Nos. 20-543, 20-544

In the Supreme Court of the United States

JANET L. YELLEN, 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 Writs of Certiorari
to the United States Court of Appeals for the
District of Columbia Circuit

AMICUS CURIAE BRIEF ON THE MERITS OF ALASKA FEDERATION OF NATIVES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In the Coronavirus Aid, Relief, and Economic Security Act ("CARES"), Congress directed the Secretary of the Treasury to disburse $8 billion of relief funds "to Tribal governments." Pub. L. No. 116-136, Div. A, Tit.V, § 5001(a), 134 Stat. 501-502 (42 U.S.C.§ 801(a)(2)(B)). CARES defines a "Tribal government" as "the recognized governing body of an Indian Tribe," 42 U.S.C. § 801(g)(5), and instructs that "[t]he term 'Indian Tribe' has the meaning given that term in" the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. § 5301 *et seq*. 42 U.S.C. § 801(g)(1). ISDA defines "Indian tribe" to mean "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, 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) (citation omitted).

The question presented is: whether Alaska Native regional and village corporations established pursuant to the Alaska Native Claims Settlement Act are "Indian Tribe[s]" for purposes of CARES, 42 U.S.C. § 801(g)(1).

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24 C.F.R. 1000.327 .....18, 25

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Department of the Interior views on Enrolled Bill S. 2017 (Dec. 27, 1974). 15

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INTEREST OF AMICUS CURIAE

Established in 1966 to achieve a fair and just settlement of aboriginal land claims, the Alaska Federation of Natives ("AFN") is the oldest and largest statewide Native membership organization in Alaska.[1] Its members include most (165 out of 229) of the sovereign Alaska Native villages (formally-recognized tribes, or "FRTs"); most of the regional and village Native corporations ("ANCs") established pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq*.; and all of the regional nonprofit tribal consortia that contract or compact to administer federal programs under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 5301 *et seq*. Having had considerable input into the passage of ANCSA and ISDA, and counting as members both FRTs and ANCs, AFN is positioned to help the Court understand why Congress chose the ISDA definition of "Indian Tribe" to distribute tribal relief funding to Native peoples under the Coronavirus Aid, Relief, and Economic Security Act ("CARES"), 42 U.S.C. § 801, and why the decision to include ANCs, so that relief funding fully reaches Alaska Natives, was made. AFN is also well-positioned to address the broader adverse consequences of the D.C. Circuit decision under review, supplied as Government Certiorari Petition 1a ("COA.Opin." and "Govt.Pet.")

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[1] All parties have consented in writing to this brief's filing, after receiving the required notice. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Alaska is different. The state and its people are often "the exception, not the rule." *See Sturgeon v. Frost*, 136 S.Ct. 1061, 1071 (2016). Accepting this proposition, as the Court has done, is the first step to resolving this case. *Id*.

This case concerns whether Alaska Natives should lose out on critical CARES tribal relief funding because Congress in ANCSA chose a model for settling the aboriginal land claims of Alaska Natives (corporations) that differs from that for American Indians (reservations), which – as detailed below – was adopted near the start of the Self-Determination Era, where the U.S. policy toward Native peoples switched to encouraging American Indian and Alaska Native tribes to provide services and supports to their people that the federal government previously administered exclusively. ANCSA is a precursor to ISDA, which was enacted four short years later. As AFN will show, Congress provided in ANCSA and ISDA for the equal treatment of Alaska Natives vis-à-vis American Indians by including ANCs in the ISDA definition of "Indian Tribes," for statutory purposes only, to more effectively accomplish the administration of Federal programs when the sovereign attributes of FRTs are not at issue.

In crafting CARES, Congress earmarked $8 billion for Native Americans and conditioned eligibility on satisfying a particular statutory definition of "Indian Tribe" found in ISDA. That definition – which does not hinge on tribal sovereignty – was carefully chosen because it specifically includes ANCs in an Alaska

inclusion clause that is neither inconsistent with, nor defeated by, an accompanying recognition clause. However, the D.C. Circuit imported into this recognition clause words that are simply not there – a purported requirement of sovereign FRT recognition. As shown below, possessing attributes of tribal sovereignty is not the only way to satisfy the recognition clause. The D.C. Circuit erroneously disqualified ANCs from CARES funding, thereby harming Alaska Natives who exercise self-determination in a way that differs from American Indians.

The D.C. Circuit rejected the analysis of the District Court, the federal agencies, and the Ninth Circuit – that the word "recognized" in the recognition clause is to be read in the ordinary sense, not as a restricted "term of art," and therefore includes ANCs ("corporations") listed in the Alaska inclusion clause. This rejection is based on the D.C. Circuit's misplaced view that ANCs ("corporations") were listed in the Alaska inclusion clause only because they might later be "recognized" as sovereign. That is, the D.C. Circuit read the recognition clause to exclude the specifically-identified entities in the inclusion clause that immediately precedes it – a reading that is neither grammatical nor sensible. The D.C. Circuit also failed to consider the re-enactment canon, which holds that Congress's repeated use of the ISDA definition (including in CARES) after the federal agencies construed it to include ANCs indicates Congressional approval of that interpretation.

