ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 11, 2020
No. 20-5204

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

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al.
[20-5205],

CHEYENNE RIVER SIOUX TRIBE, et al.
[20-5209],

UTE TRIBE OF THE UINTAH AND OURAY RESERVATION
[20-5204],

Plaintiffs-Appellants,

v.

STEVEN MNUCHIN, SECRETARY, UNITED STATES DEPARTMENT OF THE TREASURY,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia (No. 1:20-cv-01002) (Hon. Amit P. Mehta)

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANTS FOR REVERSAL

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August 5, 2020

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), below-signed counsel hereby certifies as follows:

A. Parties and *Amici*

All parties, intervenors, and amici appearing before the district court are listed in the *Brief of Confederated Tribes Appellants*. All parties and intervenors appearing in this Court are listed in the *Brief of Confederated Tribes Appellants*.

The *amici curiae* appearing in this Court pursuant to this *Brief of Amici Curiae in Support of Appellants for Reversal* are: the National Congress of American Indians; Counsel for Affiliated Tribes of Northwest Indians; All Pueblo Council of Governors; California Tribal Chairpersons' 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.

B. Rulings Under Review

References to the rulings at issue appear in the *Brief of Confederated Tribes Appellants*.

C. Related Cases

The Court has consolidated Court of Appeals Case Nos. 20-5204, 20-5205, and 20-5209. Counsel is not aware of any other related cases.

STATEMENT OF CONSENT TO FILE

Pursuant to Fed. R. App. P. 29(a)(2), below-signed counsel for *amici curiae* states that all parties have consented to the filing of this brief.

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, below-signed counsel for *amici curiae* hereby states as follows.

A. General Nature and Purpose of the Entities

The *amici curiae,* as more fully set forth in their Statement of Identity, Interest in the Case, and the Source of Authority to File, are national and regional organizations that represent the interests of federally recognized Indian tribes.

B. Ownership Interests

There are no parent companies, subsidiaries, affiliates, or companies which own at least 10% of the stock of any of the *amici curiae*, and no member of any of the *amici curiae* has issued shares or debt securities to the public.

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GLOSSARY

ANCSA	Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1629h)
BIA	Bureau of Indian Affairs, United States Department of the Interior
CARES Act	Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020)
Eligibility clause	The clause "which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians," in the definition of "Indian tribe" at 25 U.S.C. § 5304(e)
ISDEAA	Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975)
IRA	The Indian Reorganization Act of 1934, 48 Pub. L. No. 73-3863, 48 Stat. 984 (1934)
List Act	Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791
NCAI	National Congress of American Indians
Solicitor	Solicitor of the United States Department of the Interior
Title V	Title V of the CARES Act, "Coronavirus Relief Fund," codified at 42 U.S.C. § 801

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Addendum to the *Brief of Confederated Tribes Appellants*.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND THE SOURCE OF AUTHORITY TO FILE

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest national organization comprised of Tribal nations and their citizens. NCAI's mission is to preserve the relationship between federally recognized Indian tribes, including Alaska Native villages, and the United States, and to promote a better understanding of Tribal nations. As such, NCAI is uniquely situated to provide critical context for this case.

The other nine *amici* likewise are national and regional organizations representing federally recognized Indian tribes and their interests across the United States. They each have an interest in this case because it involves important matters of tribal sovereignty, and the allocation of desperately needed relief funds to assist Tribal governments in dealing with the COVID-19 pandemic. Leaders of these organizations have provided testimony regarding the dire consequences befalling their member Indian tribes and challenges faced by their constituent Tribal governments in the face of this crisis. *See, e.g.,* ECF Nos. 20-1, 20-2, 20-3, 20-4, 20-5 (D.D.C. No. 1:20-cv-01002).

- Affiliated Tribes of Northwest Indians represents nearly fifty federally recognized Indian tribes from the greater Northwest and advocates for their tribal sovereignty and self-determination.
- All Pueblo Council of Governors, comprised of the governors of the nineteen Pueblo Nations of New Mexico and one in Texas, advocates for the social, cultural, and traditional well-being of the Pueblo Nations.
- California Tribal Chairpersons' Association consists of ninety federally recognized Indian tribes from across California and advocates for their sovereign interests.
- Great Plains Tribal Chairmen's Association, Inc. is organized under Section 17 the Indian Reorganization Act to support the sixteen Tribal nations of North Dakota, South Dakota, and Nebraska, and their treaty rights and inherent rights of self-government.
- Midwest Alliance of Sovereign Tribes represents the interests of thirty-five federally recognized Indian tribes from Minnesota, Wisconsin, Iowa, and Michigan.
- United South and Eastern Tribes Sovereignty Protection Fund represents thirty federally recognized Tribal nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico to advance their inherent sovereign authorities and rights.

- National Indian Gaming Association's mission is to protect and preserve the general welfare of Indian tribes striving for self-sufficiency through gaming enterprises in Indian country. It seeks to maintain and protect Indian sovereign governmental authority.
- Arizona Indian Gaming Association is comprised of eight federally recognized Indian tribes in Arizona. It is committed to protecting and promoting the self-reliance and sovereignty of Indian tribes by supporting tribal gaming enterprises on Arizona Indian lands.
- California Nations Indian Gaming Association promotes the sovereign interests of federally recognized Indian tribes through the development of sound policies and practices for the conduct of gaming activities in Indian country.

