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**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

CONFEDERATED TRIBES OF THE
CHEHALIS RESERVATION, et al.,

PLAINTIFFS,

v.

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

DEFENDANT.

Case No. 1:20-cv-1002 (APM)

BRIEF OF *AMICI CURIAE*

The Alaska Native Village Corporation Association ("ANVCA") and ANCSA Regional Association ("ARA"), collectively *Amici Curiae*, by and through counsel, Outlook Law, LLC, hereby submits its Brief.

I. Introduction of the Parties

ANVCA is a non-profit corporation formed in 2010 that has no parent corporation and issues no stock. Its mission is to promote the success of Alaska Native village corporations and protection of Alaska Native lands. ANVCA represents the 177 Alaska Native village

1 corporations that were formed under the Alaska Native Claims Settlement Act (ANCSA), 43
2 U.S.C. § 1601 *et seq.*

3 ARA is a non-profit association formed in 1998 that has no parent corporation and issues
4 no stock. Their mission is to promote and foster continued growth and economic strength of the
5 Alaska Native regional corporations for the benefit of their Alaska Native shareholders and
6 communities. The associated corporations are owned by over 130,000 Alaska Native people and
7 were formed under the ANCSA, 43 U.S.C. § 1601 *et seq.*¹

9 **II. Summary of the Argument**

10 The essence of the plaintiffs' arguments are that (1) Congress wrote an ambiguous and
11 disjointed statute concerning the Coronavirus Relief Fund, therefore this Court should narrowly
12 interpret the statute to include only Federally-recognized Indian Tribes intended to benefit from
13 desperately needed COVID-19 relief funds; (2) that ANCSA corporations, whose incorporation
14 Congress specified to be under Alaska state law, 42 U.S.C. § 1606(d), do not participate in
15 programs or services offered to other Indian Tribes; and (3) therefore this Court must ignore the
16 rules of statutory construction that apply to this statute, and instead substitute in the narrow
17 construction argued for by the plaintiffs and ignore the clear statutory intent of Congress to
18 include ANCSA corporations charged with the unique Federal public policy that exists for
19 Alaska Natives and ANCSA corporations.
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22 These arguments fail for obvious reasons, including the following: (1) Congress wrote
23 and passed, the CARES Act , Pub.L. 116-136, signed into law, nearly a month ago with specific
24 definitions of both "Indian Tribe" and "Tribal Government." No convoluted statutory analysis is
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28 ¹ Disclosure per Fed. R. App. P. 29(a)(4)(E), no party or person other than the *Amici* authored this brief. This brief has been written in a *pro bono* capacity.

1 needed to ascertain the clear intent of Congress which includes Alaska Native Corporations
2 ("ANCs") as CARES Act beneficiaries - (2) Congress passed this law with clear direction to the
3 U.S. Department of Interior and U.S. Treasury Department to include ANCs that have long been
4 held to be recognized as Indian tribes in this and other statutes;² (3) the Federal Indian policy for
5 Alaska Native land and Alaska Native people through ANCSA specifies that ANCs are subject
6 to Alaska corporation law for regulatory purposes, while Congress retained its Constitutional
7 responsibility of oversight of ANCs under the Indian Commerce Clause. U.S. Constitution,
8 Article I, §8,(3), as it does with other Indian Tribes; and (4) the clear unambiguous language of
9 the statute dictates that success on the merits is exceptionally unlikely and the extraordinary
10 remedy of injunctive relief must be denied. Finally, and perhaps fatally, the plaintiffs wholly
11 ignore the appropriate standard of review for this case, *i.e.* "rational review," and the steep climb
12 that is required to overcome an economic law passed by Congress and signed into law. That is, a
13 statute such as this comes to this Court bearing a strong presumption of validity and plaintiffs
14 must overcome their assigned burden to *negate* every conceivable basis which might support it.
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17 For these reasons alone, the relief sought must be denied.

18 **III. The Clear Language of the CARES Act Governs**

19 **A. Title V of the Cares Act is Unambiguous**

20 Pursuant to Section 601(g) of Title V, of the CARES Act, the term 'Indian Tribe' has the
21 meaning given that term in section 4(e) of the Indian Self-Determination and Education
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25 ² There are approximately 200 other statutes that contain similar definitions or are used in the
26 same way. As a point of fact, some Alaska Native people belong to no tribes, some Alaska
27 Native people are not shareholders of ANCs. The concept of double dipping (albeit catchy for
28 publicity-is not supported by facts) or that the services provided may not be fundamentally
distinct is a rudimentary misunderstanding of how Alaska Native tribes and ANCs work, as
demonstrated in the tribal consultations and ANCSA history, *infra*.

1 Assistance Act (25 U.S.C. 5304(e)) ("ISDEEA). In turn, 25 U.S.C. § 5304(e), the ISDEEA as
2 used in the CARES Act, defines any Indian Tribe as "any Indian tribe, band, nation, or other
3 organized group or community, including any Alaska Native village or regional village
4 corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85
5 Stat. 688) [43 U.S.C. §§ 1601 et seq.] which is recognized as eligible for the special programs
6 and services provided by the United States to Indians because of their status as Indians."
7 Likewise, ANCSA states that "*Notwithstanding any other provision of law, Alaska Natives
8 shall remain eligible for all Federal Indian programs on the same basis as other Native
9 Americans.*"³ This language in the CARES Act, as well as the clear language in ANCSA, makes
10 it plainly apparent that ANCs are included as Indian Tribes for the purposes of the CARES Act.
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13 The definition of "Tribal government" is set forth in the CARES Act and reads as
14 follows: "'Tribal government' means the recognized governing body of an Indian Tribe." That
15 is, the term "Tribal government" is defined plainly and unambiguously in the CARES Act as the
16 "recognized governing body of an Indian Tribe." The governing body directing the affairs of an
17 ANC is generally an elected Alaska Native Board of Directors, with a duly elected Chair, who
18 has empowered a President and/or Chief Executive Officer to act on its behalf.⁴ This could, by
19 analogy, be likened to many tribal councils with a Chair, Chief, or President. Indeed, some
20 Indian Reorganization Act ("IRA") tribes have set up as 17(c) corporations, reinforcing that
21 structure prior to the passage of ANCSA. Simply put, ANC Boards, which are required under
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27 ³ 43 U.S.C. 1626(d) (emphasis added).