The decision under review misreads the statutory text of CARES and ISDA, ignores an extensive history of legislative and administrative activity confirming

how that statutory text should be read, and violates accepted norms of statutory construction. If the decision below is allowed to stand, it will undermine the self-determination, as well as the economic and social well-being, of Alaska Natives while directly threatening numerous federal programs for Alaska Natives that, like CARES, are predicated upon the ISDA definition of "Indian Tribe." Reversal of the decision below will restore to Alaska Natives a more equitable share of the CARES tribal funding directly at issue and will also restore confidence in statutory language that is used repeatedly throughout Federal Indian laws, confirming that ANCs and thus Alaska Natives may continue to participate in a host of statutory programs for Native peoples that use the same definitions.

AFN first reviews the history of Alaska Native self-determination, including the 1971 enactment of ANCSA, which created ANCs in an effort to maximize Alaska Native self-determination in the unique circumstances of Alaska, and the 1975 enactment of ISDA, which sets forth a national self-determination policy. *See* Background and Overview. AFN then reviews the specific ISDA-based definition incorporated in CARES, how that definition has been interpreted by courts and agencies over the years, and applicable legislative history (Argument Point A). AFN then reviews related statutes that re-use these definitions and demonstrates why the decision below clashes with the text of related statutes (Point B). AFN next turns to the interplay between the decision below and ANCSA, which codified the fundamental differences between tribal governance in Alaska as opposed to the Lower 48 states that is at the heart of

this case. With reference to ANCSA, AFN describes the particularly harsh impact of the decision below on Alaska Natives who are ANC shareholders but not enrolled FRT members (Point C). Finally, AFN reviews the alarming impact of the decision below on Alaska Native participation in several important related Federal Indian programs (Point D). This includes a focused discussion of the substantial impact of the decision below on housing programs.

Because these arguments were developed at length in AFN's brief in support of certiorari, there is substantial similarity between this brief on the merits and that earlier filing.

I. BACKGROUND AND OVERVIEW

The D.C. Circuit's holding that only sovereign FRTs are "Indian Tribes" under ISDA misunderstands how Congress responded to differences between tribalism in Alaska and the rest of the nation by taking steps to ensure Alaska Natives were not disadvantaged. Those differences stem from the unique history of Alaska Natives culminating in the adoption of ANCSA and ISDA.

Due to the remoteness and vast size of Alaska, and the relative lack of effort by non-Natives to drive Alaska Natives off their aboriginal lands, little effort was made by Congress to resolve Alaska Native aboriginal land claims until the 1960s. At that time, the largest oil reserve in North America was discovered on the Arctic coast, prompting the need to resolve aboriginal title so extraction could begin. The desire on the part of the oil companies and the State and Federal governments to remove the cloud on title for natural resource development, and the desires of

Alaska Natives to continue to use and occupy their lands, resulted in the enactment in 1971 of ANCSA.

Pursuant to ANCSA, Congress: (1) entrusted lands and money from the settlement of aboriginal claims to corporations obligated to act on behalf of Alaska Natives, rather than creating reservations, 43 U.S.C. §§ 1601, 1606(r), 1607-1611, while (2) clarifying that this different system would not result in Alaska Natives receiving fewer services than American Indians. § 1626(d). Alaska Natives expect ANCs to turn CARES funding into urgently needed action fighting the pandemic. ANCs have infrastructure and capability to move quickly, obtain resources, utilize supply chains, mobilize manpower, facilitate the distribution of vaccines, and leverage public-private partnerships to stretch resources to help Alaska Natives combat the coronavirus health pandemic and corresponding economic collapse.

As a result of ANCSA, viewing the combination of an Alaska FRT and its related ANCs (and also the not-for-profit tribal consortia discussed further below) produces a picture that looks more like a Lower 48 FRT than when attempting to view an Alaska FRT in isolation. In contrast to Lower 48 FRTs, which operate gaming and other businesses and manage substantial land reservations, most Alaska FRTs have little capacity without ANC's and tribal consortia to respond to a public health emergency. Far from being "dubious" or not based in reality, as suggested by respondents Cheyenne River Sioux Tribe et al, in their brief opposing certiorari (pp. 9-10), interpretations that limit Federal Indian programs to FRTs are sometimes ill-suited to Alaska Natives.

