Nos. 20-543, 20-544

In the
Supreme Court of the United States

STEVEN T. MNUCHIN, Secretary of the Treasury,

Petitioner,

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.,

Respondents.

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

Petitioners,

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.,

Respondents.

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

AMICUS CURIAE BRIEF OF ALASKA FEDERATION OF NATIVES IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT.....2

I. BACKGROUND AND OVERVIEW.....3

II. ARGUMENT 7

A. The Statutory Text of ISDA and CARES Includes ANCs 7

B. Congress Either Uses the ISDA Definition to Include ANCs or Sharply Different Language to Exclude Them 15

C. The D.C. Circuit's Ruling Denies CARES Tribal Relief Funding Entirely for Some Alaska Natives 20

D. According ANCs Only Lesser "Tribal Organization" Status Frustrates the Self-Determination of Alaska Natives and Their Participation in Specific ISDA-Based Federal Programs.....22

III. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Montana v. Blackfeet Tribe of Indians,
451 U.S. 759 (1985) 11

Bragdon v. Abbott, 524 U.S. 624 (1998) 15

Cook Inlet Native Ass'n v. Bowen,
810 F.2d 1471 (9th Cir. 1987) 3, 9-10, 12-14, 24

Ramah Navajo Chapter v. Lujan,
113 F.3d 1455 (10th Cir. 1997) 11

Sturgeon v. Frost, 136 S.Ct. 1061 (2016).....2

Statutes

5 U.S.C. § 3371 8

5 U.S.C. § 3372 8

12 U.S.C. § 1715z 19

12 U.S.C. § 4702 17

16 U.S.C. § 470bb 19

16 U.S.C. § 1722 19

16 U.S.C. § 4302 19

20 U.S.C. § 7713

25 U.S.C. § 1903 18

25 U.S.C. § 3001 18

25 U.S.C. § 3202 19
25 U.S.C. § 3501 .....19, 24
25 U.S.C. § 3502 24
25 U.S.C. § 3703 19
25 U.S.C. § 4103 ..... 16, 23-24
25 U.S.C. § 4152 24
25 U.S.C. § 5301 1
25 U.S.C § 5302 .....5, 25
25 U.S.C. § 5304 .....4, 6, 8, 23
25 U.S.C. § 7713 19
26 U.S.C. § 168 19
29 U.S.C. § 741 19
38 U.S.C. § 3765 19
42 U.S.C. § 801 .....1, 6, 8, 14, 19
42 U.S.C. § 2991b 18
42 U.S.C. § 2992c 19
43 U.S.C. § 1601 .....1, 4, 19, 25
43 U.S.C. § 1602 .....13, 18, 22
43 U.S.C. § 1604 22
43 U.S.C. § 1605 25
43 U.S.C. § 1606 .....4, 13, 22, 25
43 U.S.C. § 1607 .....4, 13, 25

43 U.S.C. § 1608 4

43 U.S.C. § 1609 4

43 U.S.C. § 1610 4

43 U.S.C. § 1611 ..... 4, 25

43 U.S.C. § 1612 25

43 U.S.C. § 1613 25

43 U.S.C. § 1626 ..... 4, 20-21

Pub. Law No. 93-638 8

Pub. Law No. 103-454 11

Pub. Law No. 100-472 14

Pub. Law No. 116-136 19

Regulations

24 C.F.R. 1000.301 16

24 C.F.R. 1000.302 ..... 16, 24

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Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 58 Fed.Reg. 54364 (Oct. 21, 1993) 10, 11

Implementation of the Native American Assistance and Self-Determination At of 1996, 63 Fed.Reg. 12334 (March 12, 1998) 16

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H.Rept. 93-1600 (Dec. 16, 1974) 13

Scalia, Antonin and Garner, Bryan A., *Reading Law: The Interpretation of Legal Texts* (2012). 15

U.S. Treasury, "Coronavirus Relief Fund Tribal Allocation Methodology," (May 5, 2020) 6

U.S. Dept. of Housing and Urban Development. "FY 2020 Final IHBG Funding by TDHEs & Regions" 23

INTEREST OF AMICUS CURIAE

Established in 1966 to achieve a fair and just settlement of aboriginal land claims, the Alaska Federation of Natives ("AFN") is the oldest and largest statewide Native membership organization in Alaska.[1] Its members include most of the sovereign Alaska Native villages (formally-recognized tribes, or "FRTs"); most of the regional and village Native corporations ("ANCs") established pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq*.; and all of the regional nonprofit tribal consortia that contract to administer federal programs under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 5301 *et seq*. Having had considerable input into the passage of ANCSA and ISDA, and counting as members both FRTs and ANCs, AFN is positioned to help the Court understand why Congress chose a particular ISDA definition of "Indian Tribe" to distribute tribal relief funding under the Coronavirus Aid, Relief, and Economic Security Act ("CARES"), 42 U.S.C. § 801, and why the decision to include ANCs, so that relief funding fully reaches Alaska Natives, was made. AFN is also well-positioned to address the broader adverse consequences of the D.C Circuit decision under review, supplied as Government Certiorari Petition 1a ("COA.Opin." and "Govt.Pet.")