28 ⁴ This did not exclude ANCs nor specify or require that the statute only included local tribal governments, large tribal governments, small tribal governments, government to government relationship, tribes with or without land, or any other strained definition.

1 ANCSA to be composed of solely Alaska Native shareholders, are elected to the governing body
2 of an Indian Tribe.

3 This reading comports with the most basic application of statutory construction and
4 interpretation in that the statute must be read as a whole. This does not beget a reading where
5 ANCs would be included in some way in the consultations and then left off of the disbursements.
6 That is, the term "Tribal government" *does not* contain any such restriction against the Alaska
7 Native people nor does it in any way refer to the list of Federally Recognized Tribes. Had
8 Congress wanted to say that it was limited to certain tribes and exclude others not on the list, it
9 could have certainly done so. *It did not.*

10
11 The plaintiffs argue that the Federal Tribal List published by the Secretary of the Interior
12 determines which entities meet the definition of Indian Tribe in the ISDEAA. But they similarly
13 highlight that the list of federally recognized tribes "does not include any Alaska Native regional
14 or village corporations ("ANCs")." Compl. at ¶ 47 (emphasis in original). In other words, they
15 argue that all ANCs are essentially stricken from the definition that Congress specifically
16 selected to use in the CARES Act. That argument does not make sense and effectively nullifies
17 specifically enumerated terms in a definition drafted by Congress. Moreover, the Federal Tribe
18 List Act actually uses an entirely different definition of Indian Tribe -- the one found in Section
19 5130(2) which does not include ANCs -- than the ISDEAA definition chosen by Congress in the
20 CARES Act.

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23 If Congress intended to exclude ANCs, it could have done so and in a much less
24 convoluted way. And if Congress had intended for the Federal Tribal List to define the scope of
25 eligible Indian Tribes under the CARES Act it could have easily referred to that list instead of
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1 incorporating the ISDEAA definition—which again differs from other definitions of Indian
2 Tribes by specifically including ANCs.

3 Accordingly, and without question, the plain, unambiguous statutory provisions prevail
4 over any other provisions. As such, courts must "apply the statute according to its terms."⁵ That
5 is, if the intent of Congress is clear on the face of the statute, the court must "give effect to that
6 intent."⁶

7
8 Thus, and according to the CARES Act, as cited above, the term "Indian Tribe" includes
9 ANCs, formed by ANCSA.⁷ This inclusion is correctly read into the definition of Tribal
10 government in Title V, and, as such, ANCs are rightfully included in the disbursements. If
11 Congress had wanted to eliminate the ANCs and the Native people from consideration, it could
12 have done so. Instead, it did the opposite with its inclusive definition of Tribal government - to
13 facilitate maximum Native participation. This also agrees with the Congressional intent of not
14 only the CARES Act, but with the Indian Self-Determination and Education Assistance
15 ("ISDEAA") as well.

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18 **B. Legislative Intent was Clear when it Included Alaska Native Corporations in the
ISDEAA**

19 Even if legislative context of the ISDEAA is needed, which it is not, the legislative intent
20 of including ANCs was clear. That is, when Congress passed the provisions in the ISDEAA that
21 explicitly and unequivocally included ANCs, it spoke its intent plainly and unambiguously.

22 Without question, Congress then and Congress now with the CARES Act intended a doctrine of
23 inclusion, not exclusion of all Native peoples. In 1974, one such Congressional record reiterates
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27 ⁵ *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (citing *United States v. Gonzales*, 520 U.S. 1, 4
(1997)).

28 ⁶ *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1473 (9th Cir. 1987).

⁷ See 25 U.S.C. 5304(e)-the ISDEAA.

1 the Congressional intent of inclusion: to engage in the most Native participation. It states the
 2 following:

3 SEC. 3. (a) The Congress hereby recognizes the obligation of the United States
 4 to respond to the strong expression of the Indian people for self-determination
 5 by ***assuring maximum Indian participation*** in the direction of educational as
 6 well as other Federal services to Indian communities so as to render such
 7 services more responsive to the needs and desires of those communities.

