Nos. 20-543, 20-544

In The Supreme Court of the United States

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY,
Petitioner,

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.,
Respondents.

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

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.,
Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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QUESTION PRESENTED

Title V of the CARES Act authorizes a Coronavirus Relief Fund, and appropriates $150 billion to governments—specifically, "States, Tribal governments, and units of local government." From that appropriation, $8 billion is designated for Tribal governments. The question presented is:

Whether for-profit Alaska Native Corporations are "Tribal governments," when they possess no attributes of sovereignty.

RELATED PROCEEDINGS

United States Court of Appeals (D.C. Circuit):

Confederated Tribes of the Chehalis Reservation v. Mnuchin, Nos. 20-5204, 20-5205, 20-5209 (Sept. 25, 2020)

United States District Court (D.D.C.):

Confederated Tribes of the Chehalis Reservation v. Mnuchin, Nos. 1:20-cv-01002-APM, 1:20-cv-01059-APM, 1:20-cv-01070-APM (June 26, 2020)

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STATUTORY PROVISIONS INVOLVED

Section 601(g)(1) and (5) of the Coronavirus Aid, Relief, and Economic Securities Act ("CARES Act"):

> (1) Indian Tribe
>
> The term "Indian Tribe" has the meaning given that term in section 5304(e) of Title 25.
>
> . . .
>
> (5) Tribal government
>
> The term "Tribal government" means the recognized governing body of an Indian Tribe.

42 U.S.C. § 801(g)(1), (5).

STATEMENT

Title V of the CARES Act makes funding available "to States, Tribal governments, and units of local government[,]" 42 U.S.C. § 801(a)(1), to cover "necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19)[.]" *Id*. § 801(d)(1). Alaska is home to 229 federally-recognized Tribes, each with a government-to-government relationship with the United States. 85 Fed. Reg. 5,461, 5,466-67 (Jan. 30, 2020). In Alaska, as in other States, the Tribes act on their own behalf, and provide myriad governmental services to their Tribal citizens and community members. Alaska Tribes provide these services directly, or through tribally created and tribally controlled non-profit

organizations. By virtue of their status as governments, Alaska Tribes applied for, and received, money under Title V of the CARES Act.

Alaska Native Corporations ("ANCs"), created pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), are neither "States" nor "units of local government," nor are they "Tribal governments." They were created in 1971 specifically to serve as land holders and engines of economic development, and they have been highly successful in accomplishing that mission. Yet they have never—neither in law, nor in fact—functioned in a manner similar to Tribal governments, nor have they been recognized as equivalent to Tribal governments by the United States. No court has held that ANCs are "Tribal governments," nor that they have "recognized governing bodies." The result of the decision by the Court of Appeals was, therefore, in line with longstanding case law. Because the result in the Court of Appeals was correct and this case does not present a question that requires this Court's attention, the Petitions for Certiorari should be denied.

REASONS FOR DENYING THE PETITIONS

I. There is No Circuit Split That Warrants Review

Petitioners assert that the decision below creates a split with the Ninth Circuit's holding in *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471 (9th Cir. 1987). Not so. Although the decision below is in tension

with *Bowen*, it does not create the sort of concrete conflict that requires the Court's review at this time.

In *Bowen*, the Ninth Circuit held Cook Inlet Region, Inc. ("CIRI"), an ANC, qualified as an "Indian Tribe" under the Indian Self-Determination and Education Assistance Act ("ISDEAA"). 810 F.2d at 1476. ANC Petitioners note that the decision below "acknowledged that it was 'declin[ing] to follow' the Ninth Circuit's *Bowen*," in reaching the "holding that ANCs are not and have never been 'Indian tribes' under ISDEAA." Alaska Native Vill. Corp. Ass'n, Inc. Pet. for Writ of Cert. ("ANC Pet.") at 20; *see also* Sec'y Mnuchin Pet. for Writ of Cert. ("Secretary Pet.") at 31-32 (alleging that the decision below "expressly 'decline[d] to follow' the Ninth Circuit's holding in *Cook Inlet Native Association* that ANCs qualify as 'Indian tribes' for ISDA purposes").

"There is, of course, an important difference between the holding in a case and the reasoning that supports that holding." *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998). And in alleging a split here, Petitioners "confuse[] the reasoning" of the decision below "with the holding in that case." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 39 (2000) (Thomas, J., dissenting).