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[1] All parties consented in writing to this brief's filing, after receiving the required notice. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Alaska is different. The state and its people are often "the exception, not the rule." *See Sturgeon v. Frost*, 136 S.Ct. 1061, 1071 (2016). Accepting this proposition, as the Court has done, is the first step to resolving this case. *Id*.

This case concerns whether Alaska Natives should lose out in CARES tribal relief funding because Congress in ANCSA chose a model for recognizing the inherent right of Alaska Native self-determination (corporations) that differs from that of American Indians (reservations). As AFN will show, Congress provided in the governing statutes for the equal treatment of Alaska Natives by treating ANCs as statutory "Indian Tribes" for Federal programs not requiring a FRT's sovereign attributes.

In crafting CARES, Congress earmarked $8 billion for Native Americans and conditioned eligibility on satisfying a particular statutory definition of "Indian Tribe" found in ISDA. That definition – which does not hinge on tribal sovereignty – was carefully chosen because it specifically includes ANCs in an Alaska inclusion clause that is neither inconsistent with nor defeated by an accompanying recognition clause. The D.C. Circuit implied into the recognition clause words that are just not there – a purported requirement of sovereign FRT recognition. As shown below, possessing attributes of tribal sovereignty is not the only way to satisfy the recognition clause. The Court thereby erroneously disqualified ANCs from this funding, harming Alaska Natives who exercise self-determination in a way somewhat different from American Indians.

The D.C. Circuit rejected the analysis of the District Court, the federal agencies, and the Ninth Circuit that the recognition clause could not be allowed to make surplusage out of the inclusion of ANCs in the Alaska inclusion clause, based on the Court's misplaced view that ANCs were put in the Alaska inclusion clause only on the off-chance that ANCs might later be recognized as sovereign. Finally the Court failed to consider the re-enactment canon, which holds that Congress's repeated re-use of the ISDA definition (including in CARES) after the federal agencies construed it to include ANCs is Congressional approval of that interpretation, and other pertinent canons.

Certiorari should be granted because the decision under review misreads the statutory text of CARES and ISDA; undermines the self-determination of Alaska Natives; and threatens a host of federal programs for Alaska Natives that, like CARES, is built on the ISDA definition of "Indian Tribe." Review by the Court is also essential to resolve the circuit split that now exists with the Ninth Circuit and the forum-shopping that will likely occur in litigation such as this. *See Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471 (9th Cir. 1987) (holding ANCs meet the ISDA definition of "Indian Tribe").

I. BACKGROUND AND OVERVIEW

The D.C. Circuit's holding that only sovereign FRTs are "Indian Tribes" under ISDA misunderstands how Congress responded to differences between tribalism in Alaska and the rest of the Nation by taking steps to ensure Alaska Natives were not disadvantaged. Those differences

stem from the unique history of Alaska Natives culminating in the adoption of ANCSA and ISDA.

Due to the remoteness and vast size of Alaska, and the relative lack of effort by non-Natives to drive Alaska Natives off their aboriginal lands, little effort was made by Congress to resolve aboriginal land claims in Alaska until the 1960s. At that time, the largest oil reserve in North America was discovered on the Arctic coast, prompting the need to resolve aboriginal title so extraction could begin. The desire on the part of the oil companies and the State and Federal governments to remove the cloud on title for natural resource development, and the desires of Alaska Natives to continue to use and occupy their lands, resulted in 1971 in ANCSA.

Pursuant to ANCSA, Congress: (1) entrusted lands and money from the settlement of aboriginal claims to corporations obligated to act on behalf of Alaska Natives, rather than creating reservations, 43 U.S.C. §§ 1601, 1606(r), 1607-1611, while (2) clarifying that this different system would not result in Alaska Natives receiving fewer services than American Indians. § 1626(d). Alaska Natives expect ANCs to turn CARES Act funding into urgently needed action fighting the pandemic. ANCs have infrastructure and capability to move quickly, obtain resources and supply chains, mobilize manpower, facilitate the distribution of a vaccine, and leverage public-private partnerships to stretch resources to help Alaska Natives combat the coronavirus health pandemic and corresponding economic collapse.

As a result of ANCSA, viewing the <u>combination</u> of an Alaska FRT and its related ANCs (and also the

not-for-profit tribal consortia discussed further below) produces a picture that looks more like a Lower 48 FRT than when attempting to view an Alaska FRT in isolation. In contrast to Lower 48 FRTs, which operate gaming and other businesses and manage substantial land reservations, most Alaska FRTs have little capacity alone to respond to a public health emergency. Interpretations that limit Federal Indian programs to FRTs can be ill-suited to Alaska.