8 (b) The Congress declares its commitment to the maintenance of the Federal
 9 Government's unique and continuing relationship with and responsibility to the
 10 ***Indian people through the establishment of a meaningful Indian self-***
 11 ***determination policy*** which will permit an orderly transition from Federal
 12 domination of programs for and services to Indian people in the planning
 13 conduct, and administration of those programs and services.⁸

14 The reference to Alaska village and regional corporations in the ISDEAA's definition is
 15 specific and was added by amendment. "Because the modifying language was in the law before
 16 the reference to the native corporations, the secretaries reasonably interpreted the eligibility
 17 clause to modify only the first entities listed in the definition."⁹

18 The U.S. House Report stated that the definition of "tribe" had been amended "to include
 19 the regional and village corporations established by the Alaska Native Claims Settlement Act."¹⁰
 20 Since "Congress chose to isolate this section for special consideration by way of amendment, the
 21 language inserted should be given effect."¹¹

22 Case law from various Federal Circuits reinforces that ANCs were deliberately included
 23 as Indian Tribes. Particularly instructive here is the Ninth Circuit's opinion in *Cook Inlet Native*
 24 *Association v. Bowen*, 810 F.2d 1471 (9th Cir. 1987). There, the court was asked to determine
 25 the meaning of "Indian tribe" as used in the ISDEAA and, in the process, considered—and

26 ⁸ Indian Self-Determination and Education Assistance Act, Report to Accompany S. 1017, 93rd
 27 Congress, 2nd Session, p. 2 (1974) (emphasis added).

28 ⁹ *Bowen*, 810 F.2d at 1475 (citing 120 Cong. Rec. 40252).

¹⁰ H.R. Rep. 1600 93d Cong., 2d Sess. 14 (1974).

¹¹ *Bowen*, 810 F.2d at 1475 (citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986)).

1 rejected—the exact argument presented by the plaintiffs here. Specifically, Cook Inlet Native
2 Association ("CINA") challenged the district court's judgment upholding an administrative
3 interpretation of "tribe," which interpretation included ANCs, but excluded non-profit Native
4 corporations. The crux of CINA's argument, like the plaintiffs' here, focused on the eligibility
5 clause of the ISDEAA's definition, that in order to be a "tribe," the corporation must be
6 "recognized as eligible for special programs and services provided by the United States to
7 Indians because of their status as Indians."¹² CINA was not eligible for such programs.

9 The Ninth Circuit disagreed with CINA's argument. According to the Court, just because
10 an ANC may not be eligible for "special programs" due to its status, does not mean the statute is
11 otherwise inoperable.¹³ "The words of a statute should be harmonized internally and with each
12 other to the extent possible."¹⁴ In other words, the Court observed, "the statute should not be
13 interpreted to render one part inoperative"¹⁵

15 The Court went on to consider the legislative history discussed above, noting the fact that
16 the reference to ANCs was added by amendment.¹⁶ The Court was persuaded that because the
17 regional profit corporations were "expressly mentioned by definition," customary rules of
18 construction supported their recognition as tribes under the ISDEAA.¹⁷ "To avoid rendering
19 their mention superfluous," the Assistant Solicitor for Indian Affairs interpreted the eligibility
20 language "to modify only the words 'any Indian tribe, band, nation, or other organized group or
21 community'"¹⁸ According to the court, "[b]ecause the modifying language was in the law
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25 ¹² *Id.* at 1474 (9th Cir. 1987) (citing precursor to 25 U.S.C. § 5304(e)).

26 ¹³ *Id.*

27 ¹⁴ *Id.* (citing *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631—33 (1973)).

28 ¹⁵ *Id.* (citing *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985)).

¹⁶ *Id.* at 1475.

¹⁷ *Id.* at 1474.

¹⁸ *Id.* (quoting Memorandum of Charles Soller, May 21, 1976).

1 before the reference to the native corporations, the secretaries reasonably interpreted the
2 eligibility clause to modify only the first entities listed in the definition."¹⁹ Thus, "[r]egional
3 profit corporations were properly recognized as Indian tribes for purposes of the [ISDEAA]."²⁰

4 The court also found it persuasive that the ISDEAA's purpose is to insure maximum
5 Native participation in and control over Native programs and that "the corporations formed
6 pursuant to [ANCSA] also were established to provide maximum participation by Natives in
7 decisions affecting their rights and property."²¹ Because "[t]he construction of the statute by the
8 agency charged with its administration is entitled to substantial deference,"²² and because the
9 administrative interpretation of the statute here was reasonable and consistent with statutory
10 language and legislative history, the Ninth Circuit affirmed the district court's judgment
11 confirming the agency interpretation of inclusiveness. The D.C. Circuit, as referenced above,
12 would later (2003) do the same.

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15 ***This could not be more true as Indian Tribes actively work to prevent, respond to, and***
16 ***recover from COVID-19.*** Indigenous Alaska Native peoples should not be excluded because of
17 a contorted interpretation of plain statutory language. Accordingly, ANCs, by the clear language
18 of the CARES Act, are Indian Tribes with Tribal governments, included in the \$8 Billion
19 distribution of Title V, Section 6, funds for COVID-19 Relief. To infer that Congress would
20 pass a law of inclusion without meaning to include indigenous Alaska Natives in a definition that
21 explicitly does so is a strained reading.

22 23 24 **IV. History of ANCSA**

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27 ¹⁹ *Id.* at 1475.

²⁰ *Id.*

²¹ *Id.* at 1476.

²² *Id.* at 1473 (citing *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986)).