The D.C. Circuit, in the decision below, could not have been clearer about its holding: "We hold that Alaska Native Corporations are not eligible for funding under Title V of the CARES Act. We thus reverse the grant of summary judgment to the government and the intervenors, as well as the denial of summary

judgment to the plaintiff tribes." App. to Secretary Pet. at 25a. This in no way conflicts with the holding in *Bowen*, which concerned the eligibility of ANCs under ISDEAA. 810 F.2d at 1476. The Secretary acknowledges as much. Secretary Pet. at 22 ("To be sure, this case arises in the context of the CARES Act, whereas *Bowen* involved an ISDA contract dispute."). In short, when Petitioners allege that the decision below "held that ANCS 'are not Indian tribes under ISDA,' " Secretary Pet. at 32, they are stating the reasoning of the decision below, not its holding.

It is, therefore, premature for this Court to address what is, at best, a nascent split. ANC Petitioners assert that, "based on the decision below," a federally recognized Tribe could "secure a declaration of [ISDEAA] ineligibility" against an ANC in the D.C. Circuit. ANC Pet. at 21. Perhaps. And if that should come to pass, *then* this Court would have a clear split between the Ninth and D.C. Circuits on the eligibility of ANCs under ISDEAA. It does not have one now.

II. The Circuit Court Decision is Consistent with Longstanding Law that Alaska Native Corporations Are Not Tribal Governments

There are 229 federally recognized Tribal governments in Alaska, all of which were eligible to apply for Title V funds, which have been disbursed in part. ANC Petitioners' brief misrepresents both the legal landscape and the factual issues in an attempt to draw this Court's attention. ANCs are not, and have never been,

"Tribal governments," and the decision by the Court of Appeals changed nothing in this regard. In order to convince this Court of their eligibility to receive Title V funds, the ANCs try to place themselves on par with the recognized Tribal governments in Alaska and the Lower 48 states. Their misrepresentations do not warrant this Court's attention, and the Petitions should be denied.

A. ANCs have never possessed the responsibilities, powers, or obligations of federally recognized Tribes

Enacted in 1971, ANCSA was a land claims settlement that: (1) extinguished aboriginal lands claims in exchange for approximately $1 billion and 45.7 million acres of land; (2) established village and regional corporations (ANCs) to receive this money and the land conveyed under the terms of the settlement; and (3) authorized the issuance of stock in those ANCs to eligible Alaska Natives. *See* 43 U.S.C. §§ 1603, 1605-1607; *see also* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 171 (3d ed. 2012). In short, ANCSA "converted the communal, aboriginal claims of the Alaska Natives into individual private property, represented by shares of stock" in village and regional ANCs. CASE & VOLUCK, *supra*, at 167. ANCSA's purpose was to bring clarity to land ownership and pave the way for oil development by extinguishing any aboriginal land claims that might hold up construction for the Trans-Alaska Pipeline. *Id.* at 165-67. ANSCA's text confirms that, in creating ANCs, Congress did so

"without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska." 43 U.S.C. § 1601(b).

While "ANCSA extinguished all aboriginal title and claims to Alaska land and revoked all existing Indian reservations[,] . . . [it] did not divest Alaska Native villages of their sovereign powers." *Alaska v. Native Vill. of Tanana*, 249 P.3d 734, 743 (Alaska 2011) (citing *John v. Baker*, 982 P.2d 738, 747-48 (Alaska 1999)); CASE & VOLUCK, *supra*, at 176 (explaining that ANCSA "did not abolish the preexisting tribal governments"). Tribal governments, including those in Alaska, are sovereigns that enjoy similar powers and immunities as state and local governments, including both civil and criminal jurisdiction over conduct arising within their jurisdiction and the power to establish courts, pass and enforce ordinances, levy taxes, and regulate commerce. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01, at 206-22 (Nell Jessup Newton ed., 2015, supp. 2019) (detailing the nature of Tribal sovereignty and powers). Recognized Tribal governments are entitled to immunities and privileges, such as immunity from federal income tax and sovereign immunity from suit. *See*, *e.g.*, 25 C.F.R. § 83.2.