ANCSA is part of the framework on which modern day Alaska Native self-determination rests, and ISDA is also part of that framework. ANCSA was enacted in 1971, one year after President Nixon boldly declared "[t]he time has come to . . . create . . . a new era in which the Indian future is determined by Indian acts and Indian decisions …."[2] The new federal Indian policy was soon fortified at the national level through the 1975 passage of ISDA. ISDA sought to recognize Native self-determination in different ways, including by empowering Native Americans to contract with federal agencies to administer education, health care, and other services formerly provided by federal employees. 25 U.S.C § 5302(a). This required addressing the intersection between the new national policy and the Alaska self-determination policy. Congress did so by adopting an "Indian Tribe" definition that references (and until this case has always been found to include) ANCs. 25 U.S.C. § 5304(e).

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[2] President Nixon, Special Message on Indian Affairs (July 8, 1970). https://www.epa.gov/sites/production/files/2013-08/documents/president-nixon70.pdf

In CARES, Congress awarded relief funding to "Indian Tribes" as defined by the ISDA definition based on their "increased expenditures" caused by the pandemic. 42 U.S.C. § 801(c)(7) and (d). Legislating in the midst of the pandemic, and evidently not desiring to exclude either non-sovereign or sovereign tribal entities with knowledge and experienced leadership, Congress chose the broad definition of "Indian Tribe" found in the ISDA definition it incorporated, 25 U.S.C. § 5304(e), rather than narrower alternatives discussed in the Argument below. Using a broad definition also made sense for a second reason. In Alaska, "increased expenditures" are generally going to be in the economically active entities (ANCs) rather than the less economically active entities (FRTs).

The Treasury Department implemented Congress's allocation standard by utilizing three pieces of ascertainable information to estimate increased expenditures: (1) budget size, (2) employee counts, and (3) population served.[3] In Alaska, the bulk of the employee counts and budgets are in the ANCs rather than FRTs. Further, a substantial portion of the population consists of Alaska Natives who are not members of FRTs and who are members of an "Indian Tribe" only by being ANC shareholders.[4] ANCSA provides that all Alaska Natives are to receive the benefits accorded American Indians, whether or not enrolled in a FRT.[5] The result is a

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[3] *See* https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf

[4] *Id.*, n. 9 (citing Treasury's data sources).

[5] *See* p. 19 below.

funding allocation that made sense until the D.C. Circuit disqualified ANCs, but no longer makes sense.

The importance of including ANCs is magnified, because the funding allocation does not consider another large set of pertinent employee counts and budgets in the Alaska tribal ecosystem – the employees and budgets of the not-for-profit tribal consortia that provide much of the health and social services to Alaska Natives. The consortia are not Indian Tribes, and, despite the close affiliations, Treasury did not allow either ANCs or Alaska FRTs to include the employee counts and budgets of their affiliated consortia in their funding applications.

The Alaska Congressional Delegation's amicus brief describes the pandemic in Alaska (pp. 6-7).

II. ARGUMENT

As an *amicus curiae*, AFN will discuss the specific statutory text at issue from its perspective as an association that has represented all facets of the Alaska Native community for more than 50 years, including in the negotiation and implementation of ANCSA and ISDA. AFN will then provide a wider-angle view of the statutory construction and practical policy issues that merit this Court's review.

A. The Statutory Text of ISDA and CARES Includes ANCs

When Congress in CARES chose to use a statutory definition from ISDA to determine which Native entities were eligible for tribal relief funding, two different ISDA definitions were available.

The first ISDA definition, which Congress did not choose, defines tribal "local governments," and

excludes ANCs by conspicuously omitting them, instead referring in its Alaska clause only to Native villages:

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village as defined in [ANCSA], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians ....[6]

The second ISDA definition, which Congress did choose in CARES, defines "Indian Tribe" and is nearly identical, except that it includes ANCs in discussing Alaska entities:

> "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 [ANCSA], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[7]

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[6] ISDA § 104(a), Pub. Law 93-638 § 105(a), codified at 5 U.S.C. § 3371(2)(c). The definition involves exchanging federal and tribal "local government" employees. § 3372. It goes on to also include "tribal organizations" as defined in ISDA.

[7] ISDA § 4(b), codified at 25 U.S.C. § 5304(e) (emphasis added, incorporated in CARES, 42 U.S.C. § 801(g)).

The clause starting with "including" is called the "Alaska inclusion clause." The next clause starting with "which is recognized" is the "recognition clause."

