THE CASE IS SCHEDULED FOR ORAL ARGUMENT ON SEPTEMBER 11, 2020

United States Court of Appeals
District of Columbia Circuit
Consolidated cases 20-5204, 20-5205, 20-5209

Confederated Tribes of the Chehalis Reservation, et al.,
Appellants
v.

Steven T. Mnuchin, in his official capacity as Secretary of U.S. Department of the Treasury, et al.,
Appellees

Brief of the Navajo Nation, Ute Tribe of the Uintah and Ouray Reservation, Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, Native Village of Venetie, Nondalton Tribal Council, and Arctic Village Council

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

The plaintiffs in the District Court were Ute Indian Tribe of the Uintah and Ouray Reservation, Cheyenne River Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Nondalton Tribal Council, Arctic Village Council, and Native Village of Venetie Tribal Government, Confederated Tribes of the Chehalis Reservation, Tulalip Tribe, Houlton Band of Maliseet Indians, Akiak Native Community, Asa'carsarmiut Tribe, Aleut Community of St. Paul Island, Navajo Nation, Pueblo of Picuris, Quinault Indian Tribe, Elk Valley Rancheria, San Carlos Apache Tribe. The Appellants are those same parties, other than the Oglala Sioux Tribe.

Defendant/Appellee and Intervenor Defendants/Appellees are Steven Mnuchin, in his official capacity AHTNA, Inc., Alaska Native Village Corp. Assoc., Inc., Association of ANCSA Regional Corp. Presidents/CEO's Inc., Calista Corp., Kwethluk Inc., Sea Lion Corp., St. Mary's Native Corp., Napaskiak, Inc., and Akiachak, Ltd.

Amicus in the District Court were Affiliated Tribes of Northwest Indians, All Pueblo Council of Governors, Arizona Indian Gaming Assoc., California Nations Indian Gaming Assoc., California Tribal Chairpersons' Assoc.,, Great Plains Tribal Chairmen's Assoc., Inc., Inter Tribal Council of the Five Civilized Tribes, Midwest Alliance of Sovereign Tribes, National Indian Gaming Assoc., United South and

Easter Tribes Sovereignty Protection Fund, Alaska Native Village Assoc. ANCSA Regional Assoc., AHTNA, Inc., Alaska Federation of Natives, Inc., Gila River Indian Community,, Native American Finance Officers Assoc., and Penobscot Nation, Nottawaseppi Huron Band of the Potawatomi.

(B) Rulings Under Review

The Ruling under review is a memorandum opinion and judgment issued by the District Court on June 26, 2020.

(C) Related Cases

Appellants are not aware of any related case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

GLOSSARY

ANC	Alaska Native Corporation
ANCSA	Alaska Native Claims Settlement Act
ARA	Association of ANCSA Regional Corp. Presidents/CEO's Inc.
ASRC	Arctic Slope Regional Corporation
BIA	U.S. Bureau of Indian Affairs
CARES Act	Coronavirus Aid, Relief, and Economic Security Act of 2020
Health Board	Great Plains Tribal Chairmen's Health Board
HEHSC	Health, Education, and Human Services Committee
IHS	Indian Health Services
ISDEAA	Indian Self-Determination and Education Assistance Act of 1975
UIC	Ukpeagvik Inupiat Corporation

DISCLOSURE STATEMENT

No party to this brief is a corporation to which FRAP Rule 26.1 applies. Appellants are each federally recognized Indian Tribes, and not corporations.

STATEMENT OF JURISDICTION

Pursuant to FRAP 28(a)(4), this case raises questions of federal law regarding funding which Congress, by statute, allocated to Tribal governments. The District Court had jurisdiction under 28 U.S.C. § 1331. The District Court judgment issued on June 26, 2020, and Appellants filed their appeals on July 13 and 14, 2020. This Court has jurisdiction under 28 U.S.C. § 1291. This Appeal is from a final judgment of the District Court disposing of all claims.

SUMMARY OF ARGUMENT

Before this case, no court had ever held that ANCs were tribal governments. Nor had any court ever held that a corporate board of directors is equal to a recognized governing body of an Indian tribe. Courts have confronted this question before and they have uniformly rejected both conclusions. In rejecting the prior case law, the District Court upended blackletter law about what a tribal government is and the longstanding system of federal contracting.