In contrast, ANCs have none of the responsibilities, powers, rights, privileges, or obligations federally recognized Tribes possess. They cannot exercise governmental powers or jurisdiction over anyone, not even their shareholders. Unlike recognized Tribal

governments, ANCs' *only obligation* is to their boards of directors and shareholders. *Accord* 43 U.S.C. §§ 1606(d) (providing that regional ANCs "shall incorporate under the laws of Alaska"), 1607(a) (same for village ANCs); Alaska Stat. § 10.06.450(b) ("A director shall perform the duties of a director . . . in good faith, in a manner the director reasonably believes to be in the best interests of the corporation."). Since their creation nearly fifty years ago, many ANCs have operated various programs that benefit their shareholders, including scholarship programs, burial assistance, dividends, and life insurance assistance. *See*, *e.g.*, Declarations of ANCs in Case No. 20-cv-01002 (D.D.C.), ECF Nos. 45-1 to 45-24. While no doubt beneficial to their shareholders, these programs do not covert ANCs into governments or equate them to Tribal governments in any way.

Despite Petitioner Mnuchin's current view, the United States has for decades consistently and unequivocally treated ANCs as non-governmental entities to which it owes no trust responsibility. This is because, in the Government's own words, they are "clearly not tribes," *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, Op. Sol. Interior M-36975, 1993 WL 13801710, at *35 n.152 (Jan. 11, 1993), and "lack tribal status in a political sense." Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,365 (Oct. 21, 1993). This position is consistent with ANCSA's legislative history and text, which confirm Congress's "intent that[,] after enactment there was to be no reservation or trust

relationship between the United States and Alaska Native groups with respect to ANCSA lands, such as exists between the government and many Indian tribes in other states." Op. Sol. Interior M-36975, at *51-52 (citing H.R. Rep. No. 92-523, at 2199 (1971)). These statements by the Department of the Interior—that the federal government "has neither a statutory nor a regulatory responsibility to Alaska Native corporations"—have been repeated and affirmed over the intervening decades. U.S. GOV'T ACCOUNTABILITY OFFICE, REGIONAL ALASKA NATIVE CORPORATIONS: STATUS 40 YEARS AFTER ESTABLISHMENT, AND FUTURE CONSIDERATIONS 50-51 (Dec. 2012) [hereinafter "GAO REPORT"], *available at* https://www.gao.gov/assets/660/650857.pdf; *see also id.* at 11 (discussing the fundamental characteristics of ANCs that further highlight the differences between ANCs and Tribes); 58 Fed. Reg. 54,365.

B. Alaska Tribes have a government-to-government relationship with the United States and offer their Tribal citizens and community residents a wide variety of government services

In trying to clothe themselves in tribal shrouds, ANC Petitioners imply that Tribes in Alaska are somehow different in their form and abilities than Tribes located in the Lower 48, and that those alleged inadequacies somehow have import in this case. ANC Pet. at 3-5. While Alaska may have a unique history, this does not mean Alaska Tribes are different or diminished in any way when compared to Tribes in the Lower 48.

Alaska Tribes possess the full governmental authority and sovereign powers of any Tribal government and provide such governmental services to their Tribal members. *See John*, 982 P.2d at 750; 85 Fed. Reg. at 5,466-67. Courts have repeatedly recognized that nothing within ANCSA ended or otherwise altered the sovereign status of Alaska Tribes and that under ANCSA, the ANCs did not supplant or replace the functions of the Alaska Tribal governments. *John*, 982 P.2d at 753; *Tanana*, 249 P. 3d at 739-44 (summarizing case law on Tribal sovereignty in Alaska). Any characterization of Alaska Tribes as somehow different from their Lower 48 counterparts is untrue and perpetuates a dangerous, revisionist history, used for decades to justify treating Alaska Tribes differently or *less than* Tribes in the Lower 48. *See*, *e.g.*, *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195, 211 (D.D.C. 2013) (describing an "Alaska exception" in which the Department of Interior relied on a misreading of ANCSA to improperly exclude Alaska Tribes from participating in the land-into-trust application process for nearly thirty-five years), *vacated as moot sub nom. Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100 (D.C. Cir. 2016). Tribes in Alaska are functionally and legally identical to Tribes in the Lower 48 and nothing in ANCSA disrupts their sovereignty or Tribal governmental status.