In reaching the surprising conclusion that the recognition clause in the ISDA definition incorporated by Congress in CARES excluded all ANCs, thus obliterating the key distinction between the two definitions, the D.C. Circuit erred in several ways.

1. The 1976 Inquiry

Among other errors, the D.C. Circuit should have conducted a 2020 inquiry to account for repeated re-enactment and re-use by Congress of the same definition, including in CARES, after the federal agencies and the Ninth Circuit in *Bowen* had construed that definition to include ANCs. Instead, the D.C. Circuit mostly stopped its inquiry in 1976, and so failed to consider the re-enactment canon, as Petitioners discuss. *See* Point A.2 below.

However, because the D.C. Circuit's analysis is essentially a 1975/1976 analysis, it is helpful to set aside the reenactment (a/k/a "prior construction") canon for a moment, and go back in time and analyze the 1975 ISDA "Indian Tribe" definition and the Interior Department's ("DOI") contemporaneous interpretation of it in 1976. Even without considering that canon, the D.C. Circuit's reading is unpersuasive, and the longstanding agency interpretations are correct.

DOI determined in the 1976 Soller memorandum that the recognition clause should not be read to defeat the inclusion of ANCs, reasoning to do so would

make surplusage out of the Alaska inclusion clause.[8] The Ninth Circuit affirmed DOI's interpretation in 1987 in the *Bowen* decision, relying on the legislative history of ISDA including Congress's decision to add ANCs to the definition of "Indian Tribe" through an amendment specific to ANCs. *Bowen*, 810 F.2d at 1475. In 1993, DOI clarified that ANCs are "made eligible for Federal contacting and services by statute," which captures the situation.[9]

Three considerations support the conclusion that ANCs are "Indian Tribes" under the ISDA definition incorporated into CARES:

First, the D.C. Circuit implausibly concluded that Congress included ANCs in the Alaska inclusion clause only on the off chance that ANCs might someday obtain sovereign recognition, and so satisfy the recognition clause under the D.C. Circuit's narrow view of that clause. Even in 1975, however, it was clear that ANCs could never establish the historical relationship with the federal government needed to be a sovereign tribe under longstanding DOI precedent.[10] DOI's 1976 interpretation does not

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[8] Memorandum from the Assistant Solicitor for Indian Affairs, Meaning of "Indian Tribe" in section 4(b) of P.L. 93-638 for purposes of application to Alaska (May 21, 1976) (printed in Confederated Tribes COA Appendix, p. A-137, "Soller Mem.").

[9] *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 58 Fed.Reg. 54,364, 54,366 (Oct. 21, 1993).

[10] The D.C. Circuit notes that DOI took until 1978 to formally codify in regulations its longstanding requirement of a historical relationship evidenced by treaty or other sovereign-like political relationships, but that test had long been part of the case law the 1978 regulations codified. Govt.Pet. at 25-27.

suggest ANCs might qualify in the future as FRTs, and so undertakes the surplusage analysis noted above.[11]

Second, the text of the recognition clause in the 1975 ISDA "Indian Tribe" definition does not reference or require recognition as a sovereign FRT, and such a requirement should not be implied. The ISDA definition was enacted in 1975, long before Congress enacted the List Act in 1994,[12] so any "term of art" theory that recognition as used in ISDA is implicitly List Act recognition is untenable. The D.C. Circuit also erred in failing to consider that the recognition can come from more than one source, e.g. being defined or established by ANCSA, per the Alaska inclusion clause's reference to ANCSA, or in some other way. DOI found that ANCs are "made eligible for Federal contracting and services by statute." [13]

Moreover, the Indian canons of construction require that statutes be liberally construed in favor of Indians.[14] Although the Court need not decide at the certiorari stage whether these canons apply, they likely do apply to this dispute over whether Alaska Native entities fall within the gate-keeping definition

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[11] Soller Mem. at 2. See also the legislative history documents discussed below, none of which suggests Congress was acting in anticipation of future formal recognitions of ANCs as FRTs.

[12] Pub. Law 103-454.

[13] *See* 58 Fed.Reg. at 54,366; *see also*, 1 Cohen's Handbook of Federal Indian Law § 4.07[3][d][i] (2017).

[14] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) (this applies to ISDA).

of a statutory Federal Indian program.[15] If the Indian canons apply, they weigh heavily against implying into the recognition clause an unstated limitation under which sovereign recognition as an FRT is the only way to satisfy that clause.

Whether or not the Indian canons apply, multiple textual factors point in favor of the Ninth Circuit's reading (*Bowen*), and against the D.C. Circuit's reading, particularly the specificity of the Alaska inclusion clause, the generality of the recognition clause, the express reference to another statute providing a qualifying test that ANCs pass ("defined in or established pursuant to" ANCSA), and the existence of many Federal Indian programs in which ANCs participate (and thus are recognized as eligible to participate in, *see* n. 13 above and Point B below).