ANCSA is part of the framework on which modern day Alaska Native self-determination rests, and ISDA is also part of that framework. ANCSA was enacted in 1971, one year after President Nixon boldly declared "[t]he time has come to . . . create . . . a new era in which the Indian future is determined by Indian acts and Indian decisions ...."[2] The new federal Indian policy was soon fortified at the national level through the 1975 passage of ISDA. ISDA sought to recognize Native self-determination in different ways, including by empowering Native Americans to contract with federal agencies to administer education, health care, and other services formerly provided by federal employees. 25 U.S.C. § 5302(a). This required addressing the intersection between the new national policy and the Alaska self-determination policy. Congress did so by adopting an "Indian Tribe" definition that references (and until this case has always been found to include) ANCs. 25 U.S.C. § 5304(e).

In CARES, Congress awarded relief funding to "Indian Tribes" as defined by the ISDA definition based on their "increased expenditures" caused by the pandemic. 42 U.S.C. § 801(c)(7) and (d). Legislating in the midst of the pandemic, and wanting to cast the widest net possible while not excluding either non-sovereign or sovereign tribal entities with knowledge and experienced leadership, Congress chose the broad definition of "Indian Tribe" found in the ISDA definition it incorporated, 25 U.S.C. § 5304(e), rather than narrower alternatives discussed in the

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[2] President Nixon, Special Message on Indian Affairs (July 8, 1970). https://www.epa.gov/sites/production/files/2013-08/documents/president-nixon70.pdf

Argument below. Using a broad definition also made sense for a second reason. In Alaska, "increased expenditures" are generally going to be found in the more economically active entities (ANCs) rather than the less economically active entities (FRTs).

The U.S. Treasury Department ("Treasury") implemented Congress's allocation standard by utilizing three pieces of ascertainable information to estimate increased expenditures: (1) budget size, (2) employee counts, and (3) population served.[3] In Alaska, the bulk of the employee counts and budgets are in the ANCs rather than FRTs. Further, a substantial portion of the population consists of Alaska Natives who are not members of FRTs and who are members of an "Indian Tribe" only by being ANC shareholders.[4] ANCSA provides that all Alaska Natives are to receive the benefits accorded American Indians, whether or not enrolled in a FRT.[5] The result is a funding allocation that made sense until the D.C. Circuit summarily disqualified ANCs.

The importance of including ANCs is magnified, because the funding allocation does not consider another large set of pertinent employee counts and budgets in the Alaska tribal ecosystem – the employees and budgets of the not-for-profit tribal consortia that provide much of the health and social services to Alaska Natives. The consortia are not Indian Tribes, and, despite the close affiliations, Treasury did not allow either ANCs or Alaska FRTs

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[3] *See* https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf

[4] *Id.*, n. 9 (citing Treasury's data sources).

[5] *See* p. 23 below.

to include the employee counts and budgets of their affiliated consortia in their funding applications.

The Alaska Congressional Delegation's certiorari-stage amicus brief describes the impact of the pandemic in Alaska (pp. 6-7), which CARES Tribal funding addresses.

II. ARGUMENT

As an *amicus curiae*, AFN will discuss the specific statutory text at issue from its perspective as an organization that has represented all facets of the Alaska Native community for more than 50 years, including in the negotiation and implementation of ANCSA and ISDA. AFN will then provide a wider-angle view of the statutory construction and practical policy issues that require reversal of the decision below.

A. The Statutory Text of ISDA and CARES Includes ANCs

When Congress in CARES chose to use a statutory definition from ISDA to determine which Native entities were eligible for tribal relief funding, two different ISDA definitions were available.

The first ISDA definition, which Congress did not choose, defines tribal "local governments," and excludes ANCs by conspicuously omitting them, instead referring in its Alaska clause only to Native villages:

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village as defined in [ANCSA], which is recognized as eligible for the special programs and

> services provided by the United States to Indians because of their status as Indians....[6]

The second ISDA definition, which Congress did choose in CARES, defines "Indian Tribe" and is nearly identical, except that it includes ANCs in discussing Alaska entities:

> "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 [ANCSA], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[7]

The clause starting with "including" is called the "Alaska inclusion clause." The next clause starting with "which is recognized" is the "recognition clause."

In reaching the surprising conclusion that the recognition clause in the ISDA definition incorporated by Congress in CARES excluded all ANCs, thus obliterating the key distinction between the two definitions, the D.C. Circuit erred in several ways.

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[6] ISDA § 104(a), Pub. Law 93-638 § 105(a), codified at 5 U.S.C. § 3371(2)(c). The definition involves exchanging federal and tribal "local government" employees. § 3372. It goes on to also include "tribal organizations" as defined in ISDA.

[7] ISDA § 4(b), codified at 25 U.S.C. § 5304(e) (emphasis added, incorporated in CARES, 42 U.S.C. § 801(g)).