While Amicus Alaska Federation of Natives ("AFN") acknowledges the recognized Tribal governments in Alaska, it asserts that they are dependent on ANCs as "the financial repository for Alaska Natives," a dubious claim which ignores the long history of

Tribal services in Alaska. Amicus Curiae Br. of Alaska Federation of Natives ("AFN Amicus Br.") at 16. This characterization of Alaska Tribes as helpless without the leadership of the ANCs has no basis in reality.

In fact, just like Tribes in the Lower 48, Alaska Tribes provide a wide array of services to their tribal citizens, including, for example, expansive medical care,[1] housing programs,[2] natural resource programs,[3] tribal courts,[4] child welfare and family assistance

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[1] *See*, *e.g.*, the Kenaitze Indian Tribe's Dena'ina Wellness Center which provides medical, dental, behavioral health, chemical dependency, wellness, physical therapy, optometry, pharmacy support, and traditional healing services in a 52,000-square-foot facility. *About the Dena'ina Wellness Center*, KENAITZE INDIAN TRIBE, https://www.kenaitze.org/denaina-wellness-center/ (last visited Dec. 10, 2020).

[2] *See*, *e.g.*, Ketchikan Indian Community's housing authority, which provides a rental program, home improvement assistance program, and elder energy assistance program, among others. *Housing*, KETCHIKAN INDIAN CMTY., http://www.kictribe.org/housing (last visited Dec. 10, 2020).

[3] *See*, *e.g.*, *Resource Protection*, SITKA TRIBE OF ALASKA, http://www.sitkatribe.org/pages/tribal-services-resource-protection-programs (last visited Dec. 10, 2020).

[4] *See*, *e.g.*, *Tribal Court*, ORGANIZED VILL. OF KAKE, http://www.kake-nsn.gov/tribal-court.html (last visited Dec. 10, 2020).

programs,[5] and transportation programs.[6] Many Alaska Tribes choose not to run their own programs directly, but instead join together with other Tribes to create and direct tribal regional non-profit consortia and tribal health organizations ("THOs") using ISDEAA contracts and compacts.[7]

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[5] *See*, *e.g.*, Central Council of Tlingit & Haida Indian Tribes of Alaska's extensive Family Services offerings, which include child care assistance, child support assistance, a child welfare unit, counseling services, suicide prevention, tribal assistance for needy families, and other wellness programs. *Family Services*, CENT. COUNCIL TLINGIT & HAIDA INDIAN TRIBES OF ALASKA, http://www.ccthita.org/services/family/overview/index.html (last visited Dec. 10, 2020).

[6] *See*, *e.g.*, the extensive transportation program run by the Chickaloon Native Village. *Transportation*, NAY'DINI'AA NA' KAYAX' (CHICKALOON NATIVE VILL.), https://www.chickaloon-nsn.gov/transportation-department/ (last visited Dec. 10, 2020).

[7] Tribal regional non-profits and non-profit THOs are not to be confused with ANCs. While not parties to this case, these non-profit entities predate ANCSA and exist to enable Alaska Tribes to take advantage of efficiencies of scale in providing government services for their member Tribes, including social, educational, and health services. *See Tribal Health Organizations*, INDIAN HEALTH SERV., https://www.ihs.gov/alaska/tribalhealthorganizations/ (last visited Dec. 10, 2020). They exist by express authorization of Tribes through Tribal resolutions designating and delegating to them certain governmental powers and authorities. The consortia and THOs are accountable to all the beneficiaries of their programs through this representative structure. Unlike ANCs, as organizations of Tribes, consortia and THOs enjoy the privileges of their member Tribes, such as immunity from suit. *See*, *e.g.*, *Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1240 (D. Alaska 2019) (explaining that ANCs are "distinct legal entities from Alaska Native tribes" and that unlike an ANC, the non-profit tribal health consortium is an entity "created and controlled by Alaska Native tribes that promotes tribal

Contrary to assertions of ANC Petitioners, ANC Pet. at 34, the decision by the Court of Appeals will not prevent Alaska Natives from receiving the benefits of Title V funds. Instead, it will ensure that the recognized Tribal governments in Alaska—who provide governmental services to their citizens and communities—will have the funds necessary to continue providing these services during the current COVID-19 crisis.

