UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION et al., Plaintiffs, v. STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, Defendant.	Case No. 1:20-cv-1002-APM
CHEYENNE RIVER SIOUX TRIBE et al., Plaintiffs, v. STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, Defendant.	Case No. 1:20-cv-01059-APM
UTE TRIBE OF THE UINTAH AND OURAY RESERVATION, Plaintiff, v. STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, Defendant.	Case No. 1:20-cv-01070-APM

DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION

Plaintiffs in these related cases allege that no Alaska Native Corporation ("ANC") is eligible for any amount of payment from the Coronavirus Relief Fund established by Title V of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, which reserved $150 billion for State governments, local governments, and the recognized governing bodies of Indian Tribes, 42 U.S.C. § 801. But Congress did not want this emergency funding to be delayed by litigation; by directing Defendant to make payments within 30 days, without publishing any methodology or payment amounts that could be challenged, Congress impliedly precluded review of this question.

Even if amenable to judicial review, these cases must fail on their merits. The CARES Act imports from another statute, the Indian Self-Determination and Education Assistance Act ("ISDEAA"), its definition of "Indian Tribe." *See* 25 U.S.C. § 5304(e). The text of ISDEAA's definition expressly includes ANCs among other types of Indian Tribes, but it also seems to subject all forms of Tribes to a restrictive clause, which ANCs do *not* satisfy. The agencies' decades-old resolution of that textual tension—that the "which" clause would be read as applicable to all types of Tribes except for ANCs—is both reasonable and persuasive, as it hews most closely to "the cardinal principle" of statutory interpretation: that every term in the statute should be given some effect. *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (quoting *Loughrin v. United States*, 573 U. S. 351, 358 (2014)).[1]

The agencies' reading of ISDEAA was upheld in *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471 (9th Cir. 1987). In the 33 years since *Bowen* was decided, it has never been overruled, questioned, or called into doubt. Nor have Plaintiffs cited any case or administrative decision, from any jurisdiction, ever to have held that ANCs are not "Indian Tribes" under ISDEAA. Indeed, *Bowen* was reaffirmed by the Ninth Circuit even after the List Act was passed in 1994, in a case where all parties and the court agreed that ANCs were still "Indian Tribes" and that *Bowen* was still good law. *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 988 (9th Cir.

[1] Here and elsewhere, unless specifically noted, internal alterations and quotation marks are omitted.

1999). To this day, the Bureau of Indian Affairs ("BIA") and the Indian Health Service ("IHS") stand by their long-held interpretation of ISDEAA's definition. And indeed, six of the 18 Plaintiffs in these cases do not even contest that ANCs are "Indian Tribes" under ISDEAA.

Congress has ratified, or at least acquiesced to, Defendant's interpretation, which has been publicly and consistently announced by the relevant agencies for decades. Congressional hearings were commissioned the year after ISDEAA passed, and a comprehensive report was submitted directly to Congress. That report plainly confirms that, while ANCs are not sovereign governments, they are eligible for ISDEAA contracts and play an important role in that contracting scheme.[2] In multiple public pronouncements since then, the government has reiterated its position. And in the only case ever to address the question directly, the Ninth Circuit affirmed that position. Congress has amended ISDEAA's definition five times since that case was decided, including 10 days before the List Act passed, and has never taken ANCs out of the definition.

Plaintiffs' contrary reading of ISDEAA defies fundamental principles of statutory interpretation. Plaintiffs would render meaningless no fewer than 20 words—or roughly one third—of ISDEAA's definition. That nullity would be especially repugnant, as the Ninth Circuit recognized, because Congress amended ISDEAA just before it passed specifically to include ANCs. And as several of the Plaintiffs have put it, ANCs serve as a "critical stop-gap" under ISDEAA's contracting scheme: they ensure that Alaska Natives living in areas without a tribal government still receive services such as healthcare. It is, therefore, eminently sensible that they would be eligible for contracting under ISDEAA and for funding under Title V of the CARES Act.

Unable to deny that ANCs have always been "Indian Tribes" under ISDEAA, Plaintiffs argue that they are not, or do not have, "recognized governing bod[ies]," under the CARES Act. 42 U.S.C. § 801(g)(5). But that argument assumes that "recognized" must mean "*federally* recognized," or "recognized *as a sovereign government*," which it does not here. In enacting the

[2] There is a difference between contracting under Title I and compacting under Title V of ISDEAA. Section 5304 defines eligibility for both and, for the purposes of this motion, Defendant will refer simply to "contracting" under ISDEAA.

CARES Act, Congress selected a definition of "Indian tribe" that expressly includes ANCs, which have no *federally* recognized governing body. The CARES Act's reference to the "recognized governing body" is also borrowed from ISDEAA, which uses the term "recognized governing body of any Indian tribe," 25 U.S.C. § 5304(l). Multiple administrative pronouncements have thus used the word "recognized" in the ISDEAA context to refer, not to federal recognition of sovereignty, but to recognition of eligibility for contracts under ISDEAA. The CARES Act also defined "government" to mean "governing body," undermining any argument that an ANC must "govern" in the traditional sense.

For these reasons and those stated below, Defendant is entitled to summary judgment.[3]

BACKGROUND

Alaska Native Corporations

Alaska became the 49th State in 1958. Under the Alaska Statehood Act, the new State began claiming millions of acres of "vacant, unappropriated, and unreserved" federal land. *See Sturgeon v. Frost*, 139 S. Ct. 1066, 1074 (2019) (quoting Pub. L. 85-508, § 6, 72 Stat. 339, 340 (1958)). The statute, as amended, allowed Alaska to select more than 100 million acres of land over the ensuing 35 years. "But the State's bonanza provoked land claims from Alaska Natives," who "had lived in the area for thousands of years," and who "asserted aboriginal title to much of the property" that Alaska was claiming. *Id.*

Those claims were extinguished by the Alaska Native Claims Settlement Act ("ANCSA"). Pub. L. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-29h). "In enacting ANCSA, Congress sought to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy." *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 523-24

[3] Although all three cases allege that Defendant's decision to make payments to ANCs was arbitrary and capricious, none of the complaints specifies why. *Chehalis* Compl. ¶¶ 117-23; *CRS* Compl. ¶¶ 73-79; *Ute* Compl. ¶¶ 49-55. The focus of briefing heretofore has been whether Defendant's decision was contrary to law. The Administrative Record represents an eminently reasonable approach and process followed by Defendant. But should Plaintiffs argue for any reason that Defendant's decision was arbitrary and capricious, Defendant will respond to those arguments in its opposition memorandum.

(1998). ANCs were created, with exclusively Alaska-Native shareholders, and given $962.5 million and approximately 44 million acres of Alaska land. "ANCSA transferred title of the settlement land to twelve regional corporations and numerous village corporations created by [ANCSA]." *Cook Inlet Region, Inc. v. Rude*, 690 F.3d 1127, 1129 (9th Cir. 2012) (citing 43 U.S.C. §§ 1606-07).

The resulting ANCs were, and still are, sui generis. "Departing from previous Indian land claims settlement acts, [ANCSA] did not vest the assets provided in the settlement in tribal governments, but in state-chartered Native corporations pursuant to an elaborate corporate scheme" with stock that "was inalienable for a period of 20 years to ensure Native control." *Cohen's Handbook of Federal Indian Law* § 4.07[3][a] (Newton ed. 2019) ("*Cohen's*"); *see* 43 U.S.C. §§ 1606, 1607, 1613. "Instead of the usual course of vesting existing tribal governments with the assets reserved after extinguishment of the aboriginal claims, Congress adopted an experimental model" of the ANCs, "a complex mechanism for Native selection and eventual ownership of approximately forty-five million acres of land and the distribution of an Alaska Native Fund of $462.5 million in congressional appropriations as well as $500 million in anticipated Alaska state oil royalties." *Cohen's* § 4.07[3][b][ii][B]; *see* 43 U.S.C. §§ 1605-1613.

The Indian Self-Determination and Education Assistance Act ("ISDEAA")

Because the CARES Act expressly incorporates the definition of "Indian tribe" from section 4(e) of ISDEAA, now codified at 25 U.S.C. § 5304(e), it is important to understand the history surrounding the drafting, enactment, and interpretation of that section.

As originally proposed, ISDEAA defined "Indian tribe" as "an Indian tribe, band, nation, or Alaska Native community for which the federal government provides special programs and services because of its Indian identity." H.R. 6372, § 450b(b), 93d Cong., 1st Sess. (1973). The original Senate bill defined "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native community as defined in the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." S. 1017, 93d Cong.,

2d Sess. (1974), 120 Cong. Rec. 2813-19.

The House Committee on Interior and Insular Affairs, to whom S. 1017 was referred, "amended the definition of 'Indian tribe' to include regional and village corporations established by the Alaska Native Claims Settlement Act." H.R. Rep. 93-1600; 120 Cong. Rec. 40252 (Dec. 16, 1974). Thus, the law as passed contained the following definition:

> "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village *or regional or village corporation* as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1801 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.]

Pub. L. 93-638 § 4(b), 88 Stat. 2203, 2204 (1975) (emphasis added). That definition remains the same today. *See* 25 U.S.C. § 5304(e).