1. The 1976 Inquiry

Among other errors, the D.C. Circuit should have conducted a 2020 inquiry to account for repeated re-enactment and re-use by Congress of the same definition, including in CARES, after federal agencies and the Ninth Circuit in *Cook Inlet Native Ass'n v. Bowen, 810 F.2d 1471 (9th Cir. 1987)* had construed that definition to include ANCs. Instead, the D.C. Circuit effectively stopped its inquiry in 1976, and so failed to consider the re-enactment canon, as Petitioners discuss. *See* Point A.2 below.

However, because the D.C. Circuit's analysis is essentially a 1975/1976 analysis, it is helpful to set aside the reenactment (a/k/a "prior construction") canon for a moment, and go back in time and analyze the 1975 ISDA "Indian Tribe" definition and the Interior Department's ("DOI") contemporaneous interpretation of it in 1976. Even without considering that canon, the D.C. Circuit's reading is unpersuasive, and the longstanding agency interpretations are correct.

DOI determined in the 1976 Soller memorandum that the recognition clause should not be read to defeat the inclusion of ANCs, reasoning that to do so would make surplusage out of the Alaska inclusion clause.[8] The Ninth Circuit affirmed DOI's interpretation in 1987 in the *Bowen* decision, relying on the legislative history of ISDA, including Congress's decision to add ANCs to the definition of

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[8] Memorandum from the Assistant Solicitor for Indian Affairs, Meaning of "Indian Tribe" in section 4(b) of P.L. 93-638 for purposes of application to Alaska (May 21, 1976) (printed in Joint Appendix, pp. 44-48, "Soller Mem.").

"Indian Tribe" through an amendment specific to ANCs. *Bowen*, 810 F.2d at 1475. In 1993, DOI clarified that ANCs are "made eligible for Federal contacting and services by statute," which captures the situation.[9]

Three considerations support the conclusion that ANCs are "Indian Tribes" under the ISDA definition incorporated into CARES.

First, the D.C. Circuit implausibly concluded that Congress included ANCs in the Alaska inclusion clause only on the off chance that ANCs might someday obtain sovereign recognition, and so satisfy the recognition clause under the D.C. Circuit's narrow view of that clause. Even in 1975, however, it was clear that ANCs could never establish the historical relationship with the federal government needed to be a sovereign tribe under longstanding DOI precedent.[10] Indeed, DOI's 1976 interpretation does not even suggest ANCs might qualify in the future as FRTs.[11]

Second, the text of the recognition clause in the 1975 ISDA "Indian Tribe" definition does not

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[9] Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 58 Fed.Reg. 54,364, 54,366 (Oct. 21, 1993).

[10] The D.C. Circuit notes that DOI took until 1978 to formally codify in regulations its longstanding requirement of a historical relationship evidenced by treaty or other sovereign-like political relationships, but that test had long been part of the case law the 1978 regulations codified. Govt.Cert.Pet. at 25-27.

[11] Soller Mem. at 2. See also the legislative history documents discussed below, none of which suggests Congress was acting in anticipation of future formal recognitions of ANCs as FRTs.

reference or require recognition as a sovereign FRT, and such a requirement should not be implied. The ISDA definition was enacted in 1975, long before Congress enacted the List Act in 1994,[12] so any "term of art" theory that recognition as used in ISDA is implicitly List Act recognition is untenable. The D.C. Circuit also erred in failing to consider that recognition can come from more than one source, *e.g.* being defined or established by ANCSA, per the Alaska inclusion clause's reference to ANCSA, or in some other way. DOI found that ANCs are "made eligible for Federal contracting and services by statute."[13]

Moreover, the Indian canons of construction require that statutes be liberally construed in favor of Indians,[14] and they likely apply to this dispute over whether Alaska Native entities fall within the gate-keeping definition of a statutory Federal Indian program.[15] If the Indian canons do apply, they weigh heavily against importing into the recognition clause an unstated limitation under which sovereign

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[12] Pub. Law 103-454.

[13] *See* 58 Fed.Reg. at 54,366; *see also*, 1 Cohen's Handbook of Federal Indian Law § 4.07[3][d][i] (2017).

[14] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) (this applies to ISDA).

[15] This is not a situation where two separate groups of Native Americans each seek to invoke these canons in opposing directions. The issue is whether ANCs qualify for a Federal Indian statutory program. Plaintiff-Respondents' interest is wholly indirect (a side-effect of disqualifying ANCs might be re-allocating part of a fixed fund to Plaintiff-Respondents).

recognition as an FRT is the only way to satisfy that clause.

Whether or not the Indian canons apply, multiple textual factors favor the Ninth Circuit's reading in *Bowen* as against the D.C. Circuit's reading, particularly the specificity of the Alaska inclusion clause, the generality of the recognition clause, the express reference to another statute providing a qualifying test that ANCs satisfy ("defined in or established pursuant to" ANCSA), and the existence of many Federal Indian programs in which ANCs participate (and thus are recognized as eligible to participate in, *see* n. 13 above and Point B below).