Third, contrary to the D.C. Circuit's holding, the reading that ANCs are "Indian Tribes" under ISDA fully comports with the series-qualifier canon. If that canon calls for applying the recognition clause to all of the entities mentioned in the definition used in CARES, ANCSA supplies the recognition ANCs and Native Villages need to satisfy that clause. As quoted above, the ISDA definition clarifies that the "Indian Tribe" definition "include[s]" Native Villages and ANCs "defined in or established" by ANCSA, which are recognized as eligible for services. Those villages

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[15] This is not a situation where two separate groups of Native American each seek to invoke these canons in opposing directions. The issue is whether ANCs qualify for a Federal Indian statutory program. Plaintiff-Respondents' interest is wholly indirect (a side-effect of disqualifying ANCs might be re-allocating part of a fixed fund to Plaintiff-Respondents).

that meet ANCSA's complex definition of "Native village" satisfy the recognition clause, and so qualify as Indian Tribes, as do those Native corporations that meet ANCSA's definition of ANC.[16] The recognition clause thus does play a role in determining which Alaska Native entities qualify as "Indian Tribes," which is all the series-qualifier canon could ask, if that canon applies.

This point that ANCSA does any recognizing necessary to satisfy the recognition clause is strongly supported by the legislative history of ISDA. The House Report explaining the amendment adding ANCs to the "Indian Tribe" definition "include[s] regional and village corporations established by the Alaska Native Claims Settlement Act," and mentions no further filtering conditions such as DOI recognition as a sovereign FRT.[17] Although the parties brought the House Report passage to the D.C. Circuit's attention, and the Ninth Circuit cited it in *Bowen*, 810 F.2d at 1475, the D.C. Circuit did not discuss it in its opinion.[18] DOI's summary sent with the enrolled bill to President Ford for signature likewise explains flatly that ANCs established under

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[16] 43 U.S.C. § 1602(c) (defining Native villages) and §§ 1602(g) and (j), 1606-1607 (defining and establishing ANCs).

[17] H.Rept. 93-1600, p. 14 (Dec. 16, 1974), available within: https://www.fordlibrarymuseum.gov/library/document/0055/1668949.pdf.

[18] Judge Katsas, the author of the opinion, stated at oral argument that he would not consider legislative history. Oral Argument Recording at 1:12:15.

https://www.cadc.uscourts.gov/recordings/recordings2020.nsf/94CFF7208B44E267852585E00070E2CB/$file/20-5204.mp3

ANCSA are "Indian Tribes" for purposes of ISDA, without mentioning any further filtering tests.[19]

2. 2020 Inquiry.

What calls even more forcefully, however, for a grant of certiorari to fully consider these statutory interpretation issues are the decades of subsequent statutory enactments preceding the adoption of CARES in 2020 in which Congress repeatedly re-used the same definition of "Indian Tribe" found in ISDA, or a substantially similar definition. These repeated re-enactments came after the agency interpretations in the 1970s and 1980s and after *Bowen* established that ANCs were indeed statutory "Indian Tribes" under ISDA-based definitions.[20] As discussed in Point B below, other federal agencies joined this interpretation of ISDA-based statutes. The re-use of the 1975 ISDA definition, including in CARES, came after Congress enacted the List Act in 1994, providing a definition Congress easily can reference when it wants to limit a specific program to FRTs.

"When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to

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[19] "'Indian Tribe' is defined to include Alaska Native villages or Regional or Village Corporations under the Alaska Native Claims Settlement Act." DOI views on Enrolled Bill S. 1017, Dec. 27, 1974, p. 4 (see n.13 above for source).

[20] *See* Pub. Law 100-472, § 103 (1988) (directly re-enacting ISDA definitions); Point B below (discussing NAHASDA, CDBFIA, and ITEDA, all enacted after 1990); Govt.Pet. at 20-21 (collecting more examples); 42 U.S.C. § 801(g)(1) (CARES).

incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott,* 524 U.S. 624, 645 (1998); *see also*, Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 235 (2012) (prior construction canon applies to "related statutes," citing *Bragdon*). Plaintiff-Respondents cannot adequately explain why Congress keeps re-adopting and re-using the ISDA "Indian Tribe" definition knowing that, contrary to Plaintiffs-Respondents' reading, the agencies implementing these statutes consistently allow ANCs to participate as "Indian Tribes."

B. Congress Either Uses the ISDA Definition to Include ANCs or Sharply Different Language to Exclude Them.

The conclusion that ANCs are "Indian Tribes" for purposes of CARES is bolstered by a broader review of federal Indian statutes. Congress frequently uses the ISDA definition to include ANCs, or uses diverging definitions to exclude them, depending on what it is trying to accomplish. A comparison of the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA") and the Community Development Banking and Financial Institutions Act of 1994 ("CDBFIA") against the Indian Child Welfare Act ("ICWA") and the Native American Graves Protection and Repatriation Act ("NAGPRA") proves this point, while an examination of the Indian Tribal Energy Development Act of 2005 ("ITEDA") shows Congress's sophistication in fine-tuning the inclusion of ANCs.