All of the *amici curiae* have authorized the filing of this brief through their representative officials or legal counsel.[1]

[1] No counsel of any party has authored this brief in whole or in part. No party and no counsel of any party has contributed money that was intended to fund preparing or submitting this brief; and no person—other than the *amici curiae*, their members, or their counsel—has contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

The common mission of all *amici curiae* is to protect the sovereign, governmental authority of federally recognized Indian tribes, and this includes Alaska Native villages. They do so in this case in the face of private corporations striving to cloak themselves with the mantle of tribal sovereignty, professing noble intentions. Tribal governmental status, however, is unique. And it is here reserved for federally recognized Indian tribes. It cannot, and should not, be so easily usurped.

Pursuant to Title V of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020), Congress amended the Social Security Act (42 U.S.C. 301 et seq.) to allocate up to $8 billion in fiscal year 2020 to "*Tribal governments*" to address their unprecedented costs associated with the COVID-19 pandemic. 42 U.S.C. §§ 801(a)(1) (emphasis added), 801(a)(2)(D). Alaska Native villages are the only entities within the State of Alaska that enjoy governmental authority over tribal citizenries; they are the only entities in Alaska that are "Tribal governments." Private corporations are not "Tribal governments," and the district court's decision allowing them to access CARES Act funds reserved for sovereign, federally recognized Indian tribes wreaks havoc with the fundamental tenets of federal Indian law protecting the dignity of Indian tribes as governments.

By the terms of Title V of the CARES Act ("Title V"), "Tribal government" means "the recognized governing body of an Indian Tribe," *id.* § 801(g)(5) and "Indian tribe" has the meaning of that term as defined in the Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA"), 25 U.S.C. § 5304(e), *see id.* § 801(g)(1). Thus, the issue presented distills as follows: whether for-profit, private corporations formed under the laws of the State of Alaska (the "ANCs") are the "recognized governing bod[ies]" of "any Alaska Native village or regional or village corporation … , *which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians*." 25 U.S.C. § 5304(e) (emphasis added).

In its decision on cross-motions for summary judgment, the district court read the italicized "eligibility clause" out of the statute for the ANCs alone, admitting that this was an "unnatural" reading. Not only is this a violation of the plain language, it also derails what *amici* stand for, a commitment to the letter of the law when it comes to the protection of tribal sovereignty.

As set forth below, the history of Congress's novel "experiment" for the colonization of the Indigenous peoples of Alaska pursuant to the 1971 Alaska Native Claims Settlement Act, Pub. L. No. 92–203, § 2(b), 85 Stat. 688, ("ANSCA") sets an important context for this case. While it was not always clear, since the mid-1990s, there has been no doubt that the 229 Alaska Native villages are the only

entities in Alaska that possess the attributes of sovereignty marking the ordinary meaning of a "Tribal government." And it is the Alaska Native villages, alone, which meet the requirements of the eligibility clause—mandatory requirements for the existence of an Indian tribe's governmental relationship to the United States pursuant to the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, Nov. 2, 1994, 108 Stat. 479, ("the List Act"), codified at 25 U.S.C. § 5131. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5,462 (Jan. 30, 2020). The ANCs have no such sovereign status as a "Tribal government."

ARGUMENT

I. IN ALASKA, ONLY ALASKA NATIVE VILLAGES HOLD THE STATUS OF TRIBAL GOVERNMENTS.

Indian tribes are governments, "pre-existing the Constitution," *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978), "that exercise inherent sovereign authority over their members and territories," *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509 (1991). Federal recognition is "a formal political act confirming [a] tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." *Mackinac Tribe v. Jewell,* 829 F.3d 754, 755 (D.C. Cir. 2016) (quotations and citation omitted).

Treaty agreements between the United States and Indian tribes were among the first means of federal recognition. *See id.* Congress abolished treaty making in 1871. *See id.* Thereafter, apart from the few instances where federal courts have determined Indian tribes to exist under a federal common law test, *see Montoya v. United States,* 180 U.S. 261, 266 (1901), the federal government recognizes Indian tribes by statute, or through a formal administrative process, *see Procedures for Federal Acknowledgement of Indian Tribes,* 25 C.F.R. §§ 83 *et seq.* As discussed below, the 1936 Alaska Amendment to the Indian Reorganization Act, Pub. L. 74-538, 49 Stat. 1250 (1936) (codified at 25 U.S.C. §§ 5119 *et. seq.*), provided a congressionally-mandated framework for the federal recognition of tribes in Alaska.

In 1994, with the enactment of the List Act, Congress established the means for unequivocally confirming the recognized status of an Indian entity (a tribe's inclusion on the Secretary of the Interior's list of federally recognized Indian tribes), employing language identical to the ISDEAA eligibility clause: the Secretary must publish a "list of all Indian tribes that the Secretary *recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.*" 25 U.S.C. § 5131(a) (emphasis added). As the Secretary concedes and the district court concluded, the identical language found in these two Acts must be construed *in pari materia*. *See* A-196.