As the Department of the Interior recognizes, Alaska Tribes, "just as the tribes of the lower 48, are domestic sovereigns. They possess all of the attributes and powers normally appertaining to such status." Op. Sol. Interior M-36975, at *4. ANCs do not stand in the shoes of Alaska's federally recognized Tribes, and allowing them to compete with Tribal governments for scarce funding exclusively set aside for *governments* would represent a monumental and unprecedented shift in the legal status of ANCs. The decision by the Court of Appeals did not move the law on this key issue and it should not be disturbed.

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self-determination and fulfills governmental functions"). Federally recognized Alaska Tribes, their regional non-profit Tribal consortia, and non-profit THOs are on the front lines of delivering services to Alaskan Native people during the COVID-19 pandemic. ANCs are not.

C. Alaska Native Corporations do not act on behalf of Tribes or perform Tribal government functions

To advance their assertion that they perform government functions, ANC Petitioners falsely imply that they act "on behalf of villages." ANC Pet. at 4-5. Unlike Tribal corporations created under the Indian Reorganization Act ("IRA") or Tribal law, the regional and village ANCs established by ANCSA are "state-chartered and state-regulated private business corporations." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 534 (1998). These corporations are owned and directed by shareholders, most—*but not all*—of whom are Alaska Natives. They are governed by shareholder-elected corporate boards of directors and managed by executives. *See* GAO REPORT, *supra*, at 16. Alaska Tribes, on the other hand, are governed by their own traditional or IRA councils. CASE & VOLUCK, *supra*, at 327-31. No corporation may act on a Tribe's behalf absent express Tribal government approval.[8]

Though ANCs may work in coalition with the federally recognized Tribes, they are not tribally controlled or tribally designated. *See*, *e.g.*, Decl. of Barlow

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[8] Similarly, ANC Petitioners' assertion that Amicus AFN "represents" all Alaska Tribes is false. ANC Pet. at 16. ANC Petitioners have provided no evidence to support this claim. AFN's own website indicates that more than sixty Alaska Tribes have chosen not to join AFN. *About*, ALASKA FEDERATION OF NATIVES, www.nativefederation.org/about-afn/ (last visited Dec. 9, 2020). Indeed, with 174 ANC members, AFN has more ANC members than Tribal members. *Id.* There are six Alaska Native Tribes as Plaintiffs in these consolidated cases.

¶ 3, in Case No. 20-cv-01002 (D.D.C.), ECF No. 45-15 (confirming the Tyonek Native Corporation "is a separate and legally distinct entity with no formal legal relationship to the Native Village of Tyonek"); Admin. Record in Case No. 20-cv-01002 (D.D.C.), ECF No. 71 (AR009 at 122) (stating ANC Bristol Bay Native Corporation "has relatively deep pockets but not the direct connection with the local tribal governments" that the regional tribal consortia possess).

Indeed, ANCs have themselves for decades vigorously argued that they *do not* exercise governmental functions. In 1976, the then-General Counsel for ANC Doyon, Ltd., testified to Congress that ANCs "were created for the sole purpose of receiving and administering the benefits of" ANCSA, and that while Doyon "serves the purposes to promote the economic well-being of the Native people of interior Alaska," it was the regional Tribal organization, "Tanana Chiefs Conference, [that] concerns itself primarily with the social, health, and welfare of the people" and implements "all social service programs." *Problems of Definition of Tribe in Alaska Relating to Public Law 93-638, Hearings Before the Subcomm. on Indian Affairs*, 94th Cong. 192-93 (1977). Decades later, in 2013, ANC Arctic Slope Regional Corporation submitted similar comments on a proposed Internal Revenue Service revenue procedure that defined "Indian tribal government" as " 'the governing body of any tribe, band, community, village or group of Indians, or (if applicable) Alaska Natives that is determined by the federal government to exercise governmental functions," and asserted that while

"a governing body of Alaska Natives would constitute an Indian tribal government, [] an [ANC] would not because it *does not exercise governmental functions*." Comments of Arctic Slope Reg'l Corp., 2013 WL 3096205, at *2 (May 31, 2013) (emphasis added). Faced with nearly identical language in the CARES Act, ANCs cannot now claim that they do in fact provide governmental functions.

