this paragraph, the Secretary shall reduce the amount determined for that State by the relative unit of local government population proportion amount described in subsection (c)(5) and pay such amount directly to such unit of local government.

(c) Payment amounts.

* * * *

> (7) Tribal governments. From the amount set aside under subsection (a)(2)(B) for fiscal year 2020, the amount paid under this section for fiscal year 2020 to a Tribal government shall be the amount the Secretary shall determine, in consultation with the Secretary of the Interior and Indian Tribes, that is based on increased expenditures of each such Tribal government (or a tribally-owned entity of such Tribal government) relative to aggregate expenditures in fiscal year 2019 by the Tribal government (or tribally-owned entity) and determined in such manner as the Secretary determines appropriate to ensure that all amounts available under subsection (a)(2)(B) for fiscal year 2020 are distributed to Tribal governments.

* * * *

(d) Use of funds. A State, Tribal government, and unit of local government shall use the funds provided under a payment made under this section to cover only those costs of the State, Tribal government, or unit of local government that—

> (1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);

(2) were not accounted for in the budget most recently approved as of the date of enactment of this section [enacted March 27, 2020] for the State or government; and

(3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

* * * *

(g) Definitions. In this section:

(1) Indian Tribe. The term "Indian Tribe" has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304(e)).

(2) Local government. The term "unit of local government" means a county, municipality, town, township, village, parish, borough, or other unit of general government below the State level with a population that exceeds 500,000.

(3) Secretary. The term "Secretary" means the Secretary of the Treasury.

(4) State. The term "State" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa.

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