Soon after ISDEAA was passed in 1975, the government realized that the amended definition contained an internal inconsistency: ANCs were expressly *included* in the definition of "Indian tribe," only to be *excluded* by the ensuing "which is recognized" clause—as they are not recognized as eligible for special programs or services because of their status as Indians. *See* Administrative Record ("AR") 012 (Soller Mem.) at 2. Beginning in May 1976, therefore, BIA began interpreting the "which is recognized" clause only to modify the phrase "any Indian tribe, band nation, or other organized group or community," in light of the legislative history of the definitional provision and well-understood maxims of statutory interpretation. *Id.* In other words, ANCs would not be not excluded from the definition due to the existence of the "which is recognized" clause.

That interpretation was upheld by the Ninth Circuit in *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471 (9th Cir. 1987). The court recounted the legislative history above, noted that government agencies—BIA and IHS—had stood consistently by this interpretation, and ultimately held that "the secretaries reasonably interpreted the eligibility clause to modify only the first entities listed in the definition." *Id.* at 1474-75 & nn.4-5. *Bowen* has never been overruled or

called into doubt. In its wake, the government has continued to contract with ANCs under ISDEAA. *See, e.g.*, *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 988 (9th Cir. 1999) (describing a "health services compact" between IHS and a regional ANC to "provide[] health care services to Alaska Natives and American Indians living in the Municipality of Anchorage" and surrounding rural areas).

The CARES Act

On March 27, 2020, the President signed the CARES Act into law. H.R. 748, 116th Cong. (2020). Title V of the CARES Act appropriates $150 billion through a "Coronavirus Relief Fund," codified as Subchapter VI to the Social Security Act at 42 U.S.C. § 801,[4] to States, Tribal governments, and units of local government.

The Coronavirus Relief Fund specifically reserved $8 billion for "Tribal governments." 42 U.S.C. § 801(a)(2)(B), defined as "the recognized governing body of an Indian Tribe," *id.* § 801(g)(5). "Indian Tribe," in turn was given the same meaning as "in section 4(e) of [ISDEAA]," 42 U.S.C. § 801(g)(1) (citing 25 U.S.C. § 5304(e). Under Section 801, "the Secretary [of the Treasury][5] shall determine, in consultation with the Secretary of the Interior and Indian Tribes," the amount to pay each Tribal government. *Id.* § 801(c)(7). That amount shall be "based on increased expenditures of each such Tribal government (or a tribally-owned entity of such Tribal government) relative to aggregate expenditures in fiscal year 2019 by the Tribal government (or tribally-owned entity)." *Id.* But so long as he distributes all of the appropriated funds, the "manner" in which to determine the amount paid to each Tribal government is "as the Secretary determines appropriate." *Id.*

To receive the amount to which they are entitled, the Tribal governments must certify that they will only use funds paid through Section 801 to cover costs that (1) are necessary expenditures

[4] The CARES Act refers to "Title" VI of the Social Security Act, and to "Sec. 601" of Title 42. But in fact, the provisions have been codified as *Subchapter* VI and at 42 U.S.C. § *801*.

[5] Where Section 801 uses the term "Secretary," that refers to the Secretary of the Treasury. 42 U.S.C. § 801(g)(3).

incurred due to the public health emergency with respect to COVID-19; (2) were not accounted for in the budget most recently approved as of the date of enactment of this section for the Tribal government; and (3) were incurred between March 1, 2020, and December 30, 2020. *Id.* §§ 801(d), (e). The Treasury Department Inspector General is to monitor and oversee the receipt, disbursement, and use of funds appropriated through Section 801, and directed specifically to recoup any funds used for impermissible purposes. *Id.* § 801(f).

Procedural History

On March 31, Assistant Secretary of the Interior Tara Sweeney wrote Tribal leaders to invite their participation in two, three-hour consultation sessions on the subject of the Coronavirus Relief Fund. AR 001. Those sessions were held on April 2 and 9, 2020. AR 002, 006. Ms. Sweeney also invited written commentary from the Tribal leaders.

By April 13, 2020, the government had received 439 comment letters from various stakeholders. These were compiled and summarized by the Department of the Interior. *See generally* AR 009. The government also received such letters after the comment period closed, 25 of which bore on the question of ANC eligibility. *See* AR 010(a)-(y).

On April 13, 2020, in order to determine the amount payable to Tribal governments, Defendant uploaded a certification form for Tribal governments to complete. *See* AR 007.

Between April 17, 2020, and April 23, 2020, Plaintiffs filed these three cases. The *Chehalis* and *Cheyenne River Sioux* Plaintiffs amended their complaints to add new plaintiffs but not new allegations.[6] The cases were consolidated on April 23, 2020.

On April 23, 2020, Defendant determined that ANCs would be eligible for payments from the Coronavirus Relief Fund. AR 014. That determination reads, in pertinent part:

> After consultation with the Department of the Interior, Treasury has concluded that Alaska Native regional and village corporations as

[6] The operative pleadings include: Am. Compl., *Chehalis*, No. 1:20-cv-1002, ECF No. 7, Apr. 21, 2020 ("*Chehalis* Compl."); Compl., *Ute Indian Tribe*, No. 1:20-cv-1070, ECF No. 1, Apr. 23, 2020 ("*Ute* Compl."); Am. Compl., *Cheyenne River Sioux*, No. 1:20-cv-1002, ECF No 14, Apr. 24, 2020 ("*CRS* Compl.").

> defined in or established pursuant to the Alaska Native Claims Settlement Act are eligible to receive payments from the Fund in the amounts to be determined by the Secretary of the Treasury. In determining the appropriate allocation of payments to Tribal governments, Treasury intends to take steps to account for overlaps between Alaskan Native village membership and Alaska Native corporation shareholders or other beneficiaries.

Id. (footnote omitted).

As noted in the passage above, Treasury's determination was made after a recommendation from the Department of the Interior. *See* AR 011 (Apr. 21, 2020, Jorjani Ltr.). That letter explained that "it is unquestionable that [ANCs] are 'Indian tribes' for the specific purpose of ISDEAA eligibility." *Id.* at 1 & n.4 (citing *Bowen*, 810 F.2d at 1476). Interior also explained that paying ANCs from the Coronavirus Relief Fund would further the purposes of the CARES Act, insofar as "ANCs act as economic vehicles in Alaska on behalf of their shareholders, the vast majority of which are members of federally-recognized Indian tribes." *Id.* at 2.

On April 27, 2020, after expedited briefing and a hearing, the Court granted Plaintiffs' motion for a preliminary injunction and enjoined Defendant from making any payments from the Coronavirus Relief Fund to ANCs. *See* Memorandum Opinion (ECF No. 36) (hereinafter "PI Op.").[7] The Court allowed Defendant to allocate, but not pay, monies to ANCs. *Id.* at 34.

On May 13, 2020, the Court set a schedule for consolidated briefing of cross motions for summary judgment. Pursuant to that schedule, Defendant produced the AR on May 22, 2020.

STANDARD OF REVIEW

Ordinarily, motions for summary judgment are reviewed under the standard set forth in Federal Rule of Civil Procedure 56, which requires a court to grant the motion when the pleadings and evidence demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). But "when a party seeks review

[7] The operative motions, which may be cited below, are as follows: Mot. for TRO & PI, *Chehalis v. Mnuchin*, No. 1:20cv-1002 (D.D.C. Apr. 20, 2020), ECF No. 3 ("*Chehalis* Mot."); Mot. for TRO & PI, *Cheyenne River Sioux v. Mnuchin*, No. 1:20-cv-1059 (Apr. 22, 2020), ECF No. 4 ("*CRS* Mot."); Mot. for TRO and PI, *Ute Indian Tribe v. Mnuchin*, No. 1:20-cv-1070 (Apr. 23, 2020), ECF No. 5 ("*Ute* Mot.").

of agency action under the APA, the district judge sits as an appellate tribunal," and "[t]he entire case on review is a question of law." *Sadeghzadeh v. USCIS*, 322 F. Supp. 3d 12, 16-17 (D.D.C. 2018) (Mehta, J.) (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal quotation marks omitted)). Accordingly, the standard in Rule 56 "does not apply because of the limited role of a court in reviewing the administrative record." *Id.* (quoting *Doe v. U.S. Citizenship & Immigration Servs.*, 239 F. Supp. 3d 297, 305 (D.D.C. 2017)). Summary judgment is "the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Id.* (quoting *Se. Conference v. Vilsack*, 684 F. Supp. 2d 135, 142 (D.D.C. 2010)).

Under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), Defendant's determination warrants deference to the extent it has the "power to persuade." That power "depends upon the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements." *Id.* Courts will "give an agency's interpretations considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use." *Grecian Magnesite Mining v. IRS*, 926 F.3d 819, 823 (D.C. Cir. 2019) (citing *Skidmore*, 323 U.S. at 140) (quoting *Davis v. United States*, 495 U.S. 472, 484 (1990)).

ARGUMENT

Defendant is entitled to summary judgment in these related cases. As an initial matter, Congress impliedly precluded review of this question by dictating that payments be made within 30 days and by not requiring any explanation of methodology or amount, either before or after payments were made.[8] Clearly, Congress did not intend these payments to be tied up in litigation.

[8] There is another threshold reason why Defendant would be entitled to summary judgment: the operative complaints have not been amended since Defendant decided on April 23, 2020, that ANCs are eligible for Coronavirus Relief Fund payments. *See* AR 014. Rather, all three complaints are based on the April 13, 2020, certification form, AR 007. Because that form is not final agency action subject to judicial review, all three complaints fail to state plausible claims, fail to invoke a valid cause of action, and fail to allege standing on any Plaintiff's behalf.