The District Court reached a conclusion no other court has reached because it took a route no other court has taken. It incorporated the term "Tribal organization" from the ISDEAA into the CARES Act even though Congress specifically chose not to include it, and thus interpreted a statute written by the Court instead of the one written by Congress. Even if it had been correct to borrow that term from ISDEAA, the Court misinterpreted it, stretching it well beyond its actual meaning. To

compound those errors, the Court also erred when it held—again, going against the overwhelming weight of precedent—that "recognized" was not a legal term of art when it has, in fact, been a clearly understood fixture of Indian law for decades. Lastly, as the final step in its tortured path to reach its desired outcome, the Court divorced the term "Tribal government" from its statutory context, resulting in the first decision to place state-chartered, for-profit corporations on par with sovereign tribal governments.

ARGUMENT

I. CASE LAW UNIFORMLY HOLDS THAT ANCS ARE NOT RECOGNIZED GOVERNING BODIES

Whether ANCs or their boards of directors are recognized governing bodies is not a question of first impression. Various federal courts have addressed this question and the answer has been universal: they are not.[1]

For example, the Ninth Circuit held ANCs are not recognized governing bodies in *Seldovia Native Association v. Lujan*, 904 F.2d 1335 (9th Cir. 1990). In *Seldovia*, an ANC argued it was a recognized governing body of an Indian tribe and therefore could sue the State of Alaska in federal court under 28 U.S.C. § 1392. *Id.* at 1350-51. It argued that ANCSA had established ANCs, *see* 16 U.S.C. §§ 1606-1607, providing them certain benefits, and that ISDEAA treated them as Indian

[1] Appellants adopt in whole the Chehallis' Appellants' statement of the case.

tribes. *See* 25 U.S.C. § 5303(e). The Ninth Circuit flatly rejected that argument: "Unlike the Native Alaskan Village in *Native Village of Noatak v. Hoffman* [896 F.2d 1157 (9th Cir. 1990)], [the ANC] is not a governmental unit with a local governing board organized under the Indian Reorganization Act[.] Because [the ANC] is not a governing body, it does not meet one of the basic criteria of an Indian tribe." *Seldovia*, 904 F.2d at 1350 (citations omitted). Every court since *Seldovia* has reaffirmed that holding.

In *Eaglesun Systems Products, Inc. v. Association of Village Council Presidents*, the Northern Oklahoma District Court held that while ANCs "are recognized as tribes for limited purposes, . . . they do not possess key attributes of an independent and self-governing Indian tribe . . . [and] are not governing bodies." No. 13-CV-0438-CVE-PJC, 2014 WL 1119726, at *6 (N.D. Okla. Mar. 20, 2014) (citation omitted). In *Pearson v. Chugach Government Services Inc.*, the Delaware District Court observed, "ANCs are not federally recognized as a 'tribe' when they play no role in tribal governance." 669 F. Supp. 2d 467, 469 n.4 (D. Del. 2006) (citation omitted). That court was unable to "find [any] evidence to suggest[] that [ANCs] are governing bodies." *Id.*, *c.f. Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1240 (D. Alaska 2019) ("While Alaska Native Corporations are owned and managed by Alaska Natives, they are distinct legal entities from Alaska Native tribes." (footnotes omitted)), *Aleman v. Chugach*

Support Servs., Inc., 485 F.3d 206, 213 (4th Cir. 2007) ("While the sovereign immunity of Indian tribes 'is a necessary corollary to Indian sovereignty and self-governance,' Alaska Native corporations are not comparable sovereign entities[.]" (citations omitted)).

The leading treatises on Alaska Native and Federal Indian law agree: ANCs are not recognized governing bodies, are not tribal governments, and do not possess any aspect of tribal sovereignty. DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 177 (3rd ed. 2012) ("At times the tribes and corporations have seemed at odds as the corporations are defined as 'tribes' in some post-ANCSA program and service legislation. It is clear, though, that as a matter of common law that the corporations are not tribes in the political sense of the term, nor are they recognized as such."), COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3][d][i], at 353 (Nell Jessup Newton ed. 2012 ed. Sup. 2019) ("Tribal governments, as opposed to regional and village corporations, are the only Native entities that possess inherent powers of self-government . . . . The Native regional and village corporations are chartered under state law to perform proprietary, not governmental, functions.").

