No. _____

In the
Supreme Court of the United States

ALASKA NATIVE VILLAGE CORPORATION ASSOCIATION, INC., et al.,

Petitioners,

STEVEN T. MNUCHIN, in his official capacity as Secretary of U.S. Department of Treasury,

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
RAGAN NARESH
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioners

October 21, 2020

QUESTION PRESENTED

The Indian Self-Determination and Education Assistance Act (ISDEAA) defines "Indian tribe" as:

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), 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). Consistent with Congress' express inclusion of "Alaska Native … regional [and] village corporation[s]" (ANCs) in the text, the Executive has long treated ANCs as "Indian tribes" under ISDEAA and the dozens of statutes that incorporate its definition. The Ninth Circuit, home to all ANCs, likewise has long held that ANCs are "Indian tribes" under ISDEAA. Thus, for decades ANCs have played a critical role in distributing federal benefits to Alaska Natives. Accordingly, when Congress earmarked $8 billion in Title V of the CARES Act for Indian tribes and incorporated the ISDEAA definition, the Treasury Secretary quite naturally obligated part of those funds to ANCs. Yet in acknowledged conflict with the Ninth Circuit and long-settled agency practice, the decision below holds that ANCs do not satisfy the ISDEAA definition that the CARES Act incorporates.

The question presented is:

Whether ANCs are "Indian tribes" under ISDEAA and therefore are eligible for emergency-relief funds under Title V of the CARES Act.

PARTIES TO THE PROCEEDING

Petitioners, intervenor-defendants below, are the Alaska Native Village Corporation Association, the Association of ANCSA Regional Corporations Presidents/CEOs; Ahtna, Inc., Akiachak, Ltd., Calista Corporation, Kwethluk, Inc., Napaskiak, Inc., Sea Lion Corporation, and St. Mary's Native Corporation.

Respondents, plaintiffs below, are Ute Tribe of the Uintah and Ouray Indian Reservation, Cheyenne River Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Nondalton Tribal Council, Arctic Village Council, Native Village of Venetie Tribal Government, Confederated Tribes of the Chehalis Reservation, Tulalip Tribes, Houlton Band of Maliseet Indians, Akiak Native Community, Asa'carsarmiut Tribe, Aleut Community of St. Paul Island, Pueblo of Picuris, Elk Valley Rancheria California, San Carlos Apache Tribe, Quinault Indian Nation, and Navajo Nation.

The defendant below is Steven Mnuchin, whom the plaintiffs sued in his official capacity as Secretary of the United States Department of the Treasury.

CORPORATE DISCLOSURE STATEMENT

Each petitioner certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit:

- *Ute Tribe of the Uintah and Ouray Indian Reservation v. Mnuchin*, No. 5204 (D.C. Cir.), on appeal from No. 1:20-cv-01070-APM (D.D.C.)
- *Confederated Tribes of the Chehalis Reservation, et al. v. Mnuchin*, No. 5205 (D.C. Cir.), on appeal from No. 1:20-cv-01002-APM (D.D.C.)
- *Cheyenne River Sioux Tribe, et al. v. Mnuchin*, No. 5209 (D.C. Cir.), on appeal from No. 1:20-cv-01059-APM (D.D.C.)

In addition, several suits have been brought that do not directly relate to this case but that do (or have) challenge(d) the distribution of the appropriation at issue. Those cases are: *Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-cv-1136 (D.D.C.) (voluntarily dismissed on July 2, 2020); *Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-cv-1491 (D.D.C.) (voluntarily dismissed on July 9, 2020), appeal No. 20-5171 (D.C. Cir.) (appeal voluntarily dismissed on July 16, 2020); and *Shawnee Tribe v. Mnuchin*, No. 20-cv-1999 (D.D.C.), appeal No. 20-526 (D.C. Cir.) (pending). No other cases directly relate to this case within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes

Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Alaska and Alaska Natives have a unique history that is reflected in an equally unique statute, the Alaska Native Claims Settlement Act of 1971 (ANCSA). That statute eschewed reservations and established novel Alaska Native Corporations (ANCs) to receive the proceeds of a comprehensive settlement of Native land claims and to play an ongoing role in the lives of Alaska Natives. ANCs have no direct analog in the lives of Natives in the Lower 48. Thus, when Congress enacted the Indian Self-Determination Education and Assistance Act of 1975 (ISDEAA) to devolve the provision of federal services to Natives just a few years after ANCSA, the question arose whether ANCs would be included in that statute and its definition of "Indian tribe." Congress answered that question in the affirmative by expressly including "any … regional or village corporation … established pursuant to the Alaska Native Claims Settlement Act" in ISDEAA's definition of "Indian tribe." The Executive promptly confirmed the inclusion of ANCs, and the Ninth Circuit, home to every ANC, affirmed that view in 1987. For the next 30 years, ANCs' status as "Indian tribes" under ISDEAA was a fact of life for Alaska Natives in receiving federal services, for ANCs in participating in ISDEAA, and for Congress in defining "Indian tribe" in new federal statutes. Congress has incorporated ISDEAA's ANC-inclusive definition of "Indian tribe" in some 60 federal statutes, including its recent effort to provide emergency pandemic relief.

Consistent with that long-settled understanding, the Treasury Secretary allocated some of those relief

funds to ANCs. That decision was challenged by three sets of tribes, some of which contended that ISDEAA's definition (and therefore the pandemic-relief funds) was limited to tribes formally recognized pursuant to the Federally Recognized Indian Tribe List Act of 1994 (List Act), or FRTs, a category that excludes ANCs. In accepting that argument, the decision below upends the long-settled legal landscape and shatters the basic infrastructure of Native life in Alaska. It creates a clear and acknowledged conflict with the Ninth Circuit, rejects over 40 years of administrative practice, and disrupts the distribution of critical benefits to Alaska Natives, including healthcare and other services most needed in a pandemic. It also effectively punishes Alaska Natives for Congress' choice in ANCSA to eschew reservations in favor of innovative, but distinctly Native, entities. The decision is as flawed as it is disruptive and plainly merits this Court's plenary review.

OPINIONS BELOW

The D.C. Circuit's opinion is available at 2020 WL 5742075 and reproduced at App.1-28. The district court's summary judgment opinion is available at 2020 WL 3489479 and reproduced at App.33-79.

JURISDICTION

The D.C. Circuit issued its opinion on September 25, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of ANCSA, ISDEAA, and the Coronavirus Aid, Relief, and Economic Security (CARES) Act are reproduced at App.132-77.

STATEMENT OF THE CASE

A. Legal Background

1. Alaska Natives, ANCSA, and ANCs

Congress has plenary power to regulate Indian affairs concerning Alaska Natives, just as it does vis-à-vis Native Americans in the Lower 48. *See generally* U.S. Const. art. I, §8, cl. 3. But from the very beginning, when Alaska was acquired from Russia in 1867, Congress recognized that Alaska's unique history and geography called for a different exercise of that power vis-a-vis Alaska and Alaska Natives. Most notable, "[t]here was never an attempt in Alaska to isolate Indians on reservations." *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 51 (1962). But the absence of reservations did not mean that Alaska Natives lacked indigenous land claims or distinct rights (such as hunting and fishing rights) as Natives.

Congress addressed those claims and the distinct situation of Alaska and its Natives in ANCSA, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§1601-24). As with nearly all federal Indian legislation, Congress enacted ANCSA "pursuant to its plenary authority under the Constitution … to regulate Indian affairs." 43 U.S.C. §1601 note. That was natural, as ANCSA was designed as a "fair and just settlement" of all land "claims by Natives … of Alaska." *Id.* §1601. Yet

ANCSA broke sharply from the typical federal-Indian-law mold employed in the Lower 48. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523-24 (1998). ANCSA mandated the settlement of indigenous land claims "with maximum participation by Natives," but "without creating a reservation system." 43 U.S.C. §1601. Instead, ANCSA established new Native entities to manage Native lands, administer settlement funds, and act for the benefit of Alaska's Natives, mandating the creation of 12 "regional corporations" and 200-plus "village corporations" centered in existing Native communities. *Id.* §§1606(a), (d), 1607(a).