1 **A. Basis and Structure of ANCSA**

2 It is important to consider these issues with the history and structure of ANCSA in the
3 backdrop. There are several misconceptions surrounding ANCs and ANCSA. ANCSA is a
4 Federal statute and configuration that was brought about because oil was discovered on the North
5 Slope of Alaska, known as Prudhoe Bay. In order to transport that oil, the outstanding land
6 claims of the Alaska Native peoples had to be addressed as the pipeline for that oil would
7 directly cross the indigenous peoples' lands.
8

9 Congress passed ANCSA and reserved all powers to amend ANCSA to itself. Explicitly,
10 it only allowed the state in which ANCSA corporations would be registered limited powers and
11 if in conflict with any provision of ANCSA/Federal law, ANCSA would control.²³
12

13 That is, Congress set forth the boundaries in ANCSA of what could be established, who
14 could be enrolled - including blood quantum requirements- (on the Secretary of the Interior's
15 'Secretary' roll), that the original articles of incorporation and bylaws be approved by the
16 Secretary, that the corporations would be managed by a board of directors and controlled by
17 Alaska Natives, that there would be a sharing of revenues by and between Regional as well as
18 Village corporations, and how land would be divided and selected among corporations.²⁴ To
19 characterize ANCs or ANCSA corporations as State chartered is, at best, woefully misinformed
20 and misleading. These corporations are a creation of the Federal government, which retains
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24 ²³ Report from the House of Representatives, Mr. Udall, Chair, to accompany H.R. 4162,
25 "Amending the Alaska Native Claims Settlement Act to Provide Alaska Natives with Certain
26 Options for the Continued Ownership of Lands and Corporate Shares Received Pursuant to the
27 Act and for Other Purposes," 99th Congress, 2nd Session, Report 99-712, 1986. *See also*, Report
28 From the House of Representatives, Additional Views, Mr. Udall, Chair, to accompany H.R.
278, Report 100-31, 100th Congress, 1st Session, 1987. *See also* Public Law 92-203, December
18, 1971.

²⁴ Public Law 92-203, December 18, 1971.

1 control of ANCSA, and they provide support and so much more to the Alaska Native people and
2 the State of Alaska.

3 These corporations, as the GAO found, provide benefits to their shareholders and the
4 communities, including the following: (1) employment opportunities/job training; (2) dividends;
5 (3) scholarships; (4) cultural preservation programs; (5) land management; (6) economic
6 development; and (7) advocacy for Alaska Native people and communities.
7

8 **B. ANCSA Did Not Extinguish the Special Relationship with the Federal Government**

9 Congress, while trying to convey land without the reservation system, did not extinguish
10 or abolish its rights under the Indian Commerce Clause; which forms, in part, the same basis for
11 abolishing or honoring reservations and relationships with the Indians. From the onset of
12 ANCSA, Congress has and continues to order studies and reports as to how indigenous Alaska
13 Native peoples through ANCs partake in and benefit from Federal programs. While doing this,
14 Congress enunciated clearly that it wished to convey the ANCSA lands to the Alaska Native
15 people while NOT extinguishing the Federal relationship with them, as the following text
16 demonstrates.
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19 (a) Congress hereby finds and declares that there is an immediate need for a fair,
20 just, and final settlement of all land claims of Alaska Natives, Native Villages
and groups;²⁵

21 *****

22 no provision of this Act shall replace or diminish any right, privilege, or
23 obligation of Natives as citizens of the United States or of Alaska, or relieve,
24 replace, or diminish any obligation of the United States or of the State of Alaska
25 to protect and promote the rights or welfare of Natives as citizens of the United
26 States or of Alaska, the Secretary [of the Interior] is authorized and directed,
together with other appropriate agencies of the United States Government, to
make a study of all Federal programs primarily designed to benefit Native
people and to report back to the Congress with his recommendations for the

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28 ²⁵ Alaska Native Land Claims, Hearings before the Committee on Interior and Insurance Affairs,
U.S. Senate, 92nd Congress, 1971.

1 future management and operation of these programs within three years of the
2 date of enactment of this Act [ANCSA];

3 (b) the settlement should be accomplished rapidly, with certainty, in conformity
4 with the real economic and social needs of Natives, without litigation, with
5 **maximum participation by Natives in decisions affecting their rights and**
6 **property**²⁶, without establishing any permanent racially defined institutions,
7 rights, privileges, or obligations, without creating a reservation system or
8 lengthy wardship or trusteeship, and without adding to the categories of
9 property and institutions enjoying special tax privileges or to the legislation
10 establishing special relationships between the United States Government and the
11 State of Alaska;²⁷

12 Clearly, Congress was dictating that while the intent was that the land rights would be
13 settled quickly, it would not and did not extinguish its relationship with the indigenous people of
14 Alaska. Indeed, ANCSA spoke directly to Federal agencies conducting loan or loan and grants
15 programs, like the CARES Act, with the following passage.

16 (g) no provision of this Act shall be construed to terminate or otherwise curtail the
17 activities of the Economic Development Administration or other Federal agencies
18 conducting loan or loan and grant programs in Alaska.²⁸

19 The Federal Government did not abandon the indigenous people of Alaska when it
20 provided for them without reservation or trust lands and placed their interests in Congressionally
21 defined corporate entities. Not only did it make that sentiment clear when it passed ANCSA, it
22 reiterated that fact when it amended ANCSA. "Both ANCSA, as amended, and this Act are
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25 ²⁶ The maximum participation by Natives would be echoed in the ISDEAA, which is recognized
26 and used to this day to be inclusive of the indigenous Native people, including those identified as
27 ANCs.

²⁷ Alaska Native Claims Settlement Act, Conference Report to Accompany H.R. 10367,
28 December 14, 1971.

²⁸ *Id.*; see also Public Law 92-203, December 28, 1971.