Rather than apply or analyze this body of law, the District Court dismissed it without discussion, characterizing it as irrelevant because it did not concern ISDEAA. This was error. The ultimate question in this case centers on *the CARES*

Act, not ISDEEA, and the legal question of whether ANCs are governing bodies bears directly on the question of whether they are "Tribal governments" under the CARES Act. Prior to this case, every federal court faced with this question concluded ANCs are not "governing bodies." The District Court's dismissal of these cases was in error.

II. THE DISTRICT COURT ERRED IN ADOPTING ISDEAA'S DEFINITION OF "TRIBAL ORGANIZATION" TO DEFINE "TRIBAL GOVERNMENT" IN THE CARES ACT

In the CARES Act, Congress defined "Tribal government" as "the recognized governing body of an Indian tribe." 42 U.S.C. § 801(g)(5). Separately, Congress defined "Indian tribe" as "the meaning given that term in [ISDEAA]." *Id*. § 801(g)(1) (citing 25 U.S.C. § 5304(e)). Accordingly, to receive CARES Act Title V funds, a tribal government must both: (1) meet ISDEAA's definition of Indian tribe, and (2) be a recognized governing body.

Under ISDEAA, tribal organizations may enter into self-determination contracts with the BIA and the IHS. 25 U.S.C. §§ 5321(a)(1), 5304(j). ISDEAA defines "Tribal organization," in part, as "the recognized governing body of any Indian tribe[.]" *Id*. § 5304(l). ISDEAA further defines Indian tribe as including ANCs. *Id*. § 5304(e). Yet, the CARES Act explicitly adopts only ISDEAA's definition of "*Indian tribe*", it excludes ISDEAA's broader definition of "Tribal

organization."[2] ANCs' eligibility to enter into self-determination contracts under ISDEAA section 5321(a)(1)—a provision the CARES Act does *not* incorporate—is irrelevant in determining whether ANCs qualify as "Tribal governments" under the CARES Act.

The District Court stated that ISDEAA "serves as the starting point." Mem. Op. at 29 (JA___). This is incorrect. The "starting point" of the court's "analysis, of course, is the text of the provision at issue[.]" *Church of Scientology of Cal. v. Internal Revenue Serv.*, 792 F.2d 153, 157 (D.C. Cir. 1986). Thus, the *CARES Act* is the starting point for the court's inquiry. This case concerns ANCs' eligibility to receive Title V funds, not their eligibility to enter into ISDEAA self-determination contracts. The District Court centered its analysis on the wrong statute.

By "starting" with ISDEAA, the District Court held ISDEAA's definition of "Tribal organization" was "instructive in understanding the term 'Tribal government' under the CARES Act." Mem. Op. at 30 (JA___). Focusing its analysis solely on ISDEAA, the District Court concluded: "If ANCs have a 'recognized governing body' for purposes of ISDEAA, it stands to reason that Congress brought that same meaning forward in the CARES Act[.]" *Id*. at 32 (JA___). This conclusion

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[2] Indeed, the fact that tribal organizations were left *out* of Title V has been criticized by Alaska's Congressional delegation. Letter to Secretary Mnuchin and Secretary Bernhardt from Alaska Congressional Delegation, 3-4 (April 14, 2020) (JA___).

is contrived, divorced from the actual text of the CARES Act, the provision's context within the statute, case law, and the Indian canons of construction.

Congress utilized only ISDEAA's definition of "Indian tribe" in the CARES Act: "The term 'Indian tribe' has the meaning given that term in [ISDEAA]." 42 U.S.C. § 801(g)(1). In contrast, the CARES Act's definition of "Tribal government" *does not* adopt, reference, or cite ISDEAA's definition of "Tribal organization." *See id*. § 801(g)(5) ("The term 'tribal government' means the recognized governing body of an Indian tribe."). Indeed, no other provision in Title V, other than the definition of "Indian tribe," mentions ISDEAA.

The District Court erred in imputing Congressional intent not expressed in the text of the statute. The Supreme Court has made clear, "in an inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant[.]" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017). The lack of any reference to ISDEAA or its definition of "Tribal organization" in the CARES Act's definition of "Tribal government" evidences Congress's intent *not* to adopt ISDEAA's meaning of "recognized governing body" and instead rely on its commonly understood meaning as a legal term of art. *See infra* Section IV. Congress's intent is all the clearer because it explicitly referenced one section of ISDEAA: its definition of "Indian tribe." The District Court is not at liberty to rewrite statutory language to solve purported ambiguity.