While these new entities were dubbed Alaska Native "corporations," ANCs are no ordinary corporations. Whereas the typical corporation maximizes shareholder value for a diverse and constantly shifting group of shareholders, ANCs' prime directive is to further "the real economic and social needs of [Alaska] Natives," consistent with their congressionally established role of administering the proceeds of indigenous land claims. *Id.* §1601(b); *see also Am. Fed'n of Gov't Emps. (AFL-CIO) v. United States*, 195 F.Supp.2d 4, 21-22 (D.D.C. 2002) (ANCSA designates ANCs "as the vehicle used to provide continuing economic benefits in exchange for extinguished aboriginal land rights").

To that end, ANCSA vests village corporations with responsibility to act "for and on behalf of a Native village," 43 U.S.C. §1602(j), and vests regional corporations with responsibility to "promote the health, education, [and] welfare" of Natives in their region, *id.* §1606(r). Congress ensured that ANCs'

leadership, as well as their mission, would be distinctly Native. Specifically, ANCSA required the incorporators of each regional corporation to be named by the then-existing Native association in the region, and requires that their management be vested in an elected board of directors comprised entirely of Native shareholders. *Id.* §1606(d), (f); *see id.* §1602(b) (defining "Native"). And although ANCSA permits non-Natives to inherit shares in certain circumstances, it prohibits non-Natives from exercising voting rights and sharply limits the benefits for which non-Natives are eligible. *See id.* §1606(h)(1)(B)-(C), (2)(C)(ii), (3)(D)(i).

Consistent with their congressionally prescribed role, ANCs undertake many "functions that would ordinarily be performed by tribal governments" in the Lower 48, App.21, including everything from housing and healthcare services to scholarships, youth education, and elder care, App.27 (Henderson, J., concurring). While they often work shoulder-to-shoulder with villages and non-profit entities, ANCs administer many critical services on their own, especially in urban areas where there are many Alaska Natives with an ANC-affiliation but no FRT-affiliation. Any understanding of Native life in Alaska generally, and how federal Indian benefits are distributed in particular, would be fundamentally incomplete without an appreciation of ANCs' critical role.

2. ISDEAA and its progeny

In service of its substantial trust responsibilities, the federal government has long provided special programs and services to Indians, including Alaska

Natives. The government historically administered these special programs and services itself, acting through the Indian Health Service (IHS) and the Bureau of Indian Affairs (BIA). That direct-federal-provision model began to change "in the early 1970's," as "federal policy shifted toward encouraging the development of Indian-controlled institutions." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 840 (1982).

Just four years after establishing ANCs in ANCSA, Congress took a key step down that road by enacting ISDEAA, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§5301 *et seq.*). Congress enacted ISDEAA to "help Indian tribes assume responsibility for aid programs that benefit their members" that would otherwise be administered directly by the federal government. *Menominee Indian Tribe of Wis. v. United States*, 136 S.Ct. 750, 753 (2016). "To that end, the Act directs the Secretary of the Interior, 'upon the request of any Indian tribe … to enter into a self-determination contract … to plan, conduct, and administer' health, education, economic, and social programs that the Secretary otherwise would have administered." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 186 (2012) (alterations in original) (quoting 25 U.S.C. §450f(a)(1) (transferred to 25 U.S.C. §5321)). ISDEAA further authorizes tribes to enter into "compacts" with the government under which they may assume full funding and control over federal Indian programs. *See* 25 U.S.C. §5322. An Indian tribe with an ISDEAA compact is in a "government-to-government relationship" with "the United States" as a matter of law. *Id.* §5384; *see also* 25 C.F.R. §1000.161.

Given that Congress had only recently established ANCs as part of its distinct approach to Alaska Natives and their land claims, the question naturally arose during the congressional debates over ISDEAA whether ANCs would be included among the "Indian tribes" eligible to enter into ISDEAA contracts and compacts. In the initial draft of the legislation, ISDEAA's definition of "Indian tribe" made no explicit mention of ANCSA or ANCs. It instead defined "Indian tribe" as "an Indian tribe, band, nation, or Alaska Native community for which the Federal Government provides special programs and services because of its Indian identity." H.R. 6372, 93d Cong., §1 (1973). Later versions defined the term as "any Indian tribe, band, nation, or other organized group or community, including an 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." S. 1017, 93d Cong., §4 (1974). That formulation still left questions about the eligibility of ANCs.