Appearance on the Secretary's list pursuant to the List Act confirms the "formal political act" of "permanently establish[ing]" an Indian tribe's "government-to-government relationship [with] the United States … [,] imposes on the government a fiduciary trust relationship to the tribe ... [, and] institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status such as the power to tax." H.R. REP. NO. 103-781, at 2-3 (1994). This unique relationship is forged in the Constitution. See U.S. CONST. art. I, § 8, cl. 3. The ANCs indisputably have no such relationship.

* * *

This case can begin and end with the fact that ANCs do not appear on the Secretary's list; thus, they do not satisfy the eligibility clause and cannot possibly hold the status of a "Tribal government." Nothing about the history or treatment of the Indigenous peoples of Alaska by our Nation, including the organization of ANCs pursuant to ANCSA, alters this conclusion.

As set forth below, that history shows that only the Alaska Native villages have the status of "Tribal governments." History also reveals that the ANSCA "experiment" initially spawned confusion about whether ANCs were eligible to achieve some form of federal recognition, which explains why Congress included them alongside Alaska Native villages in the definition of "Indian tribes" under ISDEAA. But they are not presently "recognized" by the United States as "Tribal

governments" in accord with the "term of art" embodied in the eligibility clause and the List Act.

A. Background: The Context for the United States' Colonization of Alaska

"Federal Indian policy [has been] schizophrenic." *United States v. Lara,* 541 U.S. 193, 219 (2004). It has shifted from actions to "remove" tribes from their homelands to distant lands to make way for white settlement; to attempts to end Tribal governments and cultures through "assimilation" and "termination" policies; to the current "modern era," from the 1970s to the present, where the federal government has committed to promote tribal sovereignty and self-government. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 8-108 (2012) (Nell Jessup Newton ed.) ("COHEN"). The Tribal nations of Alaska were not spared the dispiriting consequences of this colonizing process.

B. A Brief History of Alaska Natives.[2]

1. First Contact and the 1867 Treaty of Cession with Russia

Russians in first contact with the Indigenous peoples of Alaska in the 1700s encountered numerous "distinct cultural groups" of Alaska Natives, including the Inupiat, the Yupik, the Aleuts, the Athabascans, the Haida, and the Tlingit. *See* Op.

[2] This section draws from the comprehensive analysis of Indian affairs in Alaska completed in early 1993 by Thomas Sansonetti, Solicitor of the Department of the Interior (the "Solicitor"). *See* Op. Sol. Interior M-36975 (Jan. 11, 1993), 1993 WL 13801710.

Sol. Interior M-36975 at *29. These were highly organized communities, which, like any sovereign, set rules for trade and subsistence activities; recognized land boundaries; conducted war; and managed domestic and diplomatic affairs. *Id*. at 9 (citations omitted).

In 1867, the United States assumed possession of present-day Alaska by means of the Treaty of Cession with Russia. *See* 15 Stat. 539 (1867). The Treaty "maintained and protected" the Alaska Native tribes' "free enjoyment of their liberty, property, and religion" and provided that the "tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to the aboriginal tribes of [the United States]." *Id.* art. III-IV. The United States never negotiated treaties with the numerous Alaska Native tribes for the relinquishment of their retained aboriginal title to their homelands. *See* Op. Sol. Interior M-36975 at *10. As the Solicitor noted, "[t]he remote location, large size and harsh climate of Alaska further delayed the need to confront questions concerning the relationship between the Native peoples of Alaska and the United States." *Id.* at *4.

2. Before Statehood

In 1871, Congress declared an end to treaty-making with tribes in response to rapid westward expansion of the U.S. population. *See* 25 U.S.C. § 71. Congress then embraced a policy of forced assimilation under the General Allotment Act of 1887 (the "Dawes Act"), codified as amended at 25 U.S.C. §§ 331–358. *See also*

Alaska Native Allotment Act of 1906, Pub. L. No. 59-171, 34 Stat 197 (repealed by ANCSA in 1971). The Dawes Act and a series of other federal statutes sought to dissolve Tribal nations and their citizenry, open their lands for non-Indian settlement, and eradicate their separate political identity. *See* COHEN at 72-76. As a result of allotment, Indian landholdings decreased by 65% from 138 million acres in 1881 to 48 million acres in 1934. *Id.* at 73.