NAHASDA (1996), CDBFIA (1994), and ITEDA (2005) were all adopted after the 1976 DOI and 1987

Ninth Circuit interpretations regarding the ISDA definition of "Indian Tribe" were published, and all define "Indian Tribe" to include ANCs.

NAHASDA helps secure financing for affordable tribal housing activities and includes ANCs by utilizing a definition of "federally recognized tribe" that tracks ISDA:

> any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA], that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians pursuant to [ISDA.][21]

As the financial repository for Alaska Natives, ANCs can be and are useful in promoting housing assistance, and often own the land involved. Consequently, the Department of Housing and Urban Development ("HUD") adopted rules providing for their participation since tribal sovereignty is not implicated.[22]

CDBFIA seeks to promote economic revitalization and community development through targeted investment and defines "Indian Tribe" to include ANCs by incorporating the ISDA definition:

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[21] 25 U.S.C. § 4103(13)(B).

[22] 63 Fed.Reg. 12334, 12335, 12366 (March 12, 1998); *see* 24 C.F.R. 1000.301, 302(4), 327 (funding "regional corporation").

> any Indian tribe, band, pueblo, nation, or other organized group or community, including any Alaska Native village or regional or village corporation, as defined in or established pursuant to [ANCSA], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.[23]

Treasury certifies ANC participation in this program, which again does not involve tribal sovereignty, and so follows DOI's interpretation of ISDA.[24]

By contrast, legislation that excludes ANCs from program eligibility utilizes contrasting statutory language that clearly excludes ANCs.

ICWA defines "Indian Tribe" in a manner that includes Alaska Native villages but not village corporations or regional corporations, and so excludes ANCs:

> ["Indian Tribe" means] any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska

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[23] 12 U.S.C. § 4702(12).

[24] Treasury "List of Certified CDFIs," https://www.cdfifund.gov/programs-training/certification/cdfi/Pages/default.aspx (including entities owned by ANCs CIRI and Arctic Slope (Alaska Growth Capital)).

> Native village as defined in section 1602(c) of title 43[.][25]

ICWA concerns placement preferences in child custody decisions where divorcing parents are not involved, a sovereign function inappropriate for corporate entities. Thus, ANCs are unsurprisingly excluded.

NAGPRA defines "Indian tribe" similarly to ICWA and mostly tracks the other ISDA definition quoted above, the one not selected by Congress in CARES.[26] NAGPRA's definition thus limits its Alaska inclusion clause to Native villages, excluding ANCs.

> any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to [ANCSA]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.][27]

Ensuring proper repatriation for human remains and sacred objects taken from Native graves is more appropriate for sovereign FRTs than corporate ANCs; therefore, Congress excluded them.

While the primary point of comparing and contrasting these four statutes is to show the consistent way in which Congress uses ISDA-based

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[25] 25 U.S.C. § 1903(8).

[26] *See* p. 7 above (quoting ISDA § 104(a)).

[27] 25 U.S.C. § 3001(7).

language to include ANCs and clearly different language when it wishes to exclude ANCs, it is also worth noting that CARES directs that Treasury allocate the relief funding based on "increased expenditures" due to the pandemic.[28] This has economic rather than sovereign implications. CARES does not limit use of the relief funding to the types of sovereign activities usually involved when ANCs are excluded.

A fifth statute, ITEDA, shows Congress's proficiency in fine-tuning the ISDA definition, in order to include ANCs in part of a program. As the Government explains, ITEDA incorporates the ANC-inclusive ISDA "Indian Tribe" definition, but then qualifies that incorporation by expressly excluding ANCs from a subset of the ITEDA energy development programs.[29] This shows Congress's understanding that using the ISDA definition includes ANCs as "Indian Tribes," absent a specific carve-out.

Many other statutes include ANCs, by adopting ISDA-like definitions of "Indian tribe," or terms like "tribal land."[30]

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[28] *See* 42 U.S.C. § 801(c)(7) and (d). The pertinent CARES Act division is called: "Keeping Workers Paid and Employed, Health Care System Enhancements, and Economic Stabilization." Pub. L. No. 116-136, Div. A.

[29] 25 U.S.C. § 3501(4); Govt.Pet. at 22.