Had Congress actually intended to adopt ISDEAA's definition of "Tribal organization," it could have done so expressly, as it did with ISDEAA's definition of "Indian tribe." *C.f. Cyan, Inc. v. Beaver Cnty. Emps. Retirement Fund*, 138 S. Ct. 1061, 1070 (2018) ("Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the line. And when Congress wants to refer to only a particular subsection or paragraph, it says so." (alterations, citation omitted)). Congress could have incorporated ISDEAA's "Tribal organization" definition into the CARES Act. But Congress wrote the statute it wrote. It qualified those entities eligible to receive funds by requiring them to be Tribal governments with recognized governing bodies. Congress very clearly demonstrated its awareness of the definitions utilized in ISDEAA and chose to utilize only one of them—"Indian tribe"—in the CARES Act.

The District Court's decision required it to read language into the CARES Act that does not exist. "It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." *Little Sisters of Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (alterations, citations omitted)). The CARES Act and its definition of "Tribal government" do not contain any reference to ISDEAA's definition of "Tribal organization." In reaching its decision, the District Court re-wrote the CARES Act to meet its desired ends.

This was a contrived solution to fit the Court's pre-ordained conclusion. The Court had already concluded that ANCs meet the CARES Act's definition of Indian tribe. *See* Mem. Op. at 21 (JA___) ("By incorporating wholesale ISDEAA's definition of 'Indian tribe' into the CARES Act, Congress declared ANCs to be eligible for Title V relief funds."). The Court concluded it would be "strange" for Congress to have included ANCs in the definition of Indian tribe, but exclude them from the definition of Tribal government. *Id*. at 34. But this result is not a basis for the Court to re-write the statute. *C.f. Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014) ("But this Court will no revise legislation[] . . . just because the text as written creates an apparent anomaly[.]").

"It is not a judge's job to add to or otherwise re-mold statutory text to try and meet a statute's perceived policy objectives. Instead, we must apply the statute as written." *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1152 (D.C. Cir. 2017), *Bay Mills*, 572 U.S. at 794 ("Court[s] ha[ve] no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress must have intended something broader." (quotation marks, citation omitted)). In holding that "Tribal government" in the CARES Act took on the meaning of "Tribal organization" in ISDEAA, the Court substituted its own policy judgment for the actual text of the CARES Act. This was error.

III. THE DISTRICT COURT ERRED IN FINDING THAT ANCS DO NOT FALL UNDER THE SECOND CATEGORY OF ISDEAA'S DEFINITION OF "TRIBAL ORGANIZATION"

Even assuming it was appropriate for the District Court to apply ISDEAA's "Tribal organization" definition in its analysis, this Court should vacate the District Court's reasoning and findings regarding "Tribal organization." ISDEAA defines "Tribal organization" as:

> [(1)] the recognized governing body of an Indian tribe, [or (2)] any legally established entity that is controlled, sanctioned, or chartered by such governing body or which is democratically elected by adult members of the Indian community to be served by such organizations and which includes the maximum participation of Indians in all phases of its activities: *Provided*, that in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of such Indian tribe shall be a prerequisite to the letting or making of such contract or grant[.]

25 U.S.C. § 5304(1).

The District Court erred in finding that ANCs do not fall under the second category of that term's definition. The District Court made two critical errors. First, it erred in finding that ANCs are not "sanctioned" by tribes, and therefore cannot fall under the second category of "Tribal organization." Second, it erred in finding that ANCs only seek tribal approval pursuant to the "Provided" clause in the definition of "Tribal organization." Between these two errors, the Court not only improperly disposed of the case, but it formulated an invalid understanding of "Tribal

organization" that, if not vacated, threatens to upend tribes' ISDEAA contracting authority in Alaska and the Lower 48.