Third, contrary to the D.C. Circuit's holding, the reading that ANCs are "Indian Tribes" under ISDA fully comports with the series-qualifier canon. If that canon calls for applying the recognition clause to all of the entities mentioned in the definition used in CARES, ANCSA supplies the recognition ANCs and Native Villages need to satisfy that clause. As quoted above, the ISDA definition clarifies that the "Indian Tribe" definition "include[s]" Native Villages and ANCs "defined in or established" by ANCSA, which are recognized as eligible for services. Those villages that meet ANCSA's complex definition of "Native village" satisfy the recognition clause, and so qualify as Indian Tribes, as do those Native corporations that meet ANCSA's definition of ANC.[16] The recognition clause thus does play a role in determining which Alaska Native entities qualify as "Indian Tribes,"

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[16] 43 U.S.C. § 1602(c) (defining Native villages) and §§ 1602(g) and (j), 1606-1607 (defining and establishing ANCs).

which is all the series-qualifier canon could ask, if that canon applies.

This point that ANCSA does any recognizing necessary to satisfy the recognition clause is strongly supported by the legislative history of ISDA. The House Report explaining the amendment adding ANCs to the "Indian Tribe" definition "include[s] regional and village corporations established by the Alaska Native Claims Settlement Act," and mentions no further filtering conditions such as DOI recognition as a sovereign FRT.[17] Although the parties brought the House Report passage to the D.C. Circuit's attention, and the Ninth Circuit cited it in *Bowen*, 810 F.2d at 1475, the D.C. Circuit did not discuss it in its opinion.[18] DOI's summary sent with the enrolled bill to President Ford for signature likewise explains flatly that ANCs established under ANCSA are "Indian Tribes" for purposes of ISDA, without mentioning any further filtering tests.[19]

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[17] H.Rept. 93-1600, p. 14 (Dec. 16, 1974), available within: https://www.fordlibrarymuseum.gov/library/document/0055/1668949.pdf.

[18] Judge Katsas, the author of the opinion, stated at oral argument that he would not consider legislative history. Oral Argument Recording at 1:12:15. https://www.cadc.uscourts.gov/recordings/recordings2020.nsf/94CFF7208B44E267852585E00070E2CB/$file/20-5204.mp3

[19] "'Indian Tribe' is defined to include Alaska Native villages or Regional or Village Corporations under the Alaska Native Claims Settlement Act." DOI views on Enrolled Bill S. 1017, Dec. 27, 1974, p. 4 (*see* n.13 above for source).

2. <u>2020 Inquiry</u>.

What calls even more forcefully, however, for reversal of the decision below are the decades of subsequent statutory enactments preceding the adoption of CARES in 2020 in which Congress repeatedly used the same definition of "Indian Tribe" found in ISDA, or a substantially similar definition. These repeated re-enactments came after the agency interpretations in the 1970s and 1980s and after *Bowen* established that ANCs were indeed statutory "Indian Tribes" under ISDA-based definitions.[20] As discussed in Point B below, other federal agencies joined this interpretation of ISDA-based statutes. The re-use of the 1975 ISDA definition, including in CARES, came after Congress enacted the List Act in 1994, providing a definition Congress easily can reference when it wants to limit a specific program to FRTs.

"When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott,* 524 U.S. 624, 645 (1998); *see also*, Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 235 (2012) (prior construction canon applies to "related statutes," citing *Bragdon*). Plaintiff-Respondents cannot adequately explain why

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[20] *See* Pub. Law 100-472, § 103 (1988) (directly re-enacting ISDA definitions); Point B below (discussing NAHASDA, CDBFIA, and ITEDA, all enacted after 1990); Govt.Pet. at 20-21 (collecting more examples); 42 U.S.C. § 801(g)(1) (CARES).

Congress keeps re-adopting and re-using the ISDA "Indian Tribe" definition knowing that, contrary to Plaintiffs-Respondents' reading, the agencies implementing these statutes consistently allow ANCs to participate as "Indian Tribes."

B. Congress Either Uses the ISDA Definition to Include ANCs or Sharply Different Language to Exclude Them.

The conclusion that ANCs are "Indian Tribes" for purposes of CARES is bolstered by a broader review of federal Indian statutes. Congress frequently uses the ISDA definition to include ANCs, or uses diverging definitions to exclude them, depending on what it is trying to accomplish. A comparison of the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA") and the Community Development Banking and Financial Institutions Act of 1994 ("CDBFIA") against the Indian Child Welfare Act ("ICWA") and the Native American Graves Protection and Repatriation Act ("NAGPRA") proves this point, while an examination of the Indian Tribal Energy Development Act of 2005 ("ITEDA") shows Congress's sophistication in fine-tuning the inclusion of ANCs.