Even if judicial review were available, the Court would have to rule for Defendant. In the CARES Act, Congress chose to incorporate a definition of "Indian Tribe" that can only be given full effect by including ANCs. To the extent there is any doubt about that reading, it was announced more than 40 years ago, affirmed by the relevant U.S. Circuit Court of Appeals more than 30 years ago, reiterated consistently and publicly by the relevant agencies since then, and never been overridden by statutory amendment—despite *five* amendments to that definitional section.

In light of Congress's decision to incorporate that definition into the CARES Act, the CARES Act's reference to the "recognized body of an Indian Tribe," does not exclusively refer to bodies that are "federally recognized" or "recognized as sovereign." Rather, "recognized" in this context means recognized as eligible to contract or compact with the United States—as ANCs always have been, and are today. And by substituting for "government" the term "governing body," Congress made it even clearer that the recipients need not be sovereigns or "govern" in the traditional sense.

I. CONGRESS PRECLUDED REVIEW OF THESE ISSUES.

The presumption favoring judicial review of administrative action "is just that—a presumption." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984); *see* APA § 701(1) (review unavailable "to the extent . . . statutes preclude judicial review").[9] It is "overcome . . . whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Id.* at 351. The presumption in favor of judicial review may be overcome by specific language in a statute; specific legislative history that is a reliable indicator of congressional intent; contemporaneous judicial construction barring review, or, as directly relevant here, "inferences of intent drawn from the statutory scheme as a whole." *Id.* at 349 (citing *Morris v. Gressette*, 432 U.S. 491 (1977); *Switchmen v. Nat'l Mediation Bd.*, 320 U.S. 297 (1943)).

Given the expedited briefing of these motions, Defendant's arguments below assume that Plaintiffs' complaints will be amended to cure these defects. Defendant reserves, for present purposes, the arguments above.

[9] It is undisputed that the CARES Act itself does not provide a cause of action to review Defendant's allocation amounts or methods.

At least two features of Title V of the CARES Act show that Congress did not intend for emergency relief payments to be subject to judicial review. First, Title V establishes a short, statutory deadline to distribute funds during an ongoing health and economic emergency. The courts have long recognized that such deadlines are strong indicia that Congress did not intend for judicial review. In *Morris v. Gressette*, 432 U.S. 491 (1977), for example, the Supreme Court reasoned that Congress had not intended for judicial review of Department of Justice decisions regarding changes to State voting procedures where "Congress had intended the approval procedure to be expeditious" and "reviewability would unnecessarily extend the period the State must wait for effecting its change." *Id.* at 503-505. The Supreme Court in *Block* cited back to this as a prime example of a "statutory scheme" establishing that judicial review is unavailable. 467 U.S. at 350 (citing *Morris*, 432 U.S. at 504-05). Similarly, in *Dalton v. Specter*, 511 U.S. 462 (1994), four Justices analyzed a statutory scheme for closing military bases and concluded that a series of "tight and rigid deadlines" indicated that judicial review was unavailable. *Id.* at 480-481 (Souter, J., concurring, joined by Blackmun, Stevens, Ginsburg JJ..). "It is unlikely," those Justices reasoned, "that Congress would have insisted on such a timetable" if the decision "would be subject to litigation," in which case the final decision "would either have to be delayed in deference to the litigation, or the litigation might be rendered moot by completion of the closing process." *Id.* Then-Judge Alito reached a similar conclusion while the case was before the Third Circuit. *See Specter v. Garrett*, 971 F.2d 936, 960 (3d Cir. 1992) (Alito, J., dissenting) ("In the vast majority of cases, judicial review could not be completed within the short time limits imposed by the Act.").

Here, the CARES Act establishes an incredibly short deadline—a mere 30 days to determine who will be paid, confer with stakeholders, determine how the funds will be allocated, and then execute $8 billion in payments.[10] That deadline arises in the midst of a health and economic crisis, where time is obviously of the essence. But if the recipients or amounts were reviewable in court, that could easily result in litigation holding up the distribution. In fact, a stark

[10] As the Court knows, Defendant was unable to meet that deadline, is paying out 60% of the funds presently and is working diligently to allocate and pay the remaining 40%.

contrast exists to what is perhaps the only analogous, emergency legislation, the Emergency Economic Stabilization Act of 2008, Pub. L. 110-343, 122 Stat. 3765. That Act expressly provided for judicial review under the APA, but established special rules and procedures to guarantee highly expedited review. *Id.* § 119, 122 Stat. 3787.

Second, the statutory scheme established by the CARES Act would normally make judicial review impossible. The CARES Act does not require publication by Defendant of whom it will be paying, its methodology or the payment amounts. The statute simply envisions that Treasury determines whom to pay and then makes payments, at which point it would be difficult or impossible to litigate the payment plan. It is only because Plaintiffs thought that Treasury might distribute funds to ANCs (a decision that had not been made when Plaintiffs filed suit) that Plaintiffs sued. And it is only because of Treasury's commitment to transparency and to ensuring a fair process in these suits that Treasury announced who it intended to pay before making any payments. If Congress intended for judicial review, the statute would have required some public announcement prior to payment. And it would be passing strange if the statute were meant to invite litigation about possible allocation decisions that had not yet been made—exactly what happened here. That is especially so given the clear statutory mandate for expedition.

II. ALASKA NATIVE CORPORATIONS ARE "TRIBAL GOVERNMENTS" AS DEFINED BY THE CARES ACT.

Even if the Court found these cases amenable to judicial review, Defendant would still be entitled to judgment on the merits of Plaintiffs' claims.

A. ANCs are "Indian Tribes" under ISDEAA.

It is notable, at the outset, that Plaintiffs are divided on this question. While the *Chehalis* and *Ute* Plaintiffs allege that ANCs do not meet the definition of "Indian tribe" in ISDEAA, the *CRS* Plaintiffs do not contest that point. Instead, they rely on the argument that the lack of a recognized governing body disqualifies the (otherwise eligible) ANCs from receiving payments. *Cf. CRS* Compl. ¶ 76 ("Under Title V of the CARES Act, Alaska Native regional corporations and village corporations established under ANCSA, do not meet the statutory definition of "Tribal

government" *because they do not have a "recognized governing body."*) (emphasis added). In fact, the *CRS* Plaintiffs admitted in their prior motion that "the inclusion of ANCs in the ISDEAA definition of 'Indian Tribe' creates a *critical stop-gap* to ensure that Alaska Natives living in areas without a tribal government still receive critical services such as healthcare." *CRS Mot.* at 30 (emphasis added). In short, six of the 18 Plaintiffs do not even contest this critical question.

This division among Plaintiffs demonstrates that the Defendants' interpretation is, at a minimum, a rational construction of the language of ISDEAA—a construction that the cognizant agencies, which have extensive expertise on these issues, have applied under ISDEAA for decades.

1. The text of ISDEAA includes ANCs as "Indian Tribes."

As the Court has rightly noted, the "starting point" for statutory interpretation "is the statutory text." PI Op. at 19 (quoting *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003)). ISDEAA defines "Indian Tribe" as follows:

> "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village *or regional or village corporation* as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1801 et seq.], 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).

If this definition ended with the ANCSA citation, no party could dispute that it expressly incorporates ANCs. However, the ensuing clause creates an apparent contradiction: because ANCs, unlike the other listed entities, do not satisfy the "which" clause, application of that clause to all preceding terms would countermand Congress' decision to insert "or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688)" into the statute in the first place.

It is "the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (quoting *Loughrin v. United States*, 573 U. S. 351, 358 (2014)). When phrased in the

negative, this principle is sometimes referred to as the "interpretive canon against surplusage." *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019). Defendant's interpretation of ISDEAA adheres to that cardinal principle: every word in the definition retains some function. Plaintiffs' reading does not; they effectively delete 21 words from the statute. This would do violence to congressional intent and render language in the statute meaningless—language that Congress specifically included just before ISDEAA passed.

The interpretive tools urged by Plaintiffs and accepted by the Court in its prior opinion—namely, the "series qualifier" canon, *see* PI Op. at 20-21—are less persuasive. *Cf. Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 743 (10th Cir. 2020) ("Above all else, our job is to give effect to the intent of the enacting body."). The series-qualifier canon "is highly sensitive to context." *Id.* at 150. *Thomas v. Bryant*, 919 F.3d 298, 306 (5th Cir. 2019) (citing Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 150 (2012)). In the context of ISDEAA, Congress affirmatively *inserted* the ANC language right before the bill became law; thus, of all the surplusages to create, this one would be particularly intolerable. In other words, ISDEAA's "grammatical construct" should not trump the imperative to "interpret a statute to give meaning to every clause and word." PI Op. at 24 (quoting *Donnelly v. FAA*, 411 F.3d 267, 271 (D.C. Cir. 2005)).

Respectfully, this Court also underestimated the harm that its interpretation might do to "Congress's purpose under ISDEAA." *Id.* It is more than a "possibility" that ANCs "might" not qualify under the eligibility clause. *Id.* There is not, and has never been, an ANC that satisfies that clause. *See Bowen*, 810 F. 2d at 1474 ("[The ANC in that case] is not eligible for special programs because of its status.") (citing the eligibility clause); AR 012 (Soller Mem.) at 2 (noting that eligibility for BIA programs and services is "not provided for by the terms of the [Alaska Native Claims] Settlement Act"). Moreover, the notion that Alaska *villages* can "fulfill ISDEAA's purpose," PI Op. at 24, does not explain why Congress intentionally included *ANCs* within the definition, too. As the *CRS* Plaintiffs themselves explain, ANCs serve "as a stop-gap to ensure critical services are provided to Alaska Natives in regions where there are no actual Tribal

governments, or where Tribal governments choose to compact with them to provide services under ISDEAA." *CRS* Mot. at 28; *see also id.* at 28-29 ("There are a significant number of urban Indians that would be left without services without this provision.").