During hearings before the House Subcommittee on Indian Affairs, a proposal was made to eliminate any ambiguity on that score by amending the definition to expressly include ANCs. In particular, the definition was amended to read as follows:

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village *or regional or village corporation* as defined in or *established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688)*, which is

> recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.]

Pub. L. No. 93-638, §4(b), 88 Stat. 2203, 2204 (1975) (emphasis added); *see Hearings Before the Subcommittee on Indian Affairs: S. 1017 and Related Bills*, 93d Cong., 2, 118 (May 20, 1974). The House Report explained that "[t]he Sub-committee amended the definition of 'Indian tribe' to include [the] regional and village corporations established by [ANCSA]." H.R. Rep. No. 1600 (1974). ISDEAA was ultimately enacted with that amended definition intact.

Consistent with Congress' express inclusion of ANCs in ISDEAA's definition, the Executive took the position from the outset that ANCs are "Indian tribes" under ISDEAA, and it has maintained that position ever since. *See, e.g.*, A137-38; 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993); A142-43 (2020 letter). The Ninth Circuit, home to every ANC, has long agreed with that view. *See Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471 (9th Cir. 1987). And ANCs have in fact entered into scores of ISDEAA contracts (and at least one compact), including many still in force today. *See, e.g.*, IHS*, Fiscal Year (FY) 2018 Report to Congress on Contract Funding of Indian Self-Determination and Education Assistance Act Awards*, https://bit.ly/2XKkNLI (last visited Oct. 20, 2020) (listing in-force agreements).

Congress has amended ISDEAA over the years, including, most notably, reenacting its definition of "Indian tribe" unchanged in 1988 (while adding and revising other ISDEAA definitions) years after the Executive confirmed the definition's inclusion of ANCs

and just one year after the Ninth Circuit affirmed that view in *Bowen*. *See, e.g.*, Pub. L. No. 100-472, 102 Stat. 2285 (1988). Moreover, Congress has borrowed or cross-referenced ISDEAA's definition of "Indian tribe" in upwards of 60 statutes over 45 years. *See, e.g.*, 25 U.S.C. §3104 note; *id.* §1801(a)(2); *id.* §1603(14); 20 U.S.C. §7011(6); 16 U.S.C. §4702(9); 12 U.S.C. §4702(12). In doing so, Congress has often made clear in the legislative text itself that it understands that ANCs are "Indian tribes" under ISDEAA.

For instance, the Indian Tribal Energy Development and Self Determination Act (ITEDSDA) generally provides that "[t]he term 'Indian tribe' has the meaning given the term in [ISDEAA]." 25 U.S.C. §3501(4)(A). But it also provides that "[f]or the purpose of" a few specified provisions, "the term 'Indian tribe' does not include any Native Corporation." *Id.* §3501(4)(B). That limited carve-out of ANCs for specified purposes makes sense only on the settled understanding that ANCs are Indian tribes under ISDEAA. More recently, Congress amended different provisions of that Act for the textually enumerated purpose of establishing a new "biomass demonstration project for federally recognized Indian tribes *and Alaska Native corporations* to promote biomass energy production." Pub. L. No. 115-325, §202(a), 132 Stat. 4445, 4459 (2018) (emphasis added). To effectuate that purpose, Congress defined "the term 'Indian tribe'" to "ha[ve] the meaning given the term in [ISDEAA]." *Id.* §202(c)(1)(B), 132 Stat. at 4461. Other statutes expressly carve out ANCs from a definition that is otherwise identical to ISDEAA's. *See*, *e.g.*, 42 U.S.C. §9601(36). There would be no need

to carve out ANCs expressly if they would not otherwise be included.

As these and other statutes reflect, Congress has long understood ISDEAA's definition to include ANCs and has often made that understanding clear in statutory text. At the same time, Congress has used very different formulations when it seeks to limit a definition of "Indian tribe" to FRTs. In the List Act, Pub. L. No. 103-454, 108 Stat. 4791 (1994), for example, Congress formalized the process for recognition of tribes having sovereign status by referencing recognition *by the Interior Secretary*. 25 U.S.C. §5130.