NAHASDA (1996), CDBFIA (1994), and ITEDA (2005) were all adopted after the 1976 DOI and 1987 Ninth Circuit interpretations regarding the ISDA definition of "Indian Tribe" were published, and all define "Indian Tribe" to include ANCs.

NAHASDA helps secure financing for affordable tribal housing activities and includes ANCs by utilizing a definition of "federally recognized tribe" that tracks ISDA:

> any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA], that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians pursuant to [ISDA.][21]

As a significant financial repository for Alaska Natives, ANCs can be and are useful in promoting housing assistance, and often own the land involved. Consequently, the Department of Housing and Urban Development ("HUD") adopted rules providing for their participation since tribal sovereignty is not implicated.[22]

CDBFIA seeks to promote economic revitalization and community development through targeted investment and defines "Indian Tribe" to include ANCs by incorporating the ISDA definition:

> any Indian tribe, band, pueblo, nation, or other organized group or community, including any Alaska Native village or regional or village corporation, as defined in or established pursuant to [ANCSA], which is recognized as eligible for the special programs and services provided

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[21] 25 U.S.C. § 4103(13)(B).

[22] 63 Fed.Reg. 12334, 12335, 12366 (March 12, 1998); *see* 24 C.F.R. 1000.301, 302(4), 327 (funding "regional corporations").

> by the United States to Indians because of their status as Indians.[23]

Treasury certifies ANC participation in this program, which again does not involve tribal sovereignty, and so follows DOI's interpretation of ISDA.[24]

By contrast, legislation that excludes ANCs from program eligibility utilizes contrasting statutory language that clearly excludes ANCs.

ICWA defines "Indian Tribe" in a manner that includes Alaska Native villages but not village corporations or regional corporations, and so excludes ANCs:

> ["Indian Tribe" means] any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43[.][25]

ICWA concerns placement preferences in child custody decisions where divorcing parents are not involved, a sovereign function inappropriate for corporate entities. Thus, ANCs are, unsurprisingly, excluded.

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[23] 12 U.S.C. § 4702(12).

[24] United States Treasury "List of Certified CDFIs," https://www.cdfifund.gov/programs-training/certification/cdfi/Pages/default.aspx (including entities owned by ANCs CIRI and Arctic Slope (Alaska Growth Capital)).

[25] 25 U.S.C. § 1903(8).

NAGPRA defines "Indian tribe" similarly to ICWA and mostly tracks the other ISDA definition quoted above, the one not selected by Congress in CARES.[26] NAGPRA's definition thus limits its Alaska inclusion clause to Native villages, excluding ANCs.

> any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to [ANCSA]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.][27]

Ensuring proper repatriation for human remains and sacred objects taken from Native graves is more appropriate for sovereign FRTs than corporate ANCs; therefore, Congress excluded them.

While the primary point of comparing and contrasting these four statutes is to show the consistent way in which Congress uses ISDA-based language to include ANCs and clearly different language when it wishes to exclude ANCs, it is also worth noting that CARES directs that Treasury allocate the relief funding based on "increased expenditures" due to the pandemic.[28] This has economic rather than sovereign implications. CARES does not limit use of the relief funding to the types of

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[26] *See* pp. 9-10 above (quoting ISDA § 104(a)).

[27] 25 U.S.C. § 3001(7).

[28] *See* 42 U.S.C. § 801(c)(7) and (d). The pertinent CARES Act division is called: "Keeping Workers Paid and Employed, Health Care System Enhancements, and Economic Stabilization." Pub. L. No. 116-136, Div. A.

sovereign activities usually involved when ANCs are excluded.

A fifth statute, ITEDA, shows Congress's proficiency in fine-tuning the ISDA definition, in order to include ANCs in part of a program. As the Government explains, ITEDA incorporates the ANC-inclusive ISDA "Indian Tribe" definition, but then qualifies that incorporation by expressly excluding ANCs from a subset of the ITEDA energy development programs.[29] This shows Congress's understanding that using the ISDA definition includes ANCs as "Indian Tribes," absent a specific carve-out.

Many other statutes include ANCs, by adopting ISDA-like definitions of "Indian tribe," or terms like "tribal land."[30]

C. The D.C. Circuit's Ruling Denies CARES Tribal Relief Funding Entirely for Some Alaska Natives.

The D.C. Circuit identified a significant part of the Alaska Native community that is in some ways even more severely affected by its decision than the rest of that community, but failed to apply an ANCSA provision that should have led it to decide the case differently, thereby avoiding the harm. As described below, the harm involved is not theoretical and bears directly upon how the statute at issue here should be

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[29] 25 U.S.C. § 3501(4); Govt.Pet. at 22.