In 1928, a comprehensive report commissioned by the Secretary of the Interior found that the allotment/assimilation efforts had proved to be a colossal failure. *See* INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 3 (L. Meriam ed., 1928) (the "MERRIAM REPORT"). In 1934, John Collier, the Commissioner of Indian Affairs, urging repudiation, reported to Congress, "[i]t is difficult to imagine any other system which with equal effectiveness would pauperize the Indian while impoverishing him, and sicken and kill his soul." Hearings on H.R. 7902 (Readjustment of Indian Affairs (Index)) before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 17 (Comm. Print 1934) at 18. Congress ended the allotment policy that year by passing the Indian Reorganization Act of 1934 ("IRA"), codified as amended at 25 U.S.C. §§5101-5129, a shift in federal Indian policy focused on rebuilding tribal land bases by authorizing land acquisitions on behalf of Tribal nations. *See* 25 U.S.C. §5108. In addition, the IRA promoted tribal self-governance, authorizing tribes to adopt

constitutions and form federally chartered corporations to act as economic drivers for Tribal nations. *Id*. §§ 5123-5124. The Alaska Amendment to the IRA extended these opportunities to Alaska Natives. *See* 25 U.S.C. §§ 5119.

Approximately one-third of today's 229 federally recognized Indian tribes in Alaska, generally referred to as Alaska Native villages, formally organized IRA Councils as their governing bodies through the Alaska amendments to the IRA. Op. Sol. Interior M-36975 at **1-2. The rest retain Traditional Councils organized under tribal law and custom. *Id.* at **52-53, 79. Organizing as an IRA council requires a tribe to adopt a constitution and bylaws, obtain Secretarial approval of the constitution, and then to have the constitution ratified by a majority vote of the adult members of the tribe in an election conducted by the Bureau of Indian Affairs ("BIA"). *See* 25 U.S.C. § 5123. The inherent governmental powers of Traditional Councils are the same as the powers of IRA councils: both possess the inherent sovereign authority of Indian tribes. *John v. Baker*, 982 P.2d 738, 748-49 (Alaska 1999). These powers include the power to adopt and operate a government of the tribe's own choosing, define criteria for citizenship, to control conduct through law and regulation, and to prescribe rules of inheritance and otherwise govern domestic relations. *See* COHEN at 206-208. Both Traditional Councils and IRA Councils possess sovereign immunity from suit unless waived. *McCrary v. Ivanof Bay Vill.,* 265 P.3d 337 (Alaska 2011).

Congress took careful consideration to ensure Alaska Natives could organize their Tribal governments in a manner that made sense in Alaska, stating:

> [G]roups of Indians in Alaska not *recognized* prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws, and to receive charters of incorporation and Federal loans under sections 5113, 5123, and 5124 of [the IRA].

25 U.S.C. § 5119 (emphasis added). Because of the unique history of Alaska Natives, many groups that would organize as Indian tribes were groups bonded by their "occupation," such as fishing communities. *See* AUTHORITY OF THE SECRETARY OF INTERIOR TO RESERVE WATERS IN CONNECTION WITH, AND INDEPENDENTLY OF, LAND RESERVATIONS FOR ALASKA[] NATIVES UNDER THE ACT OF MAY 1, 1936, 56 Interior Dec. 110, 13 (D.O.I.), 1937 WL 3346. Others organized based on their shared residency within an Alaska Native community. Thus, in determining how best to recognize governing bodies in Alaska, Congress did not rubber stamp the process in the original IRA of 1934—which was intended to organize Indians on a reservation—but instead carefully crafted criteria specific to how Alaska Natives had governed themselves up until that point. This all occurred thirty-five years prior to Congress's passage of ANCSA.

"By the time of enactment of the IRA, the preponderant opinion was that Alaska Natives were subject to the same legal principles as Indians in the contiguous 48 states, and had the same powers and attributes as other Indian tribes, except to

the extent limited or preempted by Congress." Op. Sol. Interior M-36975 at *26. And there was no reason to doubt that those that organized under the IRA were "domestic sovereigns," Indian tribes, recognized to have a "special relationship" with the United States like all other federally recognized Indian tribes. *Id.* at 4 (citations and quotations omitted)

The 1940s ushered in another reversal of federal Indian policy known as "Termination," when Congress and the BIA pursued formal policies to terminate the existence of Indian tribes. *See* COHEN at 84-93. This policy resulted in the legislative and administrative termination of the federal government's relationship with countless Indian tribes and the unwanted extension of state jurisdiction over many tribes. *See id.* at 92. The termination policies, like those of allotment/assimilation, only led to the further impoverishment of Indian people. *Id.* It would not be until the 1970s, in the wake of President Nixon's condemnation of termination as "morally and legally unacceptable" and his advocacy for tribal self-government,[3] that the federal government would again change course and commit to the "modern era"—a federal Indian policy of tribal self-determination. *See* COHEN at 93-108.

[3] President's Message to Congress Transmitting Recommendations for Indian Policy, 6 Weekly Comp. Pres. Doc. 894-905, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970).

This, then, was the stage for Alaska's statehood in 1958, ANCSA in 1971, and ISDEAA in 1975, which is widely regarded as the lynchpin of the self-determination era. *See id.* at 99.