Despite their assertions to the contrary, ANC Petitioners themselves highlight how few qualifying services they provide. ANC Petitioners assert that ANCs have "entered into scores of ISDEAA contracts" and cite generally to a 2018 Indian Health Service ("IHS") report to Congress, ANC Pet. at 8; yet, ANC Petitioners provide no specific information as to which Alaska Area IHS contracts in the report they are providing services under. Indeed, only two of the contracts listed are with organizations that are controlled by ANCs—Cook Inlet Tribal Council and South Central Foundation—both non-profit subsidiaries of CIRI. Indian Health Serv., *Fiscal Year (FY) 2018 Report to Congress on Contract Funding of Indian Self-Determination and Education Assistance Act Awards* 10 (Oct. 2019), *available at* https://bit.ly/2XKkNLI (listing in-force agreements); *see* Decl. of Minich in Case No. 20-cv-01002 (D.D.C.), ECF No. 78-2. CIRI, however, is not similarly situated to other ANCs, as its ability to participate in the delivery of healthcare to Alaska Natives in Anchorage was *specifically and separately provided for by Congress* outside of ISDEAA. *See* Pub. L. No. 105-83, § 325(d), 111 Stat. 1543 (1997).

Amicus State of Alaska asserts that ANCs "regularly contract with the federal government to deliver services to Alaska Natives." Amicus Br. of the State of Alaska at 19-20. But the record citations it uses to support this statement instead show that very few ANCs have entered into such contracts, and even fewer still have entered into contracts to provide services relevant to the COVID-19 pandemic. ANCs Sealaska Corporation and Koniag, Inc.—both highlighted by Amicus State of Alaska—do not presently contract with the federal government under ISDEAA, and though they previously held ISDEAA contracts, they explain they were "with the Bureau of Land Management" ("BLM"), Decl. of Henga ¶ 4 in Case No. 20-cv-01002 (D.D.C.), ECF No. 45-5, to "conduct land surveys for purposes of completing ANCSA land conveyances." Decl. of Mallott ¶ 7, ECF No. 45-2. ANC NANA Regional Corporation, Inc. currently has an ISDEAA contract with the BLM for a similar land survey project. Decl. of Westlake ¶ 15, ECF 45-7. Land surveys are not Treasury-approved government expenses to fight the COVID-19 pandemic.

Amicus State of Alaska references two other ANCs who have ISDEAA contracts, but notably, these monies are passed through to Native organizations, which are not controlled by the ANCs, and who themselves administer services. Decl. of Schutt ¶ 10-11, ECF No. 45-1; Decl. of Buretta ¶ 3, ECF No. 45-5.

In short, of the more than 200 village and regional ANCs, ANC Petitioners and Amicus State of Alaska can identify only six who have at one time held ISDEAA contracts with the federal government, and

three of those six are for services that do not fall within the Department of the Treasury's CARES Act guidelines. Petitioners thus assert that because one ANC provides healthcare services—under a separate, independent statute not affected by this litigation—and two others simply pass through funds, it follows that more than 200 other corporate entities—almost all of which have made no showing that they provide government services—are thus deserving of federal monies specifically set aside for governments. ANC Pet. at 4, 34-36. This is not what Congress intended when it designated federal funds for Tribal governments, and the Court of Appeals was right in determining ANCs are not eligible for Title V funds.

D. Title V money was directed to Tribal governments, and not to Alaska Natives generally

ANC Petitioners focus on the lack of reservations in Alaska and claim, without citation, that Congress established ANCs because it "understood that many Alaska Natives would have an ANC-affiliation but no village affiliation, especially in urban areas." ANC Pet. at 34. This position misunderstands Tribal membership, Tribal jurisdiction and sovereignty, and the provision of Tribal services.

As a preliminary matter, Tribal membership does not cease to exist if a Tribal citizen leaves their Tribal community and moves elsewhere. Furthermore, it is foundational in federal Indian law that Tribes have