A. ANCs Fall Under the Second Category of "Tribal Organization" Because They Are "Sanctioned" By Federally Recognized Tribes to Enter into ISDEAA Contracts

ANCs, like corporations in the Lower 48, can be, and very regularly are, "sanctioned" by the governing bodies of federally recognized tribes to provide services under ISDEAA, thus falling under the second category of "Tribal organization." Without basis or explanation, the District Court denied this reality. It incorrectly stated that this could not be the case because ANCs are corporate entities established by Congress and chartered under Alaska law. Mem. Op. at 31 (JA___). The District Court found, citing no authority, that "sanctioned" does not mean tribal approval of ISDEAA contracts: "Though the ISDEAA definition of 'tribal organization' uses the word 'sanctioned,' it does not use that term in the sense of tribal approval of ISDEAA contracts. The term 'sanction' in the definition of 'tribal organization' is entirely disconnected from contract approval." *Id*. The Court did not elaborate on why "sanctioned" cannot mean tribal approval of ISDEAA contracts, nor did it give an alternative explanation for what "sanctioned" actually means. The term's ordinary meaning, case law, federal law, tribal laws, and real-world ISDEAA contracting practices, however, all confirm that state-chartered corporations, both in

Alaska and the Lower 48, are regularly "sanctioned" by tribal governing bodies to enter into ISDEAA contracts.

"Sanctioned" is a commonplace and unambiguous term. In such cases, "we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (quotation marks, citation omitted). The ordinary meaning of "sanctioned" is "[o]fficial approval or authorization[.]" *Sanction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

The ordinary meaning of "sanctioned" makes clear that state-chartered entities, including ANCs, are "sanctioned" by tribes to enter into ISDEAA contracts, and thus fall under the second category of "Tribal organization." In *Gilbert v. Weahkee*, the South Dakota District Court held that a nonprofit corporation, the Health Board, was a Tribal organization for purposes of contracting to provide healthcare to members of a group of federally recognized tribes:

> In this case, it is clear the Health Board falls within the second category of tribal organization: an entity "controlled, sanctioned, or chartered" by tribal governments. The Health Board is an entity *organized under South Dakota law controlled by* 17 federally recognized tribes. As it relates to the present self-determination contract, the Health Board *is authorized by* the [Oglala Sioux Tribe] and [the Cheyenne River Sioux Tribe], both federally recognized tribes, to assume IHS functions at the [healthcare center].

441 F. Supp. 3d 799, at *8 (D.S.D. 2020) (emphasis added, citation omitted). The fact that the Health Board was a state-chartered corporation was irrelevant:

"Contrary to plaintiffs' argument, it does not matter that the Health Board is incorporated under state law, as opposed to tribal law. The ISDEAA's definition of tribal organization does not preclude state-chartered organizations." *Id.* at *11 n.18 (citation omitted). The court applied the ordinary meaning of "sanctioned" to find the Health Board was a Tribal organization under the second category of "Tribal organization" because it needed the approval of the beneficiary tribes to enter into the ISDEAA contract.

ANCs can only enter into ISDEAA contracts when: (1) under BIA and IHS guidelines, there is no federally recognized tribe in the proposed service area, or (2) when a tribe or tribes have provided the ANC with an authorizing resolution—the mechanism by which tribes "sanction" state-chartered entities to enter into ISDEAA contracts on their behalf. 25 U.S.C. § 5321.

A notable example of this is *Ukpeagvik Inupiat Corp. v. U.S. Department of Health and Human Services*, No. 3:13-cv-00073-TMB, 2013 WL 12119576 (D. Alaska May 20, 2013), a case that the District Court largely ignored. In *Ukpeagvik*, the Alaska District Court held that while UIC was treated as an Indian tribe under ISDEAA, it could only enter into ISDEAA contracts and provide services in its region if the actual tribal governments there passed resolutions authorizing it to do so. *Id*. at *2-3. In briefing, the United States noted that UIC was not, and never had been, a federally recognized Tribe, and that although UIC was "one of the entities

eligible to enter into an ISDEAA contract, it could only do so if it had authorizing resolutions from the tribal governments in UIC's proposed service area." U.S. Resp. in Opp'n to Mot. for Prelim. Inj. 18, *Ukpeagvik Inupiat Corp. v. U.S. Dep't of Health & Human Servs.*, No. 3:13-CV-00073-TMB (D. Alaska) (Dkt. 18). The court agreed. *Ukpeagvik*, 2013 WL 12119576, at *2.