1 Indian legislation enacted by Congress pursuant to its plenary authority under the Commerce
2 Clause to regulate Indian Affairs."²⁹

3 A U.S. House bill, which passed the House and would later be adopted in great part by
4 the Senate, went into the very telling history of ANCSA and the continuing relationship of the
5 Federal government with the indigenous Alaska Native peoples of Alaska through the ANC
6 structure. It told the story of the forced incorporation of the ANCs to give effect to the terms of
7 ANCSA to convey land, while not abolishing the rights of the indigenous Alaska Native peoples,
8 and not doing so effectively.³⁰

10 In enacting ANCSA, Congress adopted a novel, experimental approach in
11 dealing with Native people. In section 2(b) of the Act, a congressional finding
12 was made that-

13 The settlement should be accomplished rapidly, with certainty, in conformity
14 with the real economic and social needs of Natives, without litigation, with
15 maximum participation by Natives in decisions affecting their rights and
16 property * * *"

17 ***Fifteen years after the enactment of ANCSA, few of these goals have been
18 achieved.***

19 *****

20 ***It is of concern to the Committee that settlement has not been accomplished
21 rapidly and with certainty. Fifteen years after enactment, Native corporations
22 have received patents to less than 8% of their 44,000,000-acre land
23 entitlement.***³¹

24 ²⁹ Report from the House of Representatives, Mr. Udall, Chair, to accompany H.R. 4162,
25 "Amending the Alaska Native Claims Settlement Act to Provide Alaska Natives with Certain
26 Options for the Continued Ownership of Lands and Corporate Shares Received Pursuant to the
27 Act and for Other Purposes," 99th Congress, 2nd Session, Report 99-712, 1986. *See also*, Report
28 From the House of Representatives, Additional Views, Mr. Udall, Chair, to accompany H.R.
29 278, Report 100-31, 100th Congress, 1st Session, 1987.

³⁰ *See, generally, id.*

³¹ Report from the House of Representatives, Mr. Udall, Chair, to accompany H.R. 4162,
"Amending the Alaska Native Claims Settlement Act to Provide Alaska Natives with Certain
Options for the Continued Ownership of Lands and Corporate Shares Received Pursuant to the
Act and for Other Purposes," 99th Congress, 2nd Session, Report 99-712, 1986, p. 15 (emphasis
added). In fact, the lands have not been fully conveyed and of the land conveyed, 1100 sites are
considered contaminated lands "allotted" to the indigenous Alaska Native peoples.

1 The Report also evaluated the success of the Regional and Village Corporations and the
2 *forced placement* of ancestral land in positions vulnerable to creditors.³²

3 The Constitutional analysis contained in the House report is striking in that it explicitly
4 embraces that Congress was exercising its power, in passing and amending ANCSA, pursuant to
5 the Indian Commerce Clause, as enunciated in *Morton v. Mancari*, and did so by treating the
6 Alaska Native peoples, through ANCs, as Indian tribes. Congress, in embracing this case, took it
7 a step further and found that ANCSA corporations still have the *relationship* of "guardian-ward"
8 status *even if* title to the lands was conveyed or, as is the actual case, should be conveyed to the
9 indigenous Alaska Native peoples through ANCs. In short, the trust relationship, the fiduciary
10 relationship, continues and did NOT run or end with the land conveyed.³³

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13 In contrast, and straying far from the terms of the CARES Act, and the historical context
14 of Indian law, the plaintiffs take the position that ANCs, as corporate entities, lack traditional
15 "government-to-government" relationships with the United States and so should not constitute
16 "Tribal governments" under the CARES Act. In support, the plaintiffs completely ignore the
17 history of ANCSA and rely, in part, on the Supreme Court's opinion in *Alaska v. Native Village*
18 *of Venetie Tribal Government*, 522 U.S. 520 (1998), a case that is readily distinguishable from
19 the matter at hand.
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24 ³² *Id.* See also, Report From the House of Representatives, Additional Views, Mr. Udall, Chair,
25 to accompany H.R. 278, Report 100-31, 100th Congress, 1st Session, 1987.

26 ³³ Report from the House of Representatives, Mr. Udall, Chair, to accompany H.R. 4162,
27 "Amending the Alaska Native Claims Settlement Act to Provide Alaska Natives with Certain
28 Options for the Continued Ownership of Lands and Corporate Shares Received Pursuant to the
Act and for Other Purposes," 99th Congress, 2nd Session, Report 99-712, 1986, p. 31. See also,
Report From the House of Representatives, Additional Views, Mr. Udall, Chair, to accompany
H.R. 278, Report 100-31, 100th Congress, 1st Session, 1987.

1 *Venetie* was limited to the issue of whether lands owned by the Native Village of Venetie
2 Tribal Government pursuant to ANCSA constituted "Indian country" such that the Tribe could
3 collect taxes from a contractor conducting business on the Tribe's land.³⁴ In holding that these
4 lands did not qualify as "Indian country" under 18 U.S.C. § 1151, the Court noted that through
5 ANCSA, Congress departed from its "traditional practice of setting aside Indian lands," and
6 "ended federal superintendence" over such lands.³⁵ Notably, the Court's *decision did not* depend
7 on the guardian-ward status of Alaska Native peoples; rather its holding focused on ANCSA's
8 transfer of former reservation lands to ANCs and the lack of direct federal control over the land
9 at issue in the limited context regarding "Indian country."³⁶

10
11 In other words, while ANCSA extinguished the traditional concept of reservation lands in
12 Alaska, it in no way extinguished the special relationship between the Alaska Natives and the
13 United States *nor did it declare them not to be tribes for federal programs*. ANCSA itself
14 reiterates this point. Notwithstanding any other provision of law, "*Alaska Natives shall remain*
15 *eligible for all Federal Indian programs on the same basis as other Native Americans.*"³⁷ The
16 relief funds of COVID-19 are no different.