jurisdiction over the health and safety of their Tribal citizens, and that duty is not dependent on land or the physical residence of a Tribal member. *United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"); *John*, 982 P.2d at 759 ("The federal decisions contain language supporting the existence of tribal sovereignty based on either land or tribal status."); COHEN'S, *supra*, at § 4.01[1][b], at 212 ("The powers of Indian tribes over their own members are broad and generally exclusive of both federal and state power."). Indeed, Tribes throughout the country have provided COVID-19 aid to their Tribal citizens regardless of where their citizens reside. For example, Central Council of Tlingit & Haida Indian Tribes of Alaska used its CARES Act monies to offer a variety of financial assistance programs to all of its Tribal citizens "regardless of where they reside." *CARES Financial Assistance Programs*, CENT. COUNCIL OF TLINGIT & HAIDA INDIAN TRIBES OF ALASKA, http://www.ccthita.org/info/news/cares/caresrelief.htm (last visited Dec. 12, 2020); *c.f.* Nome Eskimo Cmty., *Coronavirus Emergency Financial Assistance Grant Program*, *available at* https://bit.ly/37balD0 ("All NEC tribal member households, no matter where located, can apply."). Likewise, Alaska Tribes often provide services to members of their communities who are not themselves enrolled Tribal citizens. For example, Native Village of Point Hope made available emergency financial assistance to *both* its Tribal members *and* other community residents "who have been impacted by a loss of income or

loss of access to other necessities due to the COVID-19 public health emergency." Letter from Caroline Cannon, Vice President, Native Vill. of Point Hope (Dec. 3, 2020), *available at* https://bit.ly/3oPMajo. ANC Petitioners again overstate their role and diminish the role of Tribes.

ANC Petitioners and Amicus AFN also present vague arguments that Alaska Natives as a people are harmed by the decision of the Court of Appeals because it excludes them from Title V funds. ANC Pet. at 33; AFN Amicus Br. at 20-22. But this complaint is irrelevant to the legal question of whether ANCs constitute Tribal governments.

The authority to determine Tribal membership is among the most fundamental and hallowed powers of a Tribal government. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence."). Tribal membership equates to citizenship, such that it is a political relationship between a government and an individual. *See Morton v. Mancari*, 417 U.S. 535, 551-55 (1974). While Native Americans and Alaska Native people are descendants of the original inhabitants of this continent, Tribal citizenship and an individual's relationship to a Tribal government is a relationship defined by *political* representation and association. There are many people who may identify as Native American or Alaska Native, but who, for a variety of reasons, are not members of or eligible for membership in any federally recognized Tribe. Contrary to

Petitioners' assumption, that is true in the Lower 48 as much as it is in Alaska. "Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'" *United States v. Antelope*, 430 U.S. 641, 646 (1977) (quoting *Morton*, 417 U.S. at 553 n.24).

Title V designated funds specifically for governments, not individuals. In Title V, Congress set aside funding for governments providing government services. Individuals benefit by political association with the government that serves them. By asserting that ANCs must be given Title V monies because it will benefit persons of Alaska Native descent who are not Tribal members, ANC Petitioners seek to create an individual entitlement where Congress did not do so.

Finally, ANC Petitioners assert that they are harmed by the decision of the Court of Appeals, but neglect to mention that they have already received tens of millions of dollars—if not more—under other titles of the CARES Act specific to businesses. For example, many ANCs received monies under the CARES Act's Paycheck Protection Program ("PPP"). *See*, *e.g.*, Liz Ruskin, *Wealthy and Well-Connected Alaska Firms Among Those Gaining Most from PPP*, ALASKA PUB. MEDIA (July 8, 2020), https://bit.ly/3qTkTi8. Congress intended the Title V stabilization funds to be allocated to "Tribal governments," not "state-chartered and state-regulated private business corporations," *Venetie*, 522 U.S. at 534, which have found relief elsewhere in the CARES Act.

III. The Circuit Court Decision is Consistent with The Plain Language of the CARES Act, Its Statutory Context, and Legal Precedent

The overarching structure of the CARES Act supports the conclusion by the Court of Appeals that Title V funds are solely for federally recognized Tribes, for expenditures on *governmental purposes*. Other parts of the CARES Act provide relief for businesses, such as the PPP, but the title at issue in this case—Title V—specifically allocates money for "making payments to States, Tribal governments, and units of local government." 42 U.S.C. § 801(a)(1). Petitioners have no substantive response to this argument, which is why they focus the entirety of their statutory analysis on an entirely different statute: ISDEAA. But the interpretation urged by Petitioners—which emphasizes eligibility under ISDEAA's definition of "Indian tribe" at the expense of the CARES Act's definition of "Tribal government" as "the recognized governing body of an Indian tribe"—does not comport with the context of Title V.