3. ANCSA

Like so many stories involving the displacement of Indigenous peoples, the one in Alaska involves the discovery of, and desire to exploit, a lucrative natural resource. In the early 1960s, just years after statehood, "Atlantic Richfield Company discovered a huge oilfield on Alaska's 'north slope' of the Brooks Range and native groups blanketed the proposed right-of-way for a trans-Alaska oil pipeline with claims of aboriginal title." *Native Vill. of Venetie I.R.A. Council v. State of Ak.*, 1994 WL 730893, at *1 (D. Alaska Dec. 23, 1994). Notwithstanding Alaska Natives' claims, the state had selected large areas of federal land and made application for patents for the land. *People of Vill. of Gambell v. Clark,* 746 F.2d 572, 574 (9th Cir. 1984).

> These conflicting claims hindered both development and protection of Native and national interests in Alaska. In 1966, Secretary of Interior Stewart Udall froze all public land transactions in Alaska pending resolution of the conflicting claims. In 1971 Congress passed the [ANCSA] in an effort to accommodate in a rational manner the interests of the state, Native groups, conservationists, and potential developers, including the oil companies.

Id. ANCSA "extinguished" the Alaska Tribal nations' claims of aboriginal title to their homelands in exchange for $962,500,000 and 40,000,000 acres of land. *Cape Fox Corp. v. United States,* 646 F.2d 399, 400 (9th Cir. 1981). But instead of

employing the usual model of "vesting existing tribal governments with the assets reserved after the extinguishment of the aboriginal claims, Congress adopted an experimental model initially calculated to speed assimilation of Alaska Natives into corporate America." COHEN at 330. In order to receive benefits under the Act, Native residents of Native villages were required to organize profit or nonprofit corporations, *see* 43 U.S.C. § 1607, with every village corporation opting for the for-profit form, *see* Op. Sol. Interior M-36975 at *50, n.225.

Most Alaska Natives were enrolled in the villages where they resided. *Id.* at *22. Those alive on December 31, 1971, were eligible to receive stock in one of twelve for-profit regional corporations, and in one of the over 200 for-profit village corporations. *See* 43 U.S.C. §§ 1606-1607. With respect to land allocations, thirty-eight million acres were to be selected and conveyed to Native village corporations and to the twelve regional corporations. 43 U.S.C. § 1611. As for the distribution of settlement proceeds, ANCSA allocated the entire $962,500,000 to the ANCs, rather than Native villages. *Id*. § 1605(c).

The implementation of ANCSA was "confusing and hectic." U.S. Dep't of the Interior, ANCSA 1985 Study at 8 (Draft June 29, 1984) (prepared pursuant to section 23 of ANCSA (now codified at 43 U.S.C. §1622) (requiring annual reports on implementation)). While, as set forth above, it was clear that the Alaska Native villages that had organized under the IRA were federally recognized Indian tribes,

some contests between "villages, regions, and third parties" over the sovereign eligibility of villages "lasted for years." *Id.* And as of the date of ISDEAA's enactment in 1975, the ANCs were barely formed or still in the process of forming. *See Brief of Confederated Tribes Appellants* at 24, n.4.

Given the allocation of lands and money to the ANCs under ANCSA for the United States' "extinguishment" of the Alaska Tribal nations' aboriginal land holdings, Solicitor Sansonetti described ANCSA as "parallel [to] termination statutes in significant respects." Op. Sol. Interior M-36975 at *61. Nevertheless, while this "formidable framework" "threw into question the future *role* of the tribes," ANCSA recognized "their continued existence" as sovereign governments. COHEN at 353 (emphasis in original). Unlike the Alaska Native villages, the ANCs are chartered under state law to "perform proprietary, not governmental functions." *Id.* They are not "recognized" as Tribal governments. *See* 58 Fed. Reg. at 54,365-66 (Oct. 21, 1993).

Consistent with this and notwithstanding the "formidable" corporate overlay imposed upon Alaska Natives by ANCSA, "[n]othing in ANCSA ... required the dissolution of tribal governments." COHEN at 353. Indeed, ANCSA did not revoke or disrupt in any way the governmental authorities confirmed by the IRA. *See* Op. Sol. Interior M-36975 at *23. Nor did ANCSA repeal the authority in section 1 of the Alaska Amendment of the IRA, affording Alaska Native villages continuing

authority to reorganize and adopt constitutions. *Id.* At its core, therefore, "Congress intended ANCSA to free Alaska Natives from the dictates of 'lengthy wardship or trusteeship,' *not to handicap tribes by divesting them of their sovereign powers.*" *John v. Baker,* 982 P.2d at 753 (quoting H.R. REP. No. 92-523, 1971 U.S.C.C.A.N. 2192 at 2220)) (emphasis added).

4. Post-ANCSA: Executive Action to Definitively Recognize Alaska Native Villages and To Disclaim Recognition of the ANCs

The above-referenced 1993 analysis of the sovereign status of Alaska Native villages undertaken by the Solicitor stopped short of identifying all recognized governing bodies of Indian tribes in Alaska. *See* Op. Sol. Interior M-36975 at **27-28, 35. "The question of federal recognition of Alaska tribes was definitively settled [later] in 1993, when the Department of the Interior published a revised list of federally recognized tribes." COHEN at 353. The Interior Department's "definitive" recognition of the Alaska Native villages was set forth in the preamble to Department's 1993 Federal Register Notice of "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs." *See* 58 Fed. Reg. at 54,365. The Notice states:

> The purpose of the current publication is to ... unequivocally acknowledg[e] that ... the villages and regional tribes listed below ... have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated

> authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.