[30] *See, e.g.*, 43 U.S.C. § 1601(g); 12 U.S.C. § 1715z-13(i)(2); 16 U.S.C. §§ 470bb(4)-(5),1722(6)(D), 4302(3)-(4); 20 U.S.C. § 7713(5)(A)(ii)(III); 25 U.S.C. §§ 3202(9), 3501(2)(C), 3703(10); 26 U.S.C. § 168(j)(6); 29 U.S.C. § 741(d); 38 U.S.C. § 3765(1)(C); 42 U.S.C. §§ 2991b(a), 2992c(3).

read.[31] Of course the direct impact on ANCs of denying them CARES Tribal funding is also not theoretical, but that is fully covered by the ANCs in their brief and need not be addressed again here.

These are Alaska Natives who are not enrolled in any Native Village or other FRT, and whose status as beneficiaries of federal Indian programs is related to the ISDA "Indian Tribe" definition of their regional ANC. *See* COA.Opin. at 24. If ANCs are no longer "Indian Tribes" under the ISDA definition, those Alaska Natives have no status, and so face a variety of long-term consequences, as well as receiving none of the disputed relief funds for pandemic mitigation.

In addressing these Alaska Natives, the D.C. Circuit focused on an ANCSA provision that declares that ANCSA's distribution of property to settle aboriginal claims "shall not be deemed to substitute for any governmental programs otherwise available to the Native peoples of Alaska as citizens of the United States and the State of Alaska." 43 U.S.C. § 1626(a); COA.Opin. at 24. Citing § 1626(a), the Court forecast "confidence" that Federal and State health agencies responsible for the general citizenry will somehow "fill the void" created by leaving these Alaska Natives without this CARES resource. *Id.*; *but see* State of Alaska Amicus Cert. Brief at 24 (State cannot fill that void).

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[31] For adverse consequences to the rest of the Alaska Native community, see Points I and II.D (impact on self-determination; ANSCA places Alaska Natives' land and resources in ANCs, so budget and employee count criteria restricted to FRT's do not work in Alaska).

Although cited to it by the parties, the D.C. Circuit failed to account for a neighboring ANCSA provision, which provides that "[n]otwithstanding any other provision of law, Alaska Natives shall remain eligible for all Federal Indian programs on the ***same basis*** as other Native Americans." 43 U.S.C. § 1626(d) (emphasis added).

The obvious meaning of § 1626(a) and (d), read together, is that it is not acceptable for some Alaska Natives to be denied their federal Indian beneficiary rights and to receive only whatever services might be available to the general citizenry. ANCSA affirmed that Alaska Natives are to receive the special services accorded to Native Americans "on the same basis as other Native Americans," § 1626(d). Section 1626(d) is a directive from Congress not to construe other statutes in a way that denies benefits to Alaska Natives on account of ANCSA establishing a tribal system in Alaska that is so different from elsewhere. Sadly, that is just what the D.C. Circuit did in stripping many Alaska Natives of their only path to this CARES funding, as well as of their Indian beneficiary status.

Any rejoinder from the Plaintiff-Respondents that Alaska Natives who are not members of a Native Village are undeserving of services is rebutted by ANCSA. Rather than casting out Alaska Natives who were not members of Native Villages or other FRTs, Congress provided in ANCSA that every Alaska Native would be a shareholder in one regional ANC, and so could receive services through the regional ANC, 43 U.S.C. §§ 1604(b), 1606(r), and defined "Alaska Native" primarily by blood quantum, without requiring FRT membership. § 1602(b).

D. According ANCs Only Lesser "Tribal Organization" Status Frustrates the Self-Determination of Alaska Natives and Their Participation in Specific ISDA-based Federal Programs.

In downplaying the impact on Alaska Natives of declaring ANCs not to be "Indian Tribes," the D.C. Circuit also incorrectly suggested that according ANCs lesser "tribal organization" status is sufficient for ANCs to adequately participate in other Federal Indian statutory programs using ISDA definitions (programs other than CARES tribal funding). COA.Opin. at 23-24.

The D.C. Circuit stated that it was "far from obvious" that ANCs would be excluded from these programs, as "ISDA makes funding available to any 'tribal organization' upon request by any 'Indian Tribe.'" *Id.* The Court suggested that if Alaska FRTs designated ANCs as "tribal organizations," the impact of the Court's decision would be minimized. *See id.* However, the D.C. Circuit grossly underestimated the impact of its decision, both as to specific statutory programs based on ISDA, and as to the broader fundamental shared goal of ANCSA and ISDA: maximum self-determination for Alaska Natives.

A review of three important statutes that use an ISDA-based "Indian Tribe" definition, all addressed in briefing to the D.C. Circuit, demonstrates that according ANCs only lesser non-Tribe status is insufficient to allow full Alaska Native participation in these programs:

- ISDA. An "Indian Tribe" can only sanction a "tribal organization" to operate an ISDA-funded

program on behalf of the Indian Tribe's own members. *See* 25 U.S.C. § 5304(l). For Alaska Natives who are not members of any Native Village or other Alaska FRT, according ANCs lesser "tribal organization" status is no help.