Finally, the Court faulted Defendant's reading for being "counter-textual." PI Op. at 25. But that conclusion, too, reads the "eligibility clause" as if it "cannot be reasonably construed to exclude ANCs." *Id.* As Interior explained in the Soller memorandum (AR 012); as the Ninth Circuit recognized in *Bowen*, 810 F. 2d at 1474; and as Plaintiffs effectively conceded at the prior hearing, Hr'g Tr. 12:7-13:8; ANCs have never been able to satisfy the eligibility clause. Defendant's interpretation, like BIA's and the Ninth Circuit's, does not "supplant the clear text" of ISDEAA. PI Op. at 25. Rather, Defendant's interpretation *saves* major portions of that text from effective nullification. Because Plaintiffs' reading does not, theirs is the truly "counter-textual" position. *Id.*

2. Defendant's reading was announced contemporaneously with ISDEAA and affirmed by the pertinent U.S. Circuit Court of Appeals.

As noted in the Background section above, and by Defendant at the PI hearing, this Court is not confronting these issues for the first time.

Rather, the government announced its position more than 40 years ago. *See generally* AR 012 (Soller Mem.). On April 15, 1976, little more than a year after ISDEAA was passed, the Department of the Interior's Commissioner of Indian Affairs asked the Assistant Solicitor for Indian Affairs for an opinion on "whether [Alaska] village and regional corporations are within the scope of [ISDEAA]." *Id.* at 1. The memorandum in response began by reciting ISDEAA's definitional text and reasoning: "Since both regional and village corporations find express mention in the definition, customary rules of statutory construction would indicate that the should be regarded as Indian tribes for purposes of application of this Act." *Id.* The memorandum also noted the "qualifying language" beginning with "which," and reasoned further that, inasmuch as the "which" clause "operates to disqualify [ANCs] from the benefits of [ISDEAA], then their very mention in section 4(b) is superfluous." *Id.* at 2. Accordingly, the agency adopted the "better view,"

namely that "Congress intended the qualifying language not to apply to regional and village corporations but to pertain only to that part of the paragraph which comes before the word 'including.'" *Id.*

That interpretation was challenged and upheld by the Ninth Circuit. *See Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471 (9th Cir. 1987). This may be a "decades-old Ninth Circuit decision," PI Op. at 25, but it remains the only case cited by any party to have addressed at length the question presented by these cases. And as the Court rightly intimated at the preliminary-injunction hearing, the Ninth Circuit is where one would expect these issues to arise. Hr'g Tr. 20:3-6. The plaintiff in *Bowen*, an Alaska native association, argued, as Plaintiffs do here, "that [the ANC] cannot meet the eligibility requirement included in the definition of Indian tribe." *Id.* at 1473. The Ninth Circuit surveyed the statutory text, the legislative history and purposes, and affirmed BIA's and IHS's interpretations.[11] That was, in no small part, because it would be "illogical[]" to "construe[] the language to mandate a result in one clause, only to preclude that result in the next clause." *Id.* at 1474.

Whether or not *Bowen* created a "judicial consensus," such that Congress can be said to have ratified it, PI Op. at 26 & n.12, the fact remains that the only Court to have considered the question of ANC eligibility under ISDEAA agreed with Defendant's reading, based on principles of statutory interpretation that are no less applicable today. For that reason, neither Plaintiffs nor the Court has offered any argument that *Bowen* was wrongly decided. If nothing else, therefore, *Bowen* is strong evidence that Defendant has the better reading of ISDEAA.

[11] Although the *Bowen* court noted the "substantial deference" afforded agency interpretations in such areas, *id.* at 1473, the opinion does not sound in grudging deference. Rather, the Ninth Circuit found the agencies' reading consonant with maxims of statutory interpretation, such as "the statute should not be interpreted to render one part inoperative," or "to defy commons sense," but rather "should be harmonized internally and with each other to the greatest extent possible." 810 F.2d at 1474 (collecting cases). *See also id.* at 1476 ("The trial court found correctly that classifying a business corporation as an Indian tribe does not clearly contravene the policies and purposes of the Self-Determination Act."). There is no indication that the Ninth Circuit might have disagreed with the agencies and affirmed them nonetheless out of deference.

3. Neither Defendant's reading of ISDEAA nor the Ninth Circuit's holding in *Bowen* was affected by passage of the List Act in 1994.

Rather than argue that *Bowen* was wrongly decided, Plaintiffs argue that its holding was abrogated when the List Act was passed in 1994. Pub. L. 103-454, 108 Stat. 4791. *See Chehalis* Mot. at 20-21 ("The List Act changed all of that[.]"). They suggest that, instead of amending ISDEAA directly to remove the words "or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688)," Congress chose to repeal those words sub silentio through the List Act. "There is a strong presumption that disfavors repeals by implication and that Congress will specifically address preexisting law before suspending the law's normal operations in a later statute." *Id.* (quoting *United States v. Fausto*, 484 U.S. 439, 452-53 (1988)). Plaintiffs have not overcome that strong presumption here.

Under the List Act, the Secretary of the Interior is to "publish in the Federal Register a list of all Indian tribes which 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). But because the List Act did not amend ISDEAA's definition of "Indian tribe," it did not change the express inclusion of ANCs within the definition. Indeed, the List Act adopted an altogether separate definition of "Indian tribe" for the Secretary to use when publishing the annual list of tribes "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Because ANCs are "Indian tribes" under ISDEAA without regard to whether they are eligible for such services, the List Act's definition left the definition in ISDEAA—the one that the CARES Act would later incorporate—unchanged.

Accordingly, the Ninth Circuit continued to recognize ANCs as Indian tribes under ISDEAA, citing *Bowen*, even after the List Act was passed. *E.g.*, *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 988 (9th Cir. 1999) ("The subject of this litigation is a health services compact that the [IHS], an agency of the Department of Health and Human Services, awarded in 1994 to Cook Inlet Region, Inc. ('CIRI'), an Alaska Native Regional Corporation *and Indian tribe*.") (citing 43 U.S.C. § 1602(g); 25 U.S.C. § 450b(e), now codified at 25 U.S.C. § 5304(e));

Bowen, 810 F.2d at 1476) (emphasis added). The Court previously described this as a simple "factual recitation." PI Op. at 26 n.12. But in *Shalala*, the parties agreed on Defendant's position here: that ANCs were "Indian Tribes" under ISDEAA.[12] Those briefs were submitted three years after the List Act was passed. The opinion in *Shalala* was issued more than four years after the List Act was passed. Yet the List Act was not mentioned once.

District courts within the Ninth Circuit have likewise affirmed *Bowen* after the List Act. *See Ukpeagvik Inupiat Corp. v. HHS*, No. 3:13-CV-00073-TMB, 2013 WL 12119576, at *2 & n.21 (D. Ala. May 20, 2013) ("UIC, on the other hand, asserts that the original resolutions came from village corporations, *which are also 'tribes' under the Indian Self-Determination Act*.") (emphasis added) (citing *Bowen*, 810 F.2d at 1475). Clearly, then, the List Act worked no sea change in this area of the law. To counter these cases, Plaintiffs have cited no authority for the proposition that ANCs were "Indian Tribes" before, but not after, the List Act.

Plaintiffs' implied-repeal argument is particularly implausible because, just ten days before the List Act was passed, the same Congress passed the ISDEAA Contract Reform Act, Pub. L. 103-413. That Act amended ISDEAA's definitional section, 25 U.S.C. § 5304(g), with regard to indirect costs. One must think that, had Congress intended to eliminate ANCs as "Indian Tribes" from ISDEAA obliquely through the List Act, it would have done so directly—by deleting the ANC language a mere *two subsections above* the language it was already amending through the Contract Reform Act. But Congress left ANCs in the statute.

When Interior and HHS later issued a joint rule implementing the ISDEAA Contract Reform Act, nearly two years after the List Act had passed, the agencies had the perfect opportunity to clarify any change that the List Act had wrought. *See ISDEAA Act Amendments*, 61

[12] *See* Br. Appellants, No. 97-35254, 1997 WL 33484803, at **7-8 (9th Cir. June 16, 1997) ("Even though CIRI is not a federally-recognized tribal government, it is a 'tribe' within the meaning of Title I of the ISDEA.") (citing ISDEAA Section 103(e), 25 USCS § 450b(e) (now 25 U.S.C. § 5304(e); *Bowen*, 810 F.2d at 1473); Br. Fed. Appellees, No. 97-35254, 1997 WL 33487097 (C.A.9), at *8 (9th Cir. Aug. 26, 1997) ("This Court also rejected the argument that CIRI could not be an Indian tribe for purposes of the ISDEA because it was not eligible for programs and services provided by the government.") (citing *Bowen*, 810 F.2d at 1477).