Id. at 54,365-66. Equally definitive was the Department's clarification that ANCs enjoy no such recognition as Tribal governments. The Interior Department explained:

> Rather than being limited to ... Native *governments* ... as were the prior lists, the 1988 list was expanded to include ... [the ANCs] ... [in] respon[se] to a "demand by the Bureau and other Federal agencies ... for a list of organizations which are eligible for their funding and services based on their inclusion in categories frequently mentioned in statutes concerning Federal programs for Indians." 53 FR at 52,832.
>
> The inclusion of *non-tribal entities* on the 1988 Alaska entities list ... created a discontinuity from the list of tribal entities in the contiguous 48 states ... . As in Alaska, Indian entities in the contiguous 48 states *other than recognized tribes* are frequently eligible to participate in Federal programs under specific statutes. ... Unlike the Alaska entities list, the 1988 entities list for the contiguous 48 states was not expanded to include such entities... .
>
> [T]the inclusion of ANCSA corporations, *which lack tribal status in a political sense*, called into question the status of all the listed entities.

Id. (emphasis added). Thus, the Interior Department declined to include the ANCs on the 1993 list because they were "non-tribal entities" and not "recognized" as Tribal governments. *Id.*

One year later, with the enactment of the List Act, Congress made perfectly clear that federal recognition could only be demonstrated by inclusion on the Secretary's list of entities recognized as "eligible for the special programs and services provided by the United States to Indians because of their status of Indians."

25 U.S.C. § 5131(a). From that year forward, to this day, the Alaska Native villages have been on the list and, therefore, "recognized" by the United States as Tribal governments, but the ANCs have not.[4]

II. THE ANCS' INCLUSION IN THE ISDEAA DEFINITION OF "INDIAN TRIBE" REFLECTS UNCERTAINTIES SURROUNDING THE NOVEL "EXPERIMENT" TAKING PLACE IN ALASKA.

Notwithstanding the fact that ANCs do not satisfy the eligibility clause because they are not federally recognized Indian tribes, the district court reasoned that because Congress included the ANCs within the ISDEAA definition of "Indian tribes" alongside Alaska Native villages, they must be deemed "Indian tribes" under that statute with their corporate boards of directors deemed the "recognized governing bodies" of "Tribal governments" under Title V. *See* A-194-211. In so doing, the district court decided to ignore the application of the "eligibility clause" to the ANCs while applying it to every other noun in the ISDEAA definition of an

[4] *See* 60 Fed. Reg. 9,250 (Feb. 16, 1995); 61 Fed. Reg. 58,211 (Nov. 13, 1996); 62 Fed. Reg. 55,270 (Oct. 23, 1997); 63 Fed. Reg. 71,941 (Dec. 30, 1998); 65 Fed. Reg. 13,298 (Mar. 13, 2000); 67 Fed. Reg. 46,327 (Jul. 12, 2002); 68 Fed. Reg. 68,179 (Dec. 5, 2003); 70 Fed. Reg. 71,193 (Nov. 25, 2005); 72 Fed. Reg. 13,648 (Mar. 22, 2007); 73 Fed. Reg. 18,553 (Apr. 4, 2008); 74 Fed. Reg. 40,218 (Aug. 11, 2009); 75 Fed. Reg. 60,810 (Oct. 1, 2010); 75 Fed. Reg. 66,124 (Oct. 27, 2010); 77 Fed. Reg. 47,868 (Aug. 10, 2012); 78 Fed. Reg. 26,384 (May 6, 2013); 79 Fed. Reg. 4,748 (Jan. 29, 2014); 80 Fed. Reg. 1,942 (Jan. 14, 2015); 81 Fed. Reg. 5,019 (Jan. 29, 2016); 81 Fed. Reg. 26,826 (May 4, 2016); 82 Fed. Reg. 4,915 (Jan. 17, 2017); 83 Fed. Reg. 4,235 (Jan. 30, 2018); 83 Fed. Reg. 34,863 (Jul. 23, 2018); 84 Fed. Reg. 1,200 (Feb. 1, 2019); 85 Fed. Reg. 5,462 (Jan. 30, 2020).

"Indian tribe," admittedly in violation of "plain" rules of grammar. *See* A-197-199. While describing this as an "unnatural reading," the district court said it was necessary to avoid "the rule against superfluity," rendering Congress's inclusion of the ANCs in the ISDEAA definition of "Indian tribes" without effect. *See id.* But the district court presumed, without explanation, that Congress enacted ISDEAA "knowing that ANCs could not satisfy the eligibility clause." A-193.