The phrase "Tribal government" must be interpreted within the structure of the CARES Act. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regulatory Grp. v. Envtl. Prot. Agency*, 573 U.S. 302, 320 (2014) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Title V is specifically devoted to the disbursement of funds to governmental entities who

incurred COVID-19 related expenses through the exercise of their powers and responsibilities as sovereigns. Each reference to "Tribal government" throughout Title V appears beside, and in the same context as, other political governing entities that exercise varying degrees of inherent sovereignty: "States," meaning "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," 42 U.S.C. § 801(g)(4), and other "units of local government," such as "a county, municipality, town, township, village, parish, borough, or other unit of general government below the State level." *Id.* § 801(g)(2). Congress intended for governments to receive Title V funds, not for-profit corporations.

A. Alaska Native Corporations are not recognized governing bodies of Tribes

ANCs simply cannot meet the Title V definition of "Tribal government" because they are not recognized governing bodies. No court has ever held that ANCs are Tribal governments or recognized governing bodies for Tribes. ANCs were created in 1971 specifically to serve as engines of economic development, and they have stayed true to that mission. In the words of this Court, they are "state-chartered and state-regulated private business corporations." *Venetie*, 522 U.S. at 534.

The primary drafter of ANCSA, Alaska Senator Ted Stevens, designed ANCs this way. While debating

ANCSA before its passage, he assured Congress that ANCs "are not government bodies." 117 Cong. Rec. 46,964 (daily ed. Dec. 14, 1971) (statement of Sen. Stevens). The Department of Interior has likewise stated affirmatively that ANCs "are not governments" and "lack tribal status in a political sense." 58 Fed. Reg. at 54,364-65.

Accordingly, *every* federal court presented with this question has uniformly held that ANCs are not governing bodies, are not Tribal governments, and do not possess attributes of Tribal sovereignty. *See*, *e.g.*, *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1350 (9th Cir. 1990) (rejecting an ANC's argument that 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); *Eaglesun Sys. Prods., Inc. v. Ass'n of Vill. Council Presidents*, No. 13-CV-0438-CVE-PJC, 2014 WL 1119726, at *6 (N.D. Okla. Mar. 20, 2014) (ANCs "do not possess key attributes of an independent and self-governing Indian tribe" and "are not governing bodies" (citations omitted)); *Pearson v. Chugach Gov't Servs., Inc.*, 669 F. Supp. 2d 467, 469 n.4 (D. Del. 2006) ("[T]he Court can find no evidence to suggest[ ] that [ANCs] are governing bodies"); *cf. Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 213 (4th Cir. 2007) (ANCs "and their subsidiaries are not comparable sovereign entities" to federally recognized tribes); *Barron*, 373 F. Supp. 3d at 1240 ("While [ANCs] are owned and managed by Alaska Natives, they are distinct legal entities from the Alaska Native tribes. . . . Unlike an [ANC], [the non-profit Tribal

health consortium] is an entity created and controlled by Alaska Native tribes that promotes tribal self-determination and fulfills governmental functions." (citations omitted)).

Even Amicus State of Alaska acknowledges this important distinction, recognizing that for the past four decades, federal agencies "have consistently and rightfully interpreted ANCs as non-sovereign entities." Amicus Br. of the State of Alaska at 12-13. The State of Alaska accurately explains that "ANCs do not enjoy 'a government-to-government relationship with the United States,' " do not have inherent Tribal authority, and are not federally recognized Tribes. *Id.* at 15. The Court of Appeals correctly concluded that that "recognized governing body" connotes federal recognition—that is, the governing body of a federally recognized Indian Tribe. App. to Secretary Pet. at 23a. Congress's use of "recognized" in the CARES Act is evidence of its clear intent to limit Title V funds to only federally recognized Tribal governments, excluding ANCs.

Petitioners' argument that because the CARES Act uses the term "recognized governing body" instead of "federally recognized governing body," ANCs and their boards of directors qualify for Title V funds is without merit. As Congress—and courts—have made clear, the legal term of art is "*recognized*," not "federally recognized." *See*, *e.g.*, H.R. Rep. No. 103-781, at *2 (1994); *Big Sandy Rancheria v. Becerra*, 395 F. Supp. 3d 1314, 1326 (E.D. Cal. 2019).

ANCs are not Tribal governments and do not have recognized governing bodies. The decision by the Court of Appeals was in line with every other court that has considered this issue and it does not merit further review.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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