The District Court largely avoided discussion of *Ukpeagvik*. In its sole reference to *Ukpeagvik*, the Court focused only on how UIC was *initially* authorized by other village ANCs to enter into the ISDEAA contract. Mem. Op. at 32 n.15 (JA___). In doing so the District Court ignored *Ukpeagvik*'s larger meaning: that while UIC had initially obtained authorizations from itself and two other village ANCs, the federally recognized tribes in the same communities later decided that they no longer wished to contract with UIC, and it was their priority—not the ANCs—to direct their ISDEAA contracts as they saw fit. 2013 WL 12119576, at *1-3.

That state-chartered entities are "sanctioned" by tribes is further confirmed by other real-world examples. For example, Navajo Nation permits state-chartered entities to serve as "Tribal organizations" for ISDEAA contracting, but only where such entities obtain the Navajo Nation's approval. For healthcare-related contracts, the Navajo Nation Council's Naabik'iyati' Committee, upon recommendation and approval of the HEHSC, authorizes state-chartered corporations to enter into

contracts with IHS. Navajo Nation Council Resolution, NABIJA-01-20, http://dibb.nnols.org/PublicViewBill.aspx?serviceID=5cf923f0-05c8-4a76-9d23-5e39925362c8. Furthermore, the Naabik'iyati' Committee reserves the right to revoke the designation if the entity does not adhere to the terms and conditions of the authorizing resolution. *Id*. By contrast, when the Navajo Nation itself enters into a ISDEAA contract, the Naabik'iyati' Committee needs no HEHSC approval to designate the Navajo Nation as a "Tribal organization." The Naabik'iyati' Committee recognizes that ISDEAA authorizes government agencies to enter into contracts with federally recognized Indian Tribes—in clear reference to the first category of the definition of "Tribal organization." *See, e.g.*, Navajo Nation Council Resolution, NABID-74-19, http://dibb.nnols.org/PublicViewBill.aspx?serviceID=caadc56d-71c2-478f-8813-b78fc83aab8d.

The District Court failed to apply the ordinary meaning of "sanctioned," consistent with other courts and real-world practice, and thus failed to recognize that ANCs properly fall under 5304(l)'s second-category.

B. ANCs are not Approved By Tribal Governments to Enter into ISDEAA Contracts Only Under the "Provided" Clause

The "Provided" clause does not fully explain why state-chartered corporations must receive tribal government approval to enter into ISDEAA contracts. The "Provided" clause applies only when "more than one Indian tribe" benefits from the

ISDEAA contract, in that case, "the approval of each such Indian tribe shall be a prerequisite [to contracting]." 25 U.S.C. § 5304(l). The "Provided" clause does not apply to a single beneficiary tribe.

The "Provided" clause bolsters Appellants' interpretation of the second category of "Tribal organization." Under the last antecedent rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Here, the "Provided" clause immediately follows the second category of "Tribal organization." Following the last antecedent rule, the "Provided" clause qualifies the second category in instances of multiple beneficiary tribes. In such cases, the contracting entity must obtain approval from every tribe. *C.f. Ukpeagvik*, 2013 WL 12119576, at *3. The "Provided" clause does not modify the first category, as it defines "Tribal organization" as "the recognized governing body of any Indian tribe." The "Provided" clause concerns other types of entities seeking approval of such governing bodies to be Tribal organizations.

Thus, the District Court not only erroneously interpreted the "Provided" clause, but it further failed to recognize that the most straightforward construction of that clause actually supports the finding that state-chartered entities fall under the second category of "Tribal organization."

C. THE DISTRICT COURT'S OPINION REGARDING THE MEANING OF "TRIBAL ORGANIZATION" THREATENS TO UPEND TRIBES' ISDEAA CONTRACTING AUTHORITY IN ALASKA AND THE LOWER 48

The District Court summarily dismissed Appellants' concerns that its ruling would negatively impact all 574 federally recognized tribes by elevating ANCs' status under ISDEAA and allowing them to compete with federally recognized tribes for ISDEAA contracts. Mem. Op. at 35-36 (JA___). Yet, this is the exact result of the District Court's analysis, not only with respect to ANCs, but with all entities that would normally need approval of a federally recognized tribe in order to enter an ISDEAA contract. The District Court's blunt rejection of the notion that state-chartered corporate entities are "sanctioned" by tribes under the second category of "Tribal organization" leaves only the possibility that, (1) such entities fall under the first category, "recognized governing body", or (2) are ineligible for contracting. Accordingly, those entities would not need the approval of federally recognized tribes to enter into ISDEAA contracts, or prior approvals by tribes are invalid. Either possibility is inconsistent with ISDEAA's text and would fundamentally upend the ISDEAA contracting regime operating throughout Indian Country.