B. Procedural History

1. In response to the public health and economic crises wrought by the COVID-19 pandemic, Congress enacted the CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020). Title V appropriates $150 billion "for making payments to States, Tribal governments, and units of local government" to cover "necessary expenditures incurred due to the public health emergency," and reserves $8 billion for "Tribal governments." 42 U.S.C. §801(a), (d)(1). Title V delegated to the Treasury Secretary the authority to "determine[]" the "manner" of disbursals to Tribal governments and the responsibility "to ensure that" the $8 billion is "distributed to Tribal governments." *Id.* §801(c)(7).

Congress had many statutory definitions to choose from in defining "Indian Tribe" and "Tribal government" for purposes of Title V. Some definitions turn on formal recognition by the Interior Secretary. *See* 25 U.S.C. §5130(2). Others include Alaska Native

villages, but not ANCs. *See, e.g.*, 20 U.S.C. §4402(5); 25 U.S.C. §1903(8); 34 U.S.C. §10389(3). Eschewing those options, Congress expressly incorporated ISDEAA's definition, which had long been understood to include ANCs.

In particular, Congress defined "Tribal government" to "mean[] the recognized governing body of an Indian Tribe," 42 U.S.C. §801(g)(5), and defined "Indian Tribe" to have "the meaning" it has "in section 5304(e) of title 25"—*i.e.*, ISDEAA. *Id.* §801(g)(1). Putting the two definitions together, Title V reserves $8 billion for "the recognized governing body of" "any Indian tribe, … 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." *Id.*; 25 U.S.C. §5304(e).

2. Consistent with the Executive's longstanding interpretation of ISDEAA and Congress' selection of a definition of "Indian tribe" that expressly includes ANCs, the Treasury Department issued guidance on April 23, 2020, confirming ANCs' eligibility for Title V funds. A141-45. But before the Treasury Secretary could disburse any funds to ANCs—which by then had already expended considerable resources providing aid to Alaska Natives affected by the crisis—three sets of FRTs sued, challenging ANCs' eligibility for the funds.

After hearing only from the plaintiffs and the Secretary (but not ANCs) as parties, the district court entered a preliminary injunction prohibiting the Secretary from disbursing any Title V funds to ANCs.

A86-121. At that point, petitioners—several ANCs and the associations that represent them—successfully intervened to explain, *inter alia*, ANCs' unique role in Native life in Alaska generally and in distributing federal benefits to Alaska Natives in particular. Upon considering full briefing and a more complete record, the district court changed course, dissolved the injunction, and entered summary judgment for the Secretary and the ANCs.

As the court explained, "Congress took pains to include ANCs in the ISDEAA definition," adding them to a definition that already included the eligibility clause—*i.e.*, the proviso "which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." A189, 194. Reading the eligibility clause to implicitly exclude the ANCs that Congress expressly added to the statute would render that congressional effort nugatory. A199-201. Accordingly, the district court concluded, consistent with the longstanding positions of the Executive and the Ninth Circuit, that ANCs are "Indian tribes" for purposes of ISDEAA and thus eligible for Title V funds. The court entered summary judgment for the Secretary and ANCs but enjoined the Secretary from disbursing Title V funds to ANCs pending appeal. A217-22.

3. The D.C. Circuit reversed. It began by recognizing that "ANCs are eligible for Title V funding only if they qualify as an 'Indian tribe' under [ISDEAA]." App.11. While acknowledging that "ANCSA charged the new ANCs with … functions that would ordinarily be performed by tribal

governments" in the Lower 48, App.21, the court held that ANCs are not "Indian tribes" under ISDEAA.

The court recognized that the Executive has taken the contrary position for over 40 years, since ISDEAA was first enacted. It also acknowledged that it was "declin[ing] to follow" the Ninth Circuit, which "accepted [the government's] interpretation" of ISDEAA as encompassing ANCs in *Bowen*. App.25. The court rejected the ANCs' argument that they satisfied ISDEAA's eligibility clause, instead electing to construe the word "recognized" as a "term of art" reference "to a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." App.13-14. The court thus construed the eligibility clause as limited to tribes formally recognized by the Interior Secretary as sovereign pursuant to the List Act, but nonetheless concluded that the clause modifies ANCs, which are categorically ineligible for List Act recognition—with the net effect of reading ANCs out of the ISDEAA definition altogether. *See* App.13 ("Because no ANC has been federally 'recognized' as an Indian tribe, … no ANC satisfies the [ISDEAA] definition