The district court's unexamined assumption that Congress knew that the ANCs could not and would never satisfy the eligibility clause when enacting ISDEAA ignores the novel, complex, corporate model of colonization in Alaska under ANCSA. If Congress was *uncertain* as to whether the ANCs might satisfy the eligibility clause necessary to be an "Indian tribe" under ISDEAA, no "superfluity" problem could arise: Congress would simply have left the door open for ANCs to attain federal recognition, perhaps under a special accommodation. Given the very recent extraordinary "experiment" of corporatizing Indian affairs in Alaska under ANCSA, Congress was naturally uncertain about the roles and potential sovereign identities of the Alaska Native villages and the ANCs. For example, in the 1976 memorandum cited by the district court, Assistant Solicitor for Indian Affairs Charles Soller stated that "[i]n some cases, the village may no longer have a governmental identity apart from the corporate structure." A-139.

The history set forth above is directly relevant to the inclusion of ANCs in ISDEAA's definition of "Indian tribe." ANCSA was a complex "experimental model." COHEN at 330. For one, it allocated settlement funds for the "extinguishment" of Tribal nations' aboriginal titles to private corporations, albeit corporations organized and initially owned by Alaska Natives, instead of the Tribal nations themselves. *See id.* at 330-31 (citing 43 U.S.C. § 1605(c)).[5] For another, it vested title to settlement lands in the same corporations, and not the Tribal nations themselves. *See id.* at 331.

At the same time, while ANCSA did not divest the Alaska tribes of their pre-existing sovereign status, there was uncertainty as to which of those tribes or affiliated corporate entities could be considered "recognized." There was no formal federal recognition process in place in 1971 at the time of ANCSA's enactment or in 1975 at the time of ISDEAA's enactment. The Interior Department thereafter began publishing its list of federally recognized tribes, and in 1978 promulgated its acknowledgment procedures. 43 Fed. Reg. 39,361 (Sept 5, 1978). When Congress enacted ISDEAA (1975), and continuing for nearly 20 years thereafter, neither the federal courts nor the Interior Department could definitively confirm which Alaska Native villages were recognized Indian tribes with the unique government-to-

[5] Until extinguished by the United States, Indian tribes, *not individuals or corporations*, retain aboriginal title to the lands that they exclusively occupy and govern. COHEN at 1050-53.

government relationship with the United States. *See Native Vill. of Venetie I.R.A.,*1994 WL 730893, at *12 (applying common law test to conclude that Alaska Native village constituted an Indian tribe); Op. Sol. Interior M-36975 at **27-28, 35. At the time of ISDEAA's enactment, and until Interior's 1978 regulations—apart from clarity provided by IRA organization discussed above, there was no formal process for the recognition of sovereign entities in Alaska and no definitive list of federally recognized Indian tribes in Alaska until 1993. The novel colonialization of Alaska was unfolding with an abundance of uncertainty. *See also supra* at 16-17 (describing the difficulties of ANSCA implementation).

Given this uncertainty and the complexity of the ANCSA "experiment," it is no wonder that Congress included not only the Alaska Native villages but also the ANCs in ISDEAA's "Indian tribe" definition, each with the potential option to fulfill the requirements of the eligibility clause.

* * *

In sum, the district court erred by rendering the "eligibility clause" meaningless, and by eliminating its application to the ANCs altogether without explanation other than an unfounded presumption that Congress knew they could not satisfy it. A more plausible reading of the ISDEAA definition of "Indian tribes," consistent with giving effect to all statutory terms and tribal self-determination, is that, in the face of great uncertainty about the conduct of Indian affairs in Alaska in

the wake of ANCSA, Congress left the door open for ANCs to establish federal recognition by satisfying the eligibility clause. *See Bryan v. Itasca Cty., Minnesota,* 426 U.S. 373, 387–88 (1976) (construing statute affecting tribal sovereignty in light of contemporary federal Indian policy supporting tribal self-determination).

III. ALASKA NATIVE VILLAGES POSSESS GOVERNMENTAL POWERS LIKE STATES AND LOCAL GOVERNMENTS ENTITLED TO THE CARES ACT RELIEF FUNDS, BUT ANCS DO NOT.

Amici's interpretation of the eligibility clause as it operates to define "Tribal governments" under Title V is consistent with the rule that Courts must construe statutory language in reference to the ordinary meaning of the words used by Congress, *Richards v. United States,* 369 U.S. 1, 9 (1962), and the specific context in which the language is used, *see Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997).

The purpose of Title V is to fund the emergency needs of "*governments*": "for making payments to States, Tribal governments, and units of local governments." 42 U.S.C. § 801(a)(1). "Tribal governments" must use the funds to cover "necessary expenditures incurred due to [COVID-19]." *Id.* § 801(d)(1). The term "Tribal government" must be read in this context. *See Lagos v. United States,* 138 S. Ct. 1684, 1688-89 (2018) (referencing *noscitur a sociis*: "that statutory words are often known by the company they keep"). Simply put, treating ANCs as governments

ignores the ordinary meaning of "government" and the purpose and context of Title V.

Tribal governments have inherent duties to provide for their citizens, and in Alaska, "Tribal governments, *as opposed to regional and village corporations,* are the only Native entities that possess inherent powers of self-government." COHEN at 353 (emphasis added). These "Tribal governments" are the Alaska Native villages, the governments that, in accord with Title V, have many "*necessary* expenditures due to [COVID-19]" (emphasis added) to support those to whom they owe governmental responsibilities.