IV. THE COURT ERRED IN HOLDING THAT "RECOGNIZED" IS NOT A TERM OF ART

In its order granting a preliminary injunction, the District Court held that "recognized governing body of an Indian Tribe" employed "recognized" as a legal term of art connoting federal recognition. In support of its holding on

preliminary injunction, the Court cited the Supreme Court, this Court, and other Circuits, and the D.C. District Court for the well-worn conclusion that "recognized" means recognized by the United States as the tribal political entity to and through which the United States engages in its government-to-government relationship.

In its summary judgment order, however, the District Court, reversed itself, holding that "recognized" in the CARES Act's definition of "Tribal government" is not a legal term of art. The court concluded, without analysis or citation to any authority, that that because "'[r]ecognition' is not used as a term of art in the [ISDEAA] definition of 'tribal organization'[,] it follows that the same is true under the CARES Act." Mem. Op. at 34 (JA___). The Court erred in holding that "recognized" was not a legal term of art connoting federal recognition.

"It is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." *Air Wis Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) (quotation marks, citation omitted). "Recognized" is more than a simple adjective, it is a legal term of art. . . . A formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe[.] H.R. Rep. 103-781, at 3-4 (1993). Courts have consistently acknowledged

"recognized" as a legal term of art and understood it to mean federal recognition. *See, e.g*, *Franks Landing Indian Cmty. v. N.I.G.C.*, 918 F.3d 610, 613 (9th Cir. 2019) (citing H.R. Rep. No. 103-781, at 2) ("'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), *Stand Up for Ca.! v. U.S. D.O.I.*, 204 F. Supp. 3d 212, 288 (D.D.C. 2016).

Congress defined Tribal governments as "the *recognized* governing body of an Indian tribe." 42 U.S.C. § 801(g)(5) (emphasis added). By using this legal term of art—"recognized"—to define "Tribal government" and qualify the definition of "Indian tribe," Congress clearly "intended [recognized] to have its established meaning." *Belize Social Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 1033 (D.C. Cir. 2015) (quotation marks, citation omitted). That established meaning is federal recognition. No one disputes that ANCs are not federally recognized tribes. *See* 85 Fed. Reg. 5,462 (Jan. 30, 2020).

The District Court erred in holding, without discussion and without citation to any authority, that "recognized" was not a legal term of art when Congress used it in the CARES Act's definition of "Tribal government." Accordingly, ANCs and their boards of directors are not "recognized governing bodies," and are therefore not Tribal governments under the CARES Act.

V. THE DISTRICT COURT ERRED IN HOLDING THAT THE CONTEXT OF TITLE V WITHIN THE ENTIRE CARES ACT DID NOT MATTER

The District Court also concluded that the context of the statute did not matter. The end result is an interpretation that is wholly at odds with the rest of the statute. A key term cannot be divorced from its surroundings, so the definition of "Tribal government" must be read in its context. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."), *Carlson v. Postal Regulatory Comm'n,* 938 F.3d 337, 349 (D.C. Cir. 2019). In Title V, Congress placed Tribal governments alongside, and on the same plane as, states, territories, and units of local government. Under the long-accepted canon of *noscitur a sociis*, this statutory fact is not to be ignored. *Lagos v. United States*, 138 S. Ct. 1684, 1688-89 (2018), ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 ("When several nouns or verbs or adjectives or adverbs—any words—are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar.").

Congress defined "State" in Title V as "the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa," and "unit of local government" as "a county, municipality, town, township, village, parish,

borough, or other unit of general government below the State level with a population that exceeds 500,000." 42 U.S.C. § 801(g)(2), (g)(4). A "government" is commonly understood to refer to "[t]he sovereign power in a country or state" or "organization through which a body of people exercises political authority, the machinery by which sovereign power is expressed." *Government*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Federally recognized tribes are undeniably sovereign:

> For nearly two centuries now, we have recognized Indian tribes as distinct, independent political communities, . . . qualified to exercise many of the powers and prerogatives of self-government.... As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, . . . to determine tribal membership, . . . and to regulate domestic relations among members[.]

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 327 (2008) (citations and quotation marks omitted), *see also* COHEN'S HANDBOOK § 3.02[3] at 133-36. ANCs, however, are undeniably *not* sovereign in any sense.