17
18 As one Alaskan representative testified at the tribal consultations on April 2, 2020,
19 sometimes one Alaska Native organization does not have the funding to build or maintain a
20 service while another may have the capabilities or infrastructure in place to administer it. While
21 some communities, villages or tribes may be impoverished, the community of sharing in Alaska
22 among Alaska Native people is incredible and profound, and ANCs play a major role.

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27 ³⁴ *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 523, 525 (1998).

28 ³⁵ *Id.* at 532-33.

³⁶ *Id.* at 533.

³⁷ 43 U.S.C. § 1626(d) (emphasis added).

1 Services ANCs currently provide pale in comparison to what will be demanded of them
2 in the future. As the Alaska tribes' declarations demonstrate, the cost of living and delivering
3 services is extreme and the tribes are small. In many cases, Regional and/or Village corporations
4 either fund or deliver direct services to their shareholders that a Lower 48 tribe would or could
5 provide through its governmental system. This has been recognized in law and is part of the
6 interwoven fabric of how Alaska tribes and ANCs survive in areas often only accessible by plane
7 or boat or snow machine. Many ANC Regionals have a strong percentage of at-large
8 shareholders, meaning they do not also belong to a tribe or a village corporation. For instance,
9 Chugach Alaska Corporation ("Chugach") has over 50 percent at-large shareholder base and
10 Cook Inlet Region, Incorporated ("CIRI") has a 40 percent at-large shareholder base - and if they
11 do not benefit from COVID funds to Chugach or CIRI, they will receive nothing.
12
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14 The ability to prevent, respond to, and recover from COVID-19 is a battle being fought
15 throughout communities in Alaska. Any hit on this vulnerable population with a pandemic of
16 this magnitude is devastating and the effects will be felt for generations. Alaska Natives all
17 share the same vulnerabilities that the Alaska plaintiffs' identified - health, age, access to medical
18 care, and remote locations.
19

20 **V. Plaintiffs Do Not Meet the Basic Standards for a Preliminary Injunction/TRO**

21 **A. Standards for the Extraordinary Relief of Preliminary Injunctions**

22 The plaintiffs urge the Court to adopt a loose, sliding scale approach in weighing the
23 various harms and considerations surrounding their motion.³⁸ Given precedent in this Circuit,
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27 ³⁸ That is, where a movant "makes an unusually strong showing on one of the factors, then it
28 does not necessarily have to make as strong a showing on another factor." *Dallas Safari Club v. Bernhardt*, 2020 U.S. Dist. LEXIS 62551, *9 (D.D.C. Apr. 9, 2020) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009)).

1 this should not be entertained in the context of a clear, unambiguous statute that was passed by
2 an overwhelming majority (96-0) nearly one month ago.

3 Rather, a preliminary injunction "is an extraordinary and drastic remedy, one that should
4 not be granted unless the movant, *by a clear showing*, carries the burden of persuasion."³⁹ Such
5 an exceptional remedy is "never awarded as of right"⁴⁰ and generally requires the plaintiffs to
6 demonstrate "[1] that [they are] likely to succeed on the merits, [2] that [they are] likely to suffer
7 irreparable harm in the absence of preliminary relief, [3] that the balance of the equities tips in
8 [their] favor, and [4] that an injunction is in the public interest."⁴¹

9
10 Contrary to the plaintiffs' suggestion that the Court should weigh these factors on a
11 sliding scale, the D.C. Circuit "has suggested that *Winter* should be read to abandon the sliding-
12 scale analysis in favor of a 'more demanding burden' requiring plaintiffs to independently
13 demonstrate both a likelihood of success on the merits and irreparable harm."⁴² As this Court
14 has unequivocally recognized, "courts in our Circuit have held that a failure to show a likelihood
15 of success on the merits alone is sufficient to defeat the motion."⁴³

16
17 In this case, the likelihood that the motion will succeed on the merits is low, as further set
18 forth below.

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20 **B. The Plaintiffs are Unlikely to Succeed on the Merits and Have Failed to Meet their**
21 **Burden pursuant to the Rational Review Standard**

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³⁹ *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (emphasis in original).

25 ⁴⁰ *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008).

26 ⁴¹ *Amer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (quoting *Sherley v. Sebelius*, 644
27 F.3d 388, 392 (D.C. Cir. 2011)).

28 ⁴² *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 83
(D.D.C. 2017) (citing *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011); *Davis*, 571
F.3d at 1291-92).

⁴³ *Id.* at 83 (citing *Ark. Dairy Coop Ass'n, Inc. v. USDA*, 573 F.3d 815, 832 (D.C. Cir. 2009)).

1 The plaintiffs cannot defeat the plain language of a statute by invoking a doctrine of
2 interpretation that simply is not there, particularly one that is subject to rational basis review
3 having not met their burden for judicial action. Such an approach defies the basic principles of
4 statutory construction and interpretation. The plaintiffs have not met their burden to demonstrate
5 that they will likely succeed on the merits by shoe-horning a statute into an interpretation they
6 want—not the one that was unambiguously written and passed and that is further entitled to a
7 strong presumption of validity.
8