- NAHASDA. HUD allocates housing funding among Alaska "Indian Tribes" based on population and housing units located within each tribe's geographic boundaries.[32] Only regional ANCs have geographic boundaries that cover all of Alaska, so a very substantial share of NAHASDA funding for Alaska Natives comes through the regional ANCs, because of their "Indian Tribe" status under that law. HUD's annual reports quantify the large figures involved.[33] NAHASDA does not have a "tribal organization" definition, and no other backdoor path to funding is apparent.[34]

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32 *See* 25 U.S.C. § 4103(13)(B) (ISDA-based definition of "federally-recognized tribe" quoted in Point B above); 24 C.F.R. 1000.327(a) (population / housing not within a Native Village is credited to a "regional tribe" if one exists and participates, and if not, to the regional ANC).

33 "FY 2020 Final IHBG Funding by TDHEs & Regions": https://www.hud.gov/sites/dfiles/PIH/documents/AKONAP_FY_%202020_Final_IHBG_Funding.pdf (visited Oct. 31, 2020) (showing regional ANCs are major participants in eleven of the twelve regions – for a list of the regional ANCs, *see* https://ancsaregional.com/the-twelve-regions/).

34 The Indian tribes typically assign their funding to housing authorities called "recipients," 25 U.S.C. § 4103(19), but the funding is still based on the population and housing within each Indian tribe's boundaries, and so is limited by the "Indian tribe" definition. 24 C.F.R. 1000.302(4), 1000.327; 25 U.S.C. § 4152(a).

- ITEDA. ITEDA makes grants available for energy development projects on "Indian land," defined as land held by "Indian Tribes."[35] If ANCs lose "Indian Tribe" status under ISDA, there is no apparent way to fund projects on regional ANC land outside of Native Villages.[36]

Until the clash between the Ninth Circuit (*Bowen*) and D.C. Circuit is resolved, confusion will reign, to the detriment of Alaska Natives, as the federal agencies implement these programs.

Even more troubling and far-reaching is the long-term damage to the shared ANCSA/ISDA goal of supporting maximum self-determination that would come from depriving ANCs of statutory "Indian Tribe" status in the hierarchy of federal Indian law. ANCSA supports the inherent right of Alaska Natives to self-determination by allowing Alaska Native peoples to retain a certain percentage of their lands, albeit by a different model than that used by Congress for American Indians (corporations versus reservations) and uses the new model to better the lives of their Alaska Native shareholders.[37] ISDA overlays a national-level policy in which self-determination is also achieved by encouraging Indian Tribes to take

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[35] 25 U.S.C. §§ 3501(2), 3502(a)(2)(A); *see* 25 U.S.C. § 3501(4)(A) (ISDA-based Indian Tribe definition).

[36] Non-Tribes may partner with Indian Tribes to form "tribal energy development organizations" to seek grants, but the projects must still be on "Indian land," 25 U.S.C. §§ 3501(12), 3502(a)(2)(A).

[37] 43 U.S.C. §§ 1601(b) (aboriginal claims settlement "should be accomplished … with maximum participation by Natives in decisions affecting their rights and property … without creating a reservation system or lengthy wardship or trusteeship …."), § 1606(r); *see also*, §§ 1605-1607, 1611-1613.

over from federal employees the task of directly managing the provision of federally-supported services such as education and health care.[38] Because Congress determined to further the self-determination of Alaska Natives, in part by including ANCs in the ISDA definition of "Indian Tribe," reading ANCs out of the law will disturb 45 years of settled Federal Indian policy toward Alaska Natives. Moreover, not including ANCs would severely disadvantage Alaska Natives and their corporations compared to American Indians and their reservations.

III. CONCLUSION

ANCSA was the Alaska application of the new federal Indian policy of self-determination, adopted in the largest aboriginal land claims settlement in the history of the U.S. To read ISDA, passed a short four years later, as now excluding the new entities required by Congress for Alaska Natives to express their inherent self-determination makes no sense. ANCSA and ISDA were intended to be the best path out of extreme poverty and deprivation and sought to trust and empower the Native people themselves, by their own actions, to raise their standard of living. In choosing the "Indian Tribe" definition in ISDA that included ANCs, as opposed to other stock definitions that excluded ANCs, CARES follows the ANCSA and

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[38] 25 U.S.C. § 5302(a) ("The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.")

ISDA policies of recognizing the ANCs' vital role in achieving self-determination for Alaska Natives.

The decision below does violence to accepted canons of statutory construction, to the language of CARES and to the social and economic interests of Alaska Natives. It should therefore be reversed.

Respectfully submitted,

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