Fed. Reg. 32,482 (June 24, 1996). Indeed, it would have been helpful for the agencies that govern ISDEAA contracting to announce that, after the List Act, ANCs would no longer be eligible for such contracts. But the definition of "Indian tribe" continued to include "any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act." *Id.* at 32,507. That definition remains today. *See* 25 C.F.R. § 900.6.[13]

The Court relied on two cases for its prior conclusion that the List Act altered ISDEAA's definition or otherwise undermined Defendant's definition: *Wyandot Nation of Kan. v. United States*, 858 F.3d 1392 (Fed. Cir. 2017), and *Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178 (D. Or. 2010).[14] Neither case stands for that proposition.

In *Wyandot*, a non-federally-recognized entity in Kansas—*not* an ANC—sought an accounting under the American Indian Trust Fund Management Reform Act, under which Interior accounts for "the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe." 858 F.3d at 1395 (quoting 25 U.S.C. § 4011(a)). The "Reform Act" further allows an Indian Tribe to sue for an accounting of any funds held in trust by the United States, and defines "Indian Tribe" just as ISDEAA does. The government argued, and the Federal Circuit agreed, that the Wyandot Nation—as a putative "tribe, band, nation, or other organized group or community" under the Reform Act—was subject to the "which" clause in the definition; it had to be on Interior's annual list in order to be an "Indian Tribe" eligible for an accounting. *Id.* at 1398, 1402.

[13] The Court faulted Defendant for not "cit[ing] any contemporary guidance from BIA regarding the ISDEAA definition that could confirm that the agency continues to adhere to its original interpretation." PI Op. at 25 n.11. In addition to representations made on BIA's and IHS's behalf, Hr'g Tr. 37:10-14, the citations herein, and the evidence offered by the ANC Intervenors that they do hold ISDEAA contracts, the Court can consider that this regulation—passed nearly two years after the List Act was passed—was amended again 14 years later. *See* 75 Fed. Reg. 31,701 (June 4, 2010). ANCs remain within the agencies' definition of "Indian Tribe."

[14] Neither of these cases was cited in any of the Plaintiffs' three motions for preliminary injunction. Rather, they were cited for the first time in the *Chehalis* Plaintiffs' reply brief. Thus, this is Defendant's first opportunity to address them in writing.

In *Slockish*, two non-federally-recognized entities—which were *not* ANCs—alleged that the Federal Highway Administration violated the National Historic Preservation Act ("NHPA") by not consulting with those Tribes before widening a highway in Oregon. 682 F. Supp. 2d at 1187. However, NHPA only requires federal consultation with "Indian Tribes," defined as in ISDEAA. The government argued, and the Magistrate Judge agreed,[15] that neither the Klickitat nor the Cascade Tribe—as a putative "tribe, band, nation, or other organized group or community" under NHPA—was an "Indian Tribe," because neither was on the most recent annual list from Interior. *Slockish*, 682 F. Supp. 2d at 1202.

Contrary to Plaintiffs' arguments and the Court's prior opinion, these cases do not evidence any change in the government's position after the List Act was passed. *Contra* PI Op. at 27-28. The government's reading of ISDEAA has always been that the recognition clause does not apply to ANCs, but *does* apply to tribes, bands, nations, or organized communities. *See* AR 012 (Soller Mem.) at 2; *Bowen*, 810 F.2d at 1474. Because none of the three entities in *Wyandot* or *Slockish* was an ANC, it was entirely consistent for the government to argue that they had to be on Interior's list. This is the explanation "why, in post-List Act cases like *Wyandot* and *Slockish*, the government has insisted that courts read the same definition of 'Indian tribe' at issue here with the List Act, but not in this case." PI Op. at 28.[16] There *was no* change in position after the List Act.

Finally, and tellingly, neither case refers to the List Act as any sort of sea change in this area of law. In *Slockish* especially, where *Bowen* would have been binding precedent, one might have expected the Magistrate to explain why *Bowen*—which had clearly held that certain entities *not* on Interior's annual list could still be "Indian Tribes" under an identical definition—was no longer good law, or at least distinguished it. If Plaintiffs or the Court believe that the List Act extinguished *Bowen* or the interpretations it upheld, neither *Wyandot* nor *Slockish* said so.

[15] This conclusion was not appealed to the District Judge. 682 F. Supp. 2d at 1182.

[16] Again, neither *Wyandot* nor *Slockish* was addressed in Defendant's opposition memorandum because they were both raised for the first time in the *Chehalis* reply.

4. Caselaw from non-ISDEAA contexts does not trump Defendant's interpretation of ISDEAA.

To date, Plaintiffs have not cited a single case for the proposition that ANCs are not "Indian tribes" as defined by ISDEAA—nor did the Court rely on any such case in its prior opinion.

Instead, Plaintiffs have amassed a host of authorities in *non*-ISDEAA contexts. *See Chehalis* Mot. (citing *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 532-34 (1998) (holding that land transferred to ANCs under ANCSA was not "Indian country" as defined in 18 U.S.C. § 1151(b)); *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 550-52 (9th Cir. 1991) (holding, for the purposes of invoking federal jurisdiction under 28 U.S.C. § 1362, that ANCs did not have "a governing body duly recognized *by the Secretary of the Interior*") (emphasis added); *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1350 (9th Cir. 1990) (holding that an ANC is not a "non-foreign governmental unit" for 11th Amendment purposes); *Pearson v. Chugach Gov't Servs. Inc.*, 669 F. Supp. 2d 467, 469 n.4 (D. Del. 2009) and *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 213 (4th Cir. 2007) (both holding that ANCs do not qualify as "Native American tribes" for the purposes of Title VII's exemption of from the term "employer"));[17] *see also CRS* Mot. at 25-26 (citing *Village of Venetie*, *Seldovia*, and *Pearson*); *Ute* Mot. at 13 (citing *Village of Venetie*). The Court did not rely on any of these cases in its prior opinion, likely because none of them bears on the question whether ANCs are "Indian tribes" as that term is defined by ISDEAA.

Nor did the cases principally relied on by the Court, *Wyandot* and *Slockish*, pass on the question presented in this case: whether ANCs are "Indian Tribes" under ISDEAA. And as explained above, neither of them stands for the proposition that ISDEAA's definitional section should be read differently after the List Act. In the 45 years since ISDEAA was passed, then, the

[17] The *Chehalis* Plaintiffs also cited the government's legal brief in *Ukpeagvik Inupiat Corp. v. HHS*, No. 3:13-cv-00073-TMB, 2013 WL 12119576 (D. Ala. May 20, 2013). *See Chehalis* Mot. at 24. But the government's position in that case—that the plaintiff ANC was "eligible to enter into a self-determination contract with the IHS," though it had never been "a federally recognized tribe," *id.*—is perfectly consonant with Defendant's position here. ANCs are not "federally recognized" tribes, but the *are* "Indian Tribes" eligible for contracts under ISDEAA—even if it takes an authorizing resolution from a tribal village before they can hold such a contract.

only cases to address the question have held that ANCs *are* "Indian Tribes."

5. Defendant's reading of ISDEAA has been ratified, or at least acquiesced to, by Congress.

Because Defendant has the reading of ISDEAA's definition of "Indian Tribe," Defendant need not rely on any theory of congressional ratification or acquiescence. But the history of congressional action (and inaction) with respect to ISDEAA confirms Defendant's interpretation.

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n. 66 (1982). This theory "derives from the notion that Congress is aware of a definitive judicial interpretation of a statute when it reenacts the *same* statute using the same language." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365–66, 204 L. Ed. 2d 742 (2019) (citing *Helsinn Healthcare S. A.* v. *Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-634 (2019)). Moreover, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159, 133 S. Ct. 817, 827–28, 184 L. Ed. 2d 627 (2013) (quoting *CFTC v. Schor*, 478 U.S. 833, 846 (1986)).

a) Administrative interpretations.

As the *Bowen* court observed, the record of the first 10 years after ISDEAA passed "indicates that the administrative interpretations ha[d] remained consistent with this construction [that ANCs are "Indian Tribes]." 810 F.2d at 1474.[18] And in this case, the Court need not rely on a mere presumption of awareness; Congress was told directly of those interpretations. *See*

[18] *See id.* (citing "Implementing Public Law 93–638," Native News and B.I.A. Bulletin, Vol. 13, No. 4, pp. 2-3 (July-October 1976) ("only the following entities are recognized as tribes: —Native Villages—Regional (profit) corporations—Village (profit) corporations—Legally recognized tribes"); Village Self-Determination Workbook, Nos. 1, 6, 12 (Nov. 1977); Alaska Native Village Self-Determination Briefing Book, pp. 6–7 (Nov. 1977); 46 Fed. Reg. 27179 (May 18, 1981) (recognizing regional profit corporations but not non-profit corporations as a village governing body for purposes of contracting)).

generally id. at 1475-76 ("Post-Enactment History"). Congressional hearings were held the year after ISDEAA passed, and a several-hundred-page final report was submitted to Congress. *Id.* at 1475; *see also* Ex. 1 (American Indian Policy Review Commission, *Final Report* (May 17, 1977) (Chapter 12, Section A ("Alaska"))) (the "1977 Report").[19]

That report recounted the many forms in which Alaska Natives may organize, both at the village level and in "larger aggregations." 1977 Report at 495. This included as "a village corporation" or "a regional corporation" under ANCSA. *Id.* The report was crystal clear: "any of these forms meets the definition of 'Indian tribe' used in the Self-Determination Act." *Id.* As the Ninth Circuit put it in *Bowen*, the report expressly "assumed that both regional profit and non-profit corporations are included in the Self-Determination Act definition of tribe." *Id.* at 1475-76. The report also expounded the critical distinction in this case, between the narrow group of organizations that are true "repositories of tribal sovereignty and are capable of exercising residual sovereign powers," and the category of organizations that meet ISDEAA's definition of "Indian Tribe"—which is broader. 1977 Report at 495. In an ensuing passage, prescient for purposes of this case, the report added:

> This, of course, is not to suggest that organizations of Alaska Natives other than those that are repositories of tribal sovereignty should be excluded from the benefits of existing and future legislation and programs designed to promote the development of Native peoples. It is only to point out that, typically, the Alaska Natives are organized in a number of forms some of which are classical tribal forms and some of which are not. Indeed, a native corporation organized under the Settlement Act might well be the form or organization best suited to sponsor certain kinds of federally funded programs.