As the Supreme Court explained in *Alaska v. Native Village of Venetie Tribal Government*, they are "state-chartered and state-regulated private business corporations." 522 U.S. 520, 534 (1998). Every ANCs is a for-profit corporation incorporated under the laws of Alaska. 43 U.S.C. §§ 1606-1607. Like other corporations, ANCs have corporate boards of directors and are owned by shareholders, including non-Indians. *See* 43 U.S.C. §§ 1606(f), (h)(2), (h)(3)(d), 1607(c). Their corporate operations include oil and gas drilling, refining, and

marketing, mining and other resource development, government and military contracting, real estate, and construction—they are businesses.

Indeed, ANCs openly admit that they are not Tribal governments. The twelve regional ANCs comprising Defendant Intervenor ARA, including Defendant Intervenors Calista Corp. and Ahtna Inc., acknowledge that only "[f]ederally recognized tribes possess certain inherent rights of self-government (i.e., tribal sovereignty)[,]" not ANCs, and that only federally recognized tribes are "eligible to receive certain federal benefits, services, and protections, such as funding and services from the Bureau of Indian Affairs."[3] The ASRC, another regional ANC, has represented to the Internal Revenue Service:

> The tribal entities on the North Slope, not ASRC, are the entities recognized by the Department of Interior as having government functions. *See* 78 Fed. Reg. 26384-89 (May 6, 2013). In other words, a governing body of Alaska Natives would constitute an Indian tribal government, but an Alaska Native Corporation would not because it does not exercise governmental functions.

Arctic Slope Reg'l Corp., *Comments to Notice 2012-75*, 2013 WL 3096205, at *2 (2013).

[3] *Overview of Entities Operating in the Twelve Regions*, ANCSA REG'L ASS'N, https://ancsaregional.com/overview-of-entities/ (last visited July 31, 2020).

The District Court's inclusion of corporations in Title V, which is directed at governments, also violates the whole act rule. The Supreme Court has held that statutory interpretation is a "holistic endeavor":

> A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (citations omitted). In this case, one interpretation fits the structure of the statute and the other does not. As set forth above, Title V concerns units of governments, sovereign entities. To interpret the term "Tribal government" to

include private businesses is incompatible with the structure and purpose of the statute.[4]

CONCLUSION

For the foregoing reasons, Appellants urge this Court to reverse the decision of the District Court.

Respectfully submitted this 31st day of July, 2020.

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[4] The Court misguidedly accepted that ANCs have some role in healthcare and therefore do fit the purpose of the Title V. Mem. Op. at 35 (JA___). First, the purpose of Title V was to assist *governments* that provide healthcare and other governmental services. Second, ANCs do not provide healthcare. In Alaska, non-profit tribal health organizations manage healthcare delivery for Alaska Natives. *See Tribal Health Organizations*, INDIAN HEALTH SERV., https://www.ihs.gov/alaska/tribalhealthorganizations/ (last visited July 31, 2020), *see also* CASE & VOLUCK, *supra* at 178 (explaining that tribal non-profit organizations "became the service delivery vehicles" under ISDEAA, not ANCs), *c.f. Barron*, 373 F. Supp. 3d at 1240. Federally recognized tribes and regional non-profit tribal consortia and non-profit Tribal Health Organizations, *see* 25 U.S.C. § 5304(l), are on the front lines of protecting Alaska Natives from the COVID-19 pandemic, not ANCs. The ANCs previously submitted a chart of hearsay and unsubstantiated "facts" asserting participation in healthcare, yet they submitted no other evidence proving such. While ANCs do offer corporate donations to healthcare programs, those donations are not relevant, large corporations routinely make sizeable donations, especially now, but it does not turn them into governments.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because this brief contains 5498 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rules. I relied on my word processor to obtain the count and it is Microsoft Office Word 2020.

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: /s/ *Jeffrey S. Rasmussen*
Jeffrey S. Rasmussen

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANTS' OPENING BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Webroot, dated 07/31/2020, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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I hereby certify that on the 31st day of July, 2020, a copy of this **APPELLANTS' OPENING BRIEF**, was served via the ECF/NDA system which will send notification of such filing to all parties of record.

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By: /s/ *Jeffrey S. Rasmussen*
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