[30] *See, e.g.*, 43 U.S.C. § 1601(g); 12 U.S.C. § 1715z-13(i)(2); 16 U.S.C. §§ 470bb(4)-(5),1722(6)(D), 4302(3)-(4); 20 U.S.C. § 7713(5)(A)(ii)(III); 25 U.S.C. §§ 3202(9), 3501(2)(C), 3703(10); 26 U.S.C. § 168(j)(6); 29 U.S.C. § 741(d); 38 U.S.C. § 3765(1)(C); 42 U.S.C. §§ 2991b(a), 2992c(3).

C. The D.C. Circuit's Ruling Denies CARES Tribal Relief Funding Entirely for Some Alaska Natives.

The D.C. Circuit identified a significant part of the Alaska Native community that is in some ways even more severely impacted by its decision than the rest of that community, but failed to apply an ANCSA provision that should have led that Court to decide the case differently, avoiding that impact.[31]

These are Alaska Natives who are not enrolled in any Native Village or other FRT, and whose status as beneficiaries of federal Indian programs is related to the ISDA "Indian Tribe" definition of their regional ANC. *See* COA.Opin. at 24. If ANCs are no longer "Indian Tribes" under the ISDA definition, those Alaska Natives have no status, and so face a variety of long-term consequences, as well as receiving none of the disputed relief funds for pandemic mitigation.

In addressing these Alaska Natives, the D.C. Circuit focused on an ANCSA provision that declares that ANCSA's distribution of property to settle aboriginal claims "shall not be deemed to substitute for any governmental programs otherwise available to the Native peoples of Alaska as citizens of the United States and the State of Alaska." 43 U.S.C. § 1626(a); COA.Opin. at 24. Citing § 1626(a), the Court forecast "confidence" that Federal and State health agencies responsible for the general citizenry will somehow "fill the void" created by leaving these

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[31] For adverse consequences to the rest of the Alaska Native community, see Points I and II.D (impact on self-determination, ANSCA places Alaska Natives' land and resources in ANCs, so budget and employee count criteria do not work in Alaska).

Alaska Natives without this CARES resource. *Id.*; *but see* State of Alaska Amicus Brief at 24 (State cannot fill that void).

Although cited to it by the parties, the D.C. Circuit failed to account for a neighboring ANCSA provision, which provides that "[n]otwithstanding any other provision of law, Alaska Natives shall remain eligible for all Federal Indian programs on the ***same basis*** as other Native Americans." 43 U.S.C. § 1626(d) (emphasis added).

The obvious meaning of § 1626(a) and (d) read together is that it is not acceptable for some Alaska Natives to be denied their federal Indian beneficiary rights and receive only whatever services might be available to the general citizenry. ANCSA affirmed that Alaska Natives are to receive the special services accorded to Native Americans "on the same basis as other Native Americans," § 1626(d). Section 1626(d) is a directive from Congress not to construe other statutes in a way that denies benefits to Alaska Natives on account of ANCSA establishing a tribal system in Alaska that is so different from elsewhere. Sadly, that is just what the D.C. Circuit did in stripping many Alaska Natives of their only path to this CARES funding, as well as their Indian beneficiary status.

Any rejoinder from the Plaintiff-Respondents that Alaska Natives who are not members of a Native Village are undeserving of services is rebutted by ANCSA. Rather than casting out Alaska Natives who were not members of Native Villages or other FRTs, Congress provided in ANCSA that every Alaska Native would be a shareholder in one regional ANC,

and so could receive services through the regional ANC, 43 U.S.C. §§ 1604(b), 1606(r), and defined "Alaska Native" primarily by blood quantum, without requiring FRT membership. § 1602(b).

D. According ANCs Only Lesser "Tribal Organization" Status Frustrates the Self-Determination of Alaska Natives and Their Participation in Specific ISDA-based Federal Programs.

In downplaying the impact on Alaska Natives of declaring ANCs to not be "Indian Tribes," the D.C. Circuit also incorrectly suggested that according ANCs lesser "tribal organization" status is sufficient for ANCs to adequately participate in other Federal Indian statutory programs using ISDA definitions (programs other than CARES Act tribal funding). COA.Opin. at 23-24.

The D.C. Circuit stated that it was "far from obvious" that ANCs would be excluded from these programs, as "ISDA makes funding available to any 'tribal organization' upon request by any 'Indian Tribe.'" *Id*. The Court suggested that if Alaska FRTs designated ANCs as "tribal organizations," the impact of the Court's decision would be minimized. *See id*. However, the D.C. Circuit grossly underestimated the impact of its decision, both as to specific statutory programs based on ISDA, and as to the broader fundamental shared goal of ANCSA and ISDA: maximum self-determination for Alaska Natives.