Id. "The solution is not to disqualify certain kinds of Alaska Native organizations but to assign priorities among them." *Id.*

That is precisely what IHS did four years later. In *Alaska Area Guidelines for Tribal*

[19] This report, cited in *Bowen*, is publicly available. For the Court's convenience, Defendant is attaching as an exhibit the relevant subchapter.

Clearances for Indian Self-Determination Contracts, 46 Fed. Reg. 27,178 (May 18, 1981), the agency promulgated guidelines to aid "the successful implementation of [ISDEAA] in Alaska." *Id.* at 27,178. The guidelines defined "Indian tribe" to include ANCs. *Id.* They also set a precedence for recognizing each village's governing body:

> If there is an Indian Reorganization Act (IRA) Council, and it provides governmental functions for the village, it will be recognized.
>
> If there is no IRA Council, or it does not provide governmental functions, then the traditional village council will be recognized.
>
> If there is no IRA Council and no traditional village council, then the village profit corporation will be recognized.
>
> If there is no IRA Council, no traditional village council, and no village profit corporation, then the regional profit corporation will be recognized for that particular village.

Id. at 27,179. Thus, not only did Interior and HHS announce publicly that they were treating ANCs as eligible for ISDEAA contracts, but also that ANCs could be "recognized" by the federal government as such.

For some time, ANCs were included on Interior's published annual list of Indian Tribes. *See generally Indian Entities Recognized and Eligible To Receive Services From the United States*, 58 Fed. Reg. 54,364 (Oct. 21, 1993). The first list of Tribes, which had been acknowledged under regulations preceding the List Act, was published in 1979. *Id.* (citing 44 Fed. Reg. 7,325 (Feb. 9, 1979)). That list did not include Alaska Native entities. In 1982, Interior published its "preliminary list" of Alaska Native entities. *Id.* (citing 47 Fed. Reg. 53,133 (Nov. 24, 1982)). That 1982 list did not contain ANCs, but noted in its preamble an "overlapping eligibility of Native entities in Alaska." *Id.* (citing 47 Fed. Reg. at 52,133-34). As the 1993 promulgation would later explain, ANCs "are not governments, but they have been designated as 'tribes' for the purposes of some Federal laws, primarily the Indian Self-Determination and Education Assistance Act (ISDA), [25 U.S.C. § 5304(e),] creating the overlapping eligibility referred to in the [1982] preamble." 58 Fed. Reg. at 54,364. That 1982 preamble caused confusion, however, and drew complaints from the

ANCs. *Id.* at 54,364-65.

In 1988, Interior began including ANCs on its annual lists. *Id.* at 54,365 (citing 53 Fed. Reg. 52,829, 52,832 ("The following are those Alaska entities which are *recognized* and eligible to receive funding and services from the Bureau of Indian Affairs.")) (emphasis added). But that "created a discontinuity from the list of tribal entities in the contiguous 48 states," insofar as certain non-sovereign entities from those States—which also were "eligible for contracts and grants under the ISDA"—were not included. *Id.* The 1988 list caused further confusion by including ANCs and sovereign Alaska Tribes on the same list.

In 1993, faced with objections from lower-48 Tribes and Alaska Tribes, Interior decided to remove ANCs from the list. This was to make clear that the remaining Alaska Tribes were "distinctly Native communities and [that they] have the same status as tribes in the contiguous 48 states." *Id.* But Interior was equally clear that the list would no longer include "a number of non-tribal Native entities in Alaska *that currently contract with or receive services from the Bureau of Indian Affairs* pursuant to specific statutory authority, including ANCSA village and regional corporations and various tribal organizations. These entities are made eligible for Federal contracting and services by statute and *their non-inclusion on the list below does not affect the continued eligibility of the entities for contracts and services.*" *Id.* at 54,366 (emphasis added).

The government's administrative interpretation was reaffirmed the next year in *Central Council of Tlingit and Haida Indian Tribes v. Chief Branch of. Justice Services*, 26 IBIA 159, 163 (1994) ("[ISDEAA's] definition is broader than traditional definitions of 'Indian tribe' and includes entities, notably Alaska regional and village corporations, which are not normally considered to be tribes.") (citing *Bowen*, 810 F.2d at 1471).

In 1996, Interior and HHS reiterated publicly their interpretation of "Indian Tribe" to include ANCs. *See* 61 Fed. Reg. 32,482, *supra*. Again, that was two years *after* the List Act was passed. That was but the latest in a long line of consistent, public interpretations by the relevant agencies—BIA and IHS—that ANCs are "Indian Tribes" under ISDEAA.

The upshot is that, since 1976, multiple government agencies have publicly and

consistently viewed ANCs as "Indian Tribes" under ISDEAA, despite the fact that they are not federally-recognized sovereign governments.

b) Judicial interpretations.

Judicial pronouncements on this question have been similarly "broad and unquestioned." *Jama v. ICE*, 543 U.S. 335, 349 (2005). The Ninth Circuit has held, before and after the List Act was passed, that ANCs are "Indian Tribes" under ISDEAA. *Bowen*, 810 F.2d 1471; *Shalala*, 166 F.3d at 988. While a subsequent decision in the same circuit may not alone "create a bread and unquestioned judicial consensus," PI Op. at 26 n.12 (citing *Jama*, 543 U.S. at 349), the salient point is that *Bowen* and *Shalala* stand alone and unrebutted. And as the Court has rightly suggested, the Ninth Circuit has particular significance with respect to these issues. Hr'g Tr. 20:3-6.

It is implausible, by contrast, to think that when incorporating ISDEAA's definition of "Indian Tribe" into the CARES Act, Congress had in mind—let alone ratified—interpretations of the Reform Act or NHPA. *Contra* PI Op. at 28; *cf. Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365-66 (2019) (rejecting argument "that Congress effectively ratified [Respondent's] understanding of the term 'confidential' by enacting similar phrases in other statutes" because "the ratification canon applies when Congress re-enacts the *same* statute using the same language") (citing *Helsinn Healthcare S. A. v. Teva Pharmaceuticals USA, Inc.*, 139 S. Ct. 628, 633-634 (2019)); *Beverly Enterprises, Inc. v. Herman*, 119 F. Supp. 2d 1, 9 (D.D.C. 2000) ("[T]he legislative reenactment doctrine applies (quite literally) to reenactment of the same statute; the Court is aware of no cases applying the doctrine to the scenario posited by the DoL, in which Congress enacts a new statute and thereby ratifies an agency interpretation under a separate statute.").

It is far more likely that Congress would have had in mind caselaw interpreting ISDEAA itself, along with 40 years of consistent, public pronouncements by federal agencies, all of which has held that ANCs are "Indian Tribes." A leading treatise in this area confirms that "regional and village corporations are included as 'tribes' under some Indian legislation." *Cohen's*

§ 4.07(3)(d)(i) (citing ISDEAA). Another leading text makes clear that ANCs can receive ISDEAA contracts. Case & Voluck, *Alaska Natives and American Laws* 233 (3d ed. 2012) (noting that "the inclusion of ANCSA corporations in the definition of 'Indian tribe' [in ISDEAA] allows such corporations to contract for services to deliver to their respective regions and villages").

c) Congressional revisiting of ISDEAA's definition.

In 1987, the Ninth Circuit was unprepared to accept a congressional-ratification theory. *Bowen*, 810 F.2d at 1476. That was because "failure to disapprove agency regulations does not necessarily demonstrate that Congress considered the regulations consistent with legislative intent," particularly since "Congress ha[d] not amended the statute since its enactment and may not have considered the section in light of the administrative interpretation." *Id.* But ISDEAA's definition was amended the year after *Bowen* was decided—and four more times since then.[20] And while the failure to disapprove of regulations may not have been dispositive a mere ten years after their promulgation, it has now been several decades that the government has consistently and publicly taken this position. That Congress has never—through 40 years and five amendments—stricken ANCs from ISDEAA's definition of "Indian Tribe" is strong evidence that Defendant's interpretation is correct and has been ratified by Congress.[21]

6. Agency practice does not undermine Defendant's reading of ISDEAA.

Eligibility for ISDEAA contracts is the touchstone of whether ANCs are "Indian tribes"

[20] *See* Pub. L. 100–472, title I, § 103, Oct. 5, 1988, 102 Stat. 2286 ; Pub. L. 100–581, title II, § 208, Nov. 1, 1988, 102 Stat. 2940 ; Pub. L. 101–301, § 2(a)(1)–(3), May 24, 1990, 104 Stat. 206 ; Pub. L. 101–644, title II, § 202(1), (2), Nov. 29, 1990, 104 Stat. 4665 ; Pub. L. 103 –413, title I, § 102(1), Oct. 25, 1994, 108 Stat. 4250.