9 As the D.C. Circuit Court of Appeals has recognized, Indian Tribes, *specifically*
10 *including ANCs in that definition*, have a special relationship, which is not considered race
11 based, with the federal government. In *American Federation of Government Employees (AFL-*
12 *CIO) v. United States*, 330 F. 3d 513 (D.C. Cir. 2003), *cert. denied American Federation of*
13 *Government Employees, AFL-CIO v. United States*, 540 U.S. 1088 (2003), the D.C. Circuit
14 considered a constitutional challenge to the legitimacy of a Department of Defense set-aside
15 contract to Chugach Management Services Joint Venture based, *inter alia*, on the joint venture
16 consisting of Indian Tribes and the status that conveyed.⁴⁴ The Court, citing to the definitional
17 section of ISDEAA, the same definition at issue in this case, noted that two of the entities
18 involved, Chugach Alaska Corporation, a regional ANC, and Afognak Village Corporation, a
19 village ANC, both formed under ANCSA, were "federally recognized Indian tribes."⁴⁵ In
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24 ⁴⁴ ANCSA was interpreted by the lower *AFGE* court (affirmed by the D.C. Circuit) as the
25 "modern mechanism that designates Native Alaskan Corporations as the vehicle used to provide
26 continuing economic benefits in exchange for extinguished aboriginal land rights." *AFGE v.*
27 *United States*, 195 F. Supp. 2d 4, 22 (D.D.C. 2002) (citing to *Koniag, Inc. v. Koncor Forest Res.*,
28 39 F. 3d 991, 997 (9th Cir. 1994)). Additionally, shares for Alaska Native Corporations have
restrictions placed on them regarding how and to whom shares may be transferred and used in
order to help ensure the shares continue to benefit the Alaska Native peoples. 43 U.S.C. §
1606(h).

⁴⁵ *AFGE v. United States*, 330 F.3d 513, 516 (D.C. Cir. 2003). *See also* 25 U.S.C. § 5304(e).

1 examining the unique relationship between Native Americans and the United States, this Court
2 stated "the only question properly before us is whether the government violated the equal
3 protection component of the Due Process Clause when it . . . grant[ed] a contract to a firm
4 wholly owned by Indian tribes."⁴⁶

5 The D.C. Circuit Court of Appeals, *again applying the analysis to an ANC*, further
6 distinguished the strict scrutiny standard applied to racial classifications from Native American
7 contractors in *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200 (1995) by declaring that the
8 Supreme Court "has made it clear enough that legislation for the benefit of recognized Indian
9 Tribes is not to be examined in terms applicable to suspect racial classifications, " but rational
10 review.⁴⁷ "[I]n a sense the Constitution itself establishes the rationality of the . . . classification,
11 by providing a separate federal power that reaches only to the present group."⁴⁸

12 This Court found that Congress "is not required to articulate its reasoning for enacting a
13 statute."⁴⁹ Rather, the Constitution grants "Congress discretion to regulate its internal
14 proceedings . . . Incident to its lawmaking authority, Congress has the authority to decide
15 whether to conduct investigations and hold hearings to gather information. And under the
16 Constitution, Congress has broad discretion in determining what must be published in the official
17 record."⁵⁰ "[T]here is certainly no textual basis for requiring Congress to hold hearings, issue
18 committee reports, or enact findings or statements of purpose, even though these might assist
19 judicial review and sometimes carry weight."⁵¹

24
25 ⁴⁶ *Id.* at 519.

26 ⁴⁷ *Id.* at 521 (citing *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (additional citations
omitted)).

27 ⁴⁸ *Id.* (quoting *United States v. Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (en banc)).

28 ⁴⁹ *Id.* at 522 (quoting *United States R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

⁵⁰ *Id.* (internal quotation marks and citations omitted).

⁵¹ *Id.* (internal citations omitted).

1 This was consistent with the lower court finding, which this Court upheld, that the set-
 2 aside award was subject to rational review because Congress's power to legislate affairs with
 3 Native Americans came *from its political and economic relationship with ANCs* as Indian
 4 Tribes, and was not a racial classification.⁵² As such, the lower court found, "[o]n rational basis
 5 review . . . a statute . . . comes to us bearing a strong presumption of validity, and those attacking
 6 the rationality of the legislative classification have the burden to negative [sic-negate] every
 7 conceivable basis which might support it."⁵³

9 This is also consistent with the history of ANCSA, in which Congress stated that ANCSA
 10 was passed pursuant to its *exclusive* Constitutional power to regulate commerce with the Indian
 11 Tribes. Thus, the extraordinary remedy of injunctive relief cannot be granted when the plain
 12 reading of the statute is clear. Moreover, as further set forth below, and the steep burden for
 13 overturning it on rational review has simply not be presented by the plaintiff in any manner.

15 **C. Delay will Cause Harm to all Eligible Entities for Tribal CARES Act Funding**

16 The plaintiffs seek an extraordinary remedy that is rarely granted and is unlikely to
 17 succeed on the merits. The plaintiffs do so at the 11th hour, with the law and specific provisions
 18 at issue having been passed for nearly a month, and the funds that the Indian people desperately
 19 need—all Indian people as dictated by Congress—to be disbursed in a matter of days. They do
 20 so without justification.

22 To address this sort of behavior, laches "'is designed to promote diligence and prevent
 23 enforcement of stale claims' by those who have 'slumber[ed] on their rights.'"⁵⁴ It applies "where
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25
 26 ⁵² *AFGE v. United States*, 195 F. Supp. 2d 4, 18 (D.D.C. 2002).

27 ⁵³ *Id.* at 24 (quoting *Calloway v. District of Columbia*, 216 F.3d 1, 8 (D.C. Cir. 2000) (citing to
 28 *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993)).

⁵⁴ *Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 531 (D.C. Cir. 2010) (quoting
Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 843 (D.C. Cir. 1982)).