A review of three important statutes that use an ISDA-based "Indian Tribe" definition, all addressed in briefing to the D.C. Circuit, demonstrates that according ANCs only lesser non-Tribe status is

insufficient to allow full Alaska Native participation in these programs:

- ISDA. An "Indian Tribe" can only sanction a "tribal organization" to operate an ISDA-funded program on behalf of the Indian Tribe's own members. *See* 25 U.S.C. § 5304(l). For Alaska Natives who are not members of any Native Village or other Alaska FRT, according ANCs lesser "tribal organization" status is no help.
- NAHASDA. HUD allocates housing funding among Alaska "Indian Tribes" based on population and housing units located within each tribe's geographic boundaries.[32] Only regional ANCs have geographic boundaries that cover all of Alaska, so a very substantial share of NAHASDA funding for Alaska Natives comes through the regional ANCs, because of their "Indian Tribe" status under that law. HUD's annual reports quantify the large figures involved.[33] NAHASDA does not have a "tribal

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[32] See 25 U.S.C. § 4103(13)(B) (ISDA-based definition of "federally-recognized tribe" quoted in Point B above); 24 C.F.R. 1000.327(a) (population / housing not within a Native Village is credited to a "regional tribe" if one exists and participates, and if not, to the regional ANC).

[33] "FY 2020 Final IHBG Funding by TDHEs & Regions": https://www.hud.gov/sites/dfiles/PIH/documents/AKONAP_FY%202020_Final_IHBG_Funding.pdf (visited Oct. 31, 2020) (showing regional ANCs are major participants in eleven of the twelve regions – for a list of the regional ANCs, see https://ancsaregional.com/the-twelve-regions/).

organization" definition, and no other backdoor path to funding is apparent.[34]

- ITEDA. ITEDA makes grants available for energy development projects on "Indian land," defined as land held by "Indian Tribes."[35] If ANCs lose "Indian Tribe" status under ISDA, there is no apparent way to fund projects on regional ANC land outside of Native Villages.[36]

Until the clash between the Ninth Circuit (Bowen) and D.C. Circuit is resolved, confusion will reign, to the detriment of Alaska Natives, as the federal agencies implement these programs.

Even more troubling and far-reaching is the long-term damage to the shared ANCSA/ISDA goal of supporting maximum self-determination that would come from depriving ANCs of statutory "Indian Tribe" status in the hierarchy of federal Indian law. ANCSA supports the inherent right of Alaska Natives to self-determination by allowing Alaska Native peoples to retain a certain percentage of their lands, albeit by a different model than that used by Congress for American Indians (corporations versus reservations)

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[34] The Indian tribes typically assign their funding to housing authorities called "recipients," 25 U.S.C. § 4103(19), but the funding is still based on the population and housing within each Indian tribe's boundaries, and so is limited by the "Indian tribe" definition. 24 C.F.R. 1000.302(4), 1000.327; 25 U.S.C. § 4152(a).

[35] 25 U.S.C. §§ 3501(2), 3502(a)(2)(A); *see* 25 U.S.C. § 3501(4)(A) (ISDA-based Indian Tribe definition).

[36] Non-Tribes may partner with Indian Tribes to form "tribal energy development organizations" to seek grants, but the projects must still be on "Indian land," 25 U.S.C. §§ 3501(12), 3502(a)(2)(A).

and use the new model to better the lives of their Alaska Native shareholders.[37] ISDA overlays a national-level policy in which self-determination is also achieved by encouraging Indian Tribes to take over from federal employees the task of directly managing the provision of federally-supported services such as education and health care.[38] Because Congress determined to further the self-determination of Alaska Natives, in part, by including ANCs in the ISDA definition of "Indian Tribe," reading ANCs out of the law will disturb 45 years of settled Federal Indian policy toward Alaska Natives. Moreover, not including ANCs would severely disadvantage Alaska Natives and their corporations compared to American Indians and their reservations.

III. CONCLUSION

ANCSA was the Alaska application of new federal Indian policy of self-determination, adopted in the largest aboriginal land claims settlement in the history of the U.S. To read ISDA, passed a short four years later, as now excluding the new entities

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[37] 43 U.S.C. §§ 1601(b) (aboriginal claims settlement "should be accomplished … with maximum participation by Natives in decisions affecting their rights and property … without creating a reservation system or lengthy wardship or trusteeship …."), § 1606(r); *see also*, §§ 1605-1607, 1611-1613.

[38] 25 U.S.C. § 5302(a) ("The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.")

required by Congress for Alaska Natives to express their inherent self-determination makes no sense. ANCSA and ISDA were intended to be the best path out of extreme poverty and deprivation and intended to trust and empower the Native people themselves, by their own actions, to raise their standard of living. In choosing the "Indian Tribe" definition in ISDA that included ANCs, as opposed to other stock definitions that excluded ANCs, CARES follows the ANCSA and ISDA policies of recognizing the ANCs' vital role in achieving self-determination for Alaska Natives.

The Petitions for Certiorari filed by the Government and the ANCs should be granted.

Respectfully submitted,

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