[21] Subsequent legislation also suggests that Congress presupposed ISDEAA's definition of "Indian Tribe" to include ANCs. In the Indian Tribal Energy Development and Self-Determination Act of 2005, for example, the statute incorporates by reference ISDEAA but adds that, for certain purposes, "the term 'Indian tribe' does not include any Native Corporation [as defined by ANCSA]." Pub. L. 109-58, § 503, 119 Stat. 764-65, codified at 25 U.S.C. § 3501(4)(A)-(B). In a 1997 appropriations rider, Congress authorized an ANC to enter a 638 contract "without submission of any further authorizing resolutions from any other Alaska Native Region, village corporation, Indian Reorganization Act council, or tribe." Pub. L. No. 105-83, § 325(d), 111 Stat. 1543, 1598 (1997).

under ISDEAA and, by extension, under the CARES Act. PI Hr'g Tr. 40:18-41:3. Neither Plaintiffs nor Defendant would suggest that, if one of the 574 federally recognized tribes happened not to hold an ISDEAA contract, such tribe would be ineligible for CARES Act payments. Likewise, an ANC does not cease being an "Indian tribe" under ISDEAA or the CARES Act merely because it does not, at any particular time, hold an ISDEAA contract. Thus, Defendant respectfully suggests that "actual agency practice under ISDEAA," PI Op. at 29-30, sheds little light on the legal question at issue: eligibility.

To the extent that the Court continues to find "real-world treatment of ANCs by federal agencies under ISDEAA" relevant, *id.* at 29, government agencies *have* recognized ANCs as "Indian tribes" under ISDEAA. *See* Section II(A)(5)(a), *supra* (recounting 40 years of consistent, publicized agency interpretations of "Indian Tribe" to include ANCs). And to the extent that it is relevant, ANCs *have* held ISDEAA contracts. In *Shalala*, cited above, the "subject of th[e] litigation [was] a health services compact that the [IHS] awarded in 1994 to Cook Inlet region, Inc. ('CIRI'), an Alaska Native Regional Corporation and Indian Tribe." 166 F.3d at 988. In 1993, when it removed ANCs from its annual list, Interior referred to them as "a number of non-tribal Native entities in Alaska *that currently contract with or receive services from the Bureau of Indian Affairs* pursuant to specific statutory authority," and said that they would enjoy "continued eligibility of the entities for contracts and services." 58 Fed. Reg. at 54,366 (emphasis added).[22]

7. None of Plaintiffs' policy arguments is availing.

Plaintiffs previously offered several policy arguments in support of their counter-textual reading, none of which suffices.

First, Plaintiffs suggest repeatedly that, because ANCs are "for-profit," they cannot be "Tribal governments" eligible for payments under the act. *Chehalis* Compl. ¶¶ 2, 96, 112; *CRS*

[22] The Defendant-Intervenors have also identified ISDEAA contracts that they have held. *See* Ahtna Mot. (ECF No. 43) at 2, 5-6; ANC Ass'n Mot. (ECF No. 45), Mallott Decl. (ECF No. 45-2) ¶ 7, Westlake Decl. (ECF No. 45-7) ¶ 15, Schubert Decl. (ECF No. 45-22) ¶ 10; Calista Mot. (ECF No. 46) at 13-14, Guy Decl. (ECF No. 46-1) ¶ 5.

Mot. at 24, 25; *Ute* Mot. at 7. But that argument overlooks that Village Corporations can, under ANCSA, be "for profit or nonprofit." 43 U.S.C. § 1602(j). Nothing in ISDEAA's definition of "Indian tribe" distinguishes between for-profit and nonprofit ANCs—they are both included.

Second, Plaintiffs warn that Defendant's interpretation of the CARES Act might allow Alaska tribes to "double dip" or "triple dip," because some ANCs are "closely affiliated" with native villages. *Chehalis* Mot. at 35 n.27. But the statute allows Defendant to account for differences between ANCs and other Indian Tribes, and among ANCs themselves, in determining payment amounts. And although the Court should address the statute as written, to the extent it considers *implementation* of the CARES Act, Defendant had said that it "intends to take steps to account for overlaps between Alaskan Native village membership and Alaska Native corporation shareholders or other beneficiaries." AR 014. And in the methodology later announced, Defendant explained that it would rely primarily on Department of Housing and Urban Development Indian Housing Block Grant ("IHBG") data, which "incorporates adjustments to address overlapping jurisdictions."[23] The IHBG data mitigates concerns over double counting, insofar as it credits the population of an Alaska Native village to the Alaska Native village, and the population outside the Alaska Native Village to the regional Indian tribe or, if there is no regional Indian tribe, to the regional corporation. *See generally* 24 C.F.R. §§ 1000.326-27.[24]

Third, Plaintiffs suggest that, because ANC shareholders may include non-Indians, the CARES Act should be read to exclude ANCs. *Chehalis* Mot. at 7, 26 (citing 43 U.S.C. §§ 1606(f), (h)(2), and (h)(3)(d)). But they greatly exaggerate the ANCSA provisions they cite. Section 1606(f) merely says that Regional ANCs shall be managed by a board of directors. And while Section 1606(h) contemplates the possibility of "a person not a Native" owning stock in a Regional ANC, the cited subsections provide that Regional ANCs have the statutory right to *buy back* those

[23] U.S. Dep't of Treasury, *Coronavirus Relief Fund: Allocations to Tribal Governments* 3 (May 5, 2020), *available at* https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf,

[24] Under the IHBG formula, a village corporation for an Alaska Native Village has no population data and no formula allocation. 24 C.F.R. §1000.327(a).

shares at fair market value, *id.* § 1606(h)(2)(B); the fact that stock inherited by non-Natives does *not* carry voting rights, *id.*; that Regional ANCs may *deny voting rights* to any holder of Replacement Common Stock who is not a Native or a descendent of a Native, *id.* § 1606(h)(3)(D)(i); and that Regional ANCs may give "the first right of purchase" to a shareholder's immediate family members *who are Natives*, *id.* § 1606(h)(3)(D)(ii). While Plaintiffs paint a picture of ANCs as non-Indian-controlled conglomerates, the truth is that there remains a significant overlap between the members of a village and an affiliated corporation. As the *CRS* Plaintiffs put it, "most—but not all" ANC shareholders are still Alaska Natives. *CRS* Mot. at 15. Given the abiding feature of Native control of the ANCs, it is hardly unreasonable for Congress or Defendant to think that they should be funded under Title V of the CARES Act.

B. ANCs Are Not Excluded from CARES Act Eligibility by the Phrase "Recognized Governing Bodies."

Plaintiffs have argued that, even if an ANC is an "Indian tribe" under the CARES Act, it is not (or does not have) a "recognized governing body" eligible for payments under the Coronavirus Relief Fund. *See* 42 U.S.C. § 801(g)(5) (defining "Tribal government" as "the recognized governing body of an Indian Tribe"). That argument is unpersuasive.

1. "Recognized governing body" is not term unique to Title V of the CARES Act.

Congress, in enacting the CARES Act, specifically selected another term from ISDEAA: "recognized governing body." *See* 25 U.S.C. § 5304(l) (defining "tribal organization" to mean, among other things, "the recognized governing body of any Indian tribe."). That definition has been in ISDEAA since its inception, before the List Act passed, when even Plaintiffs agreed that an ANC could be an Indian Tribe. *See* Pub. L. 93-638, § 4(c), 88 Stat. 2204. The reason for defining "Tribal organization" to include "the recognized governing body of any Indian tribe" is that ISDEAA envisioned the federal government's entering into contracts with a "Tribal organization," not an "Indian Tribe." *See* Pub. L. 93-638, § 102(a) ("The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts *with any tribal*

organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof . . . .") (emphasis added); *accord id.* § 103(a) (same for HHS).[25] These are now codified as amended at 25 U.S.C.§ 5321(a)(1), which still refers to "contracts with a tribal organization."

The relevant agencies have, therefore, used "recognized" to refer to ANCs' eligibility for ISDEAA contracting. Under the 1981 guidelines promulgated by Interior and HHS, described above, ANCs can be "recognize[d] as the village governing body" for "the purposes of contracting under Pub. L. 93-628 [ISDEAA]." 46 Fed. Reg. at 27,179. And the 1988 list of Tribes published by Interior described ANCs as "Alaska entities which are *recognized* and eligible to receive funding and services from the Bureau of Indian Affairs." 53 Fed. Reg. at 52,832 (emphasis added).

Because ANCs are "Indian Tribes" under ISDEAA, the phrase "recognized governing body" in ISDEAA cannot mean "*federally* recognized governing body." It stands to reason, then, that it also does not mean "federally recognized" in the CARES Act.

2. The word "recognized," standing alone in Title VI of the Social Security Act, is not a legal term of art.

A central pillar of Plaintiffs' prior arguments, and the Court's opinion on the preliminary injunction, is that "recognized," as used in Title V of the CARES Act, is necessarily a legal term of art referring to federal recognition. PI Op. at 21-22. That is not correct. As noted above, ISDEAA itself uses "recognized governing body" to refer to an entity that is not federally recognized, and the CARES Act adopted exactly that phrase. None of the other authorities cited by Plaintiffs or the Court suggests that Congress intended anything to the contrary.

[25] The ensuing ISDEAA regulations provided accordingly. *See generally Contracts and Grants under ISDEAA*, 40 Fed. Reg. 51,282, 51,282 (Oct. 24, 1975) ("The purpose of the regulations is to implement [ISDEAA]. Part 271 (formerly Part 401) contains regulations under which *tribal organizations*, upon the request of an Indian tribe, can contract for the operation of all or parts of authorized [BIA] programs for the benefit of Indians and Alaska Natives.") (emphasis added); *id.* ("An important feature of the legislation [ISDEAA] is the change it makes in the contract relationship by directing the Bureau to contract a program *to a tribal organization* upon the request of a tribe . . . .") (emphasis added). "Tribal organization" is used in the same sense throughout the regulations. *See generally id.* at 51,286-300 ("Part 271—Contracts under ISDEAA"). *See, e.g.*, *id.* at 51,288 ("Any *tribal organization* is eligible to apply for a contract with the Bureau to plan, conduct, and administer all or parts of Bureau programs . . . .").

Both cases cited in the Court's prior opinion say, not "recognition," but "*Federal* recognition." *See* PI Op. at 21 (citing *Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 918 F.3d 610, 613 (9th Cir. 2019) ("'Federal recognition' of an Indian tribe is a legal term of art meaning that the federal government acknowledges as a matter of law that a particular Indian group has tribal status."); *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 131 (D.D.C. 2015) ("Federal 'recognition' of an Indian tribe is a term of art that conveys a tribe's legal status vis-à-vis the United State[s]. . . ."), *aff'd*, 829 F.3d 754 (D.C. Cir. 2016)). Likewise, the House of Representatives Report offered by Plaintiffs and cited by the Court says, "This *federal* recognition is no minor step." *Id.* at 22 (citing H.R. Rep. No. 103-781, at 2-3 (1994)) (emphasis added). And the Court itself used the term "Federal recognition." *Id.*

But the CARES Act says "recognized governing body," not "*federally* recognized governing body." And unlike "federal recognition," there is no "cluster of ideas that [are] attached" to the word "recognition," standing alone. PI Op. at 21-22 (quoting *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (quoting *Molzof v. United States*, 502 U.S. 301, 307 (1992))). As noted above, whatever gloss courts have applied to "federal recognition" has depended on the "federal" qualifier. This is more than a "modest statutory textual difference[]." *Id.* at 31.

There is another explanation for making payments to the "recognized" governing body of an Indian Tribe: to specify the entity to whom payments would be made. Leaving it at "Indian tribe" would doubtless have invited litigation, as parties often dispute just *who* or *what* is "the Tribe" for the purposes of government benefits.[26] In this sense, the term "recognized" is not necessarily externally facing. In *Village of Hotvela Traditional Elders v. IHS*, for example, the court concluded that a Hopi village's board of directors were immune from suit because they were

[26] *See, e.g.*, *Cayuga Nation v. Bernhardt*, 374 F. Supp. 3d 1, 5 (D.D.C. 2019); *Cal. Valley Miwok Tribe v. Jewell*, 5 F. Supp. 3d 86 (D.D.C. 2013) (noting that the Department suspended the tribe's ISDEAA contract in light of an unresolved leadership dispute); *Alturas Indian Rancheria and Wendy Del Rosa v. Pac. Reg' Dir., Bureau of Indian Affairs*, 64 IBIA 236 (2017); *Picayune Rancheria of the Chukchansi Indians v. Pac. Reg'l Dir., Bureau of Indian Affairs*, 62 IBIA 103 (2016) (dismissing challenges to a decision by Pacific Regional Director to recognize on an interim basis the last undisputed tribal council).

"a recognized governing body within the Hopi Nation." *Id.* 1 F. Supp. 2d 1022, 1029 (D. Ariz.), *aff'd*, 141 F.3d 1182 (9th Cir. 1998). Thus, "recognized governing body" can refer to what the Tribe itself, not the federal government, recognizes. That is a sensible way to avoid litigation over what entity within a Tribe is eligible for CARES Act payments.[27]

3. Every ANC has a "governing body" that may be recognized for payment under the CARES Act.

Having established that "recognized" does not mean "federally recognized," in this context, that leaves the term "governing body." Again, because ISDEAA allows that ANCs have "recognized governing bod[ies]," the Court can easily conclude that the CARES Act contemplates the same.

Plaintiffs' prior argument to the contrary was largely tautological. They posited that, because ANCs "do not govern" and "do not provide government services," they do not have "recognized governing bodies." Am. Compl. ¶ 98. But here again, Plaintiffs must take liberties with the statute in order to sustain their argument—this time changing the phrase "governing body" back to "government" and, in so doing, reversing what Congress provided for in the CARES Act. *See* 42 U.S.C. § 801(g)(5) ("The term 'Tribal *government'* means the recognized *governing body* of an Indian Tribe.") (emphasis added).

The Court previously invoked the *noscitur a sociis* canon to interpret the term "Tribal government." PI Op. at 23 (citing *Lagos v. United States*, 138 S. Ct. 1684, 1688–89 (2018)). But that canon is only a "useful rule of construction where words are of obscure or doubtful meaning." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923). It is used "to resolve ambiguity,

[27] Defendant's reading also best explains the sole reference to "Indian tribes" alone in Title V of the CARES Act. *See* 42 U.S.C. § 801(c)(7). By directing Treasury to consult with Interior and "Indian tribes," *id.*, instead of "Tribal governments," Congress freed up the Tribes to consult through whatever delegates or representatives they saw fit, and ensured that these "consultation[s]," were not delayed for unavailability of the recognized governing bodies. It also allowed tribes to consult jointly through a third party—*e.g.*, an inter-tribal consortium—that could not have called itself "the recognized governing body" of each represented tribe. But by reverting to "recognized governing body" for the purposes of *payments*, Congress made clear that the Tribes themselves (not consortia or associations) would be paid.

not create it." *Yates v. United States*, 574 U.S. 528, 564 (2015) (Kagan, J., dissenting) (citing *Russell Motor Car*, 261 U.S. at 520). In this case, "Tribal government" is expressly defined, eliminating any ambiguity surrounding it. 42 U.S.C. § 801(g)(5). More than that, the term "government" is defined as "governing body," eliminating any interpretive value behind what "government is commonly understood to refer to . . . ." PI Op. at 23 (citing dictionary definitions).

Plaintiffs also point out that an Alaska Regional Corporation is managed by a board of directors, *id.* (citing 43 U.S.C. § 1606(f)), but offer no reason why a board of directors cannot be a "recognized governing bod[y]" under the CARES Act. Again, ISDEAA itself contemplates that ANCs have recognized governing bodies, so that phrase must encompass corporate governance of some kind.

4. Neither pre- nor post-enactment legislative history undermines Defendant's reading of the CARES Act.

Plaintiffs have cited various statements by individual legislators as purported support for their preferred interpretation. *Chehalis* Mot. at 28; *CRS* Mot. at 21-22; *Ute* Mot. at 4. However, the statements relied upon demonstrate why "floor statements by individual legislators rank among the least illuminating forms of legislative history." *Trump v. Hawaii*, 138 S. Ct. 2392, 2413 (2018) (quoting *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 943 (2017)).[28] Mr. Gellego's statement sheds no light on the question before the court, as he merely uses the same term ("governments") as the CARES Act itself. *Chehalis* Mot. at 28. The same goes for Senators Schumer's, Cantewell's, and Cortez Masto's statements. *CRS* Mot. at 21-22. And although Mr. Joyce noted in passing "the Federal Government's unique government-to-government relationship with Indian Tribes," *Chehalis* Mot. at 28, that statement was made in the entirely separate context of whether to fund

[28] Plaintiffs have argued that "nowhere does the legislative history of Title V even hint that Congress intended to provide Title V relief funds to ANCs." *Chehalis* Mot. at 28. That is both misleading, since there is no written legislative history, and irrelevant, since, "The starting point for interpretation of a statute is the language of the statute itself." *Chehalis* Mot. at 28 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In this case, the relevant statute expressly *includes* ANCs.

tribes directly or through the States. Tribes that have a government-to-government relationship with the United States are of course included in the government's interpretation, so the statement does nothing to suggest (contrary to the statute's plain language) that ANCs are to be excluded from the available funding.

The *CRS* Plaintiffs also cited an April 1, 2020, letter from Senators Martha McSally and Steve Daines to the Secretaries of the Treasury and Interior. *CRS* Mot. at 22-23. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (collecting cases). But in this case, the post-enactment history is mixed at best. *See* AR 004 (Apr. 6, 2020 Ltr. from Ala. Cong. Delegation) at 2 (ANCs should be included because they meet the ISDEAA definition of "Indian Tribe" and "bring unique resources to the table with the responsibility of law to endeavor toward the social and economic well-being of the Alaska Native people."); AR 008 (Apr. 14, 2020 Ltr. from Ala. Cong. Delegation) (arguing at length why ANCs should be included).

At bottom, none of the pre- or post-enactment legislative history can surmount the best reading of the statute, adopted 40 years ago and affirmed soon thereafter by expert federal agencies, courts, and ultimately Congress.

CONCLUSION

For the foregoing reasons, Defendant is entitled to summary judgment.

Dated: May 29, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ERIC WOMACK
Assistant Branch Director

/s/ Jason C. Lynch
Jason C. Lynch (D.C. Bar No. 1016319)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW, Rm. 11214

Washington, DC 20005
Tel: (202) 514-1359
Email: Jason.Lynch@usdoj.gov

Attorneys for Defendants