1 there is (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice
2 to the party asserting the defense."⁵⁵ "[A] court assessing whether to award the 'extraordinary
3 remedy' of preliminary-injunctive relief . . . may determine whether laches renders that relief
4 inappropriate."⁵⁶ This Court in *Standing Rock Sioux Tribe*, for example, imposed, in part, the
5 doctrine of laches to deny a preliminary injunction to prevent the construction of an oil pipeline
6 where the movant failed to raise its religious exercise objections with the Corps of Engineers
7 until just "a week or two" before the expected commencement of oil flow despite opportunities
8 to do so earlier, and where the Corps of Engineers would be prejudiced due to the substantial
9 increase in cost were it forced to make other arrangements for the construction.⁵⁷ As stated by
10 the E.D. Va. Opinion cited to by the court, which applies equally here, "[e]quity demands that
11 those who would challenge the legal sufficiency of administrative decisions concerning time
12 sensitive public . . . projects do so with haste and dispatch."⁵⁸

15 A failure to read and ascertain the statute's plain language—which statute is subject to a
16 rational basis review and so already bears a "strong presumption of validity"⁵⁹— does not justify
17 waiting to seek redress. Tribal consultations were held on this very matter. The first occurred on
18 April 2, 2020, and the second was held on April 9, 2020. The consultations had Alaska Native
19 Corporation participation as Tribes. Yet, the plaintiffs chose to wait until nearly the last minute,
20 a mere four days before disbursement, to file for a temporary restraining order and preliminary
21

24 ⁵⁵ *Id.* (quotation marks and citations omitted).

25 ⁵⁶ *Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 84 (citing *Perry v. Judd*, 840 F. Supp. 2d 945,
953-55 (E.D. Va. 2012)).

26 ⁵⁷ *Id.* at 84-88.

27 ⁵⁸ *Perry*, 840 F. Supp. 2d at 950 (quoting *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872
F.2d 75, 80 (4th Cir. 1989)).

28 ⁵⁹ *Calloway v. District of Columbia*, 216 F.3d 1, 8 (D.C. Cir. 2000) (quoting *FCC v. Beach
Communications, Inc.*, 508 U.S. 307, 314 (1993)).

1 injunctive relief in a matter in which they are not likely to succeed on the merits.⁶⁰ In doing so,
2 the harm that they could cause by failing to timely bring forth an action could directly harm
3 plaintiffs and all other eligible Indian Tribes. There was no sound reasoning for the stall and the
4 harm it could bring could be devastating on Alaska Native peoples that would have voiced
5 objection.

6
7 Their TRO motion and briefing spans forty (40) pages and was filed just four days before
8 disbursement was to occur on a basis of distribution allocation that has not yet been set forth.
9 Consequently, the *amici* have had just two days to consider and respond to the plethora of
10 arguments raised on an exceedingly important legal issue that will directly impact hundreds of
11 thousands of lives in the midst of a global pandemic. This was done even though the CARES
12 Act has been passed for almost a month.

13
14 It was clear from the beginning (even from a cursory read) that Alaska Native
15 Corporations were deliberately included in the CARES Act as "Indian tribes," as they are in
16 countless other statutes. The CARES Act was not written to exclude, but rather, to include.⁶¹
17 Despite this backdrop, the plaintiffs have waited until the last possible minute to bring their TRO
18 and the 40 page briefing, just days before critically needed funds are disbursed, thereby
19 jeopardizing *all* those Native entities that Congress intended to benefit from the statute.
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25 ⁶⁰ The plaintiffs also filed an Amended Complaint over 40 pages long yesterday.

26 ⁶¹ This inclusion also did not preclude a tens of billions-dollar gaming industry group for filing
27 for amici status even though the members may have to negotiate and pay state taxes/royalties and
28 then have the agreements approved by the Federal government. That does not seem like the
government to government relationship touted by the plaintiffs free from any state interference
or interaction.

1 **VI. Conclusion**

2 In creating ANCs under ANCSA, Congress clearly intended to create a new structure for
3 Tribal authority and economies in Alaska. In addition, Congress has subsequently recognized
4 the status of ANCs as federally recognized tribes in numerous relevant statutes. Relying on these
5 and other authorities, federal courts, including Courts of Appeals and this Circuit, have ruled that
6 ANCs are federally recognized Tribes.⁶² The plaintiffs' plea for injunctive relief is fatally
7 flawed; it would require the court to rule that plaintiffs would have a likelihood of success on the
8 merits of overturning all of the above statutes and judicial precedent, including in the D.C.
9 Circuit Court of Appeals.
10

11 It would also require the Court to substitute the wishes of the plaintiffs for the clear intent
12 of Congress in passing the unambiguous language in the CARES Act including ANCs in the
13 definition of 'Tribe.' Through ANCSA, Congress intended to create ANCs as entities through
14 which economic benefit could flow to the Native communities, and Native peoples, each ANC
15 represents. ANCs are thus a logical vehicle for ensuring CARES Act funding reaches Native
16 communities, and by including ANCs as COVID Relief funding recipients, Congress
17 demonstrated this intent. The plaintiffs are attempting to supplant this clear Congressional intent
18 with their own; success on those merits is highly unlikely.
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21 For the above reasons, as Amici Curiae, we humbly ask this Court to deny the Plaintiff's
22 Motion for Injunctive Relief and Temporary Restraining Order.
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27 ⁶² See, e.g., *American Federation of Government Employees v. United States*, 330 F. 3d 513, 516
28 (D.C. Cir. 2003); *cert denied American Federation of Government Employees (AFL-CIO) v. United States*, 540 U.S. 1088 (2003).

1 Dated this 22nd day of April, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of April 2020, a true and correct copy of the **Brief of *Amici Curiae*** was filed with CM/ECF, which will send notification to the parties on record.

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