Alaska Native villages, as governments, have enrolled *citizens* and exercise inherent sovereign authority over them with their own judicial forums. *See, e.g., State v. Native Vill. of Tanana,* 249 P.3d 734, 750 (Alaska 2011); *In re C.R.H.,* 29 P.3d 849, 854 (Alaska 2001); *Baker,* 982 P.2d at 751-59. Those citizens elect government officials, *see, e.g.,* Tlingit & Haida, Rules for the Election of Delegates, http://www.ccthita.org/government/legislative/GoverningDocs/RulesofElection.pdf (last visited Aug. 4, 2020), who are empowered to negotiate with State and local governments on their behalf, and to enact ordinances to preserve the safety and welfare of the Alaska Native village. *See*, *e.g.*, Constitution and By-Laws of the Angoon Community Association Alaska, Art. V – Powers, http://thorpe.ou.edu/IRA/consangoon.pdf) (last visited Aug. 4, 2020). The elected

Tribal government officials of Alaska Native villages are duty bound to protect and preserve the rights of their citizens, including their right to enjoy community resources and property, *id*., and Alaska Native villages exercise tax authority to generate revenues needed to support self-governance. *See, e.g.,* Tlingit & Haida, CSC Stat. Sec. 03.01.019 (April 20, 2018) (last visited Aug. 5, 2020).

In contrast, ANCs *exercise no governmental functions whatsoever*. While, as the ANCs pointed out in briefing before the district court, ANCSA "*permit[s]*" them to provide their shareholders with benefits to their health, education, and welfare, *see* ECF No. 78-1 (D.D.C. No. 1:20-cv-01002) at 58 n.9 (citing 43 U.S.C. § 1606(r)) (emphasis added), they have no *duty* to do so. ANCs are private, state-chartered corporations owned by corporate shareholders, who are not required to be enrolled citizens of an Alaska Native village. *See* COHEN at 353 ("[M]any Natives are not shareholders in Native corporations, because stock was initially limited to Natives alive on December 18, 1971). ANCs are overseen by executives enjoying salaries in the seven figures, not public servants responsible to a constituency.[6] Regional ANCs are multinational corporations that do not rely on tax revenue or federal

[6] For example, in 2018, the top five executives for Arctic Slope Regional Corporation ("ASRC"), each earned annual salaries of between $1.87 million and $5.1 million. Arctic Slope Reg'l Corp., 2019 Proxy Statement to Shareholders, at 36 (Apr. 26, 2019) available at https://alaskalandmine.com/wp-content/uploads/2019/12/2019-ASRC-Proxy-Statement-5-9-19.pdf (last visited Aug. 4, 2020).

program funding like Alaska Native villages. Some rank in the top 200 largest private companies in the United States and report annual revenues in multiple billions of dollars. *See* Forbes, Arctic Slope Reg'n Corp., available at https://www.forbes.com/companies/arctic-slope-regional-corporation/#175fc5e2982c (last visited Aug. 4, 2020). Annual revenues at the village corporation level can average above $50 million. *See* Alaska Native Village Corp. Ass'n, ANVCA Members, available at https://anvca.biz/anvca-members (last visited Aug. 4, 2020). That such corporations might make charitable contributions to Alaska Natives and realize related tax deductions does not make them governments.

Further, the federal government owes a unique trust obligation to Indian tribes. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The ANCs admit that they "do not possess a government-to-government relationship with the federal government." ANCSA Reg'l Ass'n, Overview of Entitles Operating in the Twelve Regions, available at https://ancsaregional.com/overview-of-entities/#village-corporations (last visited Aug. 4, 2020). *See also Cape Fox Corp. v. United States,* 456 F. Supp. 784, 799 n.51 (D. Alaska 1978), *rev'd in part on other grnds,* 646 F.2d 399 (9th Cir. 1981). Rather, it is the Alaska Native villages that maintain government-to-government relations with the United States. *See People of Togiak v. United States,* 470 F. Supp. 423, 428 (D.D.C. 1979).

* * *

The Supreme Court has time and again admonished that Indian tribes are not "private, voluntary organizations." *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *accord Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 140 (1982); *Bryan v. Itasca Cty., Minnesota,* 426 U.S. 373, 388 (1976). Indeed, the Court has said that it "denigrates" the sovereign dignity of Indian tribes to suggest that they are. *Merrion,* 455 U.S. at 140-146. Congress is deemed to know this law. *See Clay v. United States,* 537 U.S. 522, 527 (2003). Thus, absent far more clarity of Congress's intent than is present here, this Court should not lightly presume that Congress would conflate the sovereignty of Alaska Native villages, and other federally recognized tribes, with the status of private corporations by treating the ANCs as "Tribal governments" under Title V.

CONCLUSION

For all of the above reasons, the Court should rule in favor of the Appellants, reverse the district court, and hold that Alaska Native villages are the only entities in Alaska eligible for payments of Title V CARES Act funds reserved for "Tribal governments."

Respectfully submitted, August 5, 2020

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Dated: August 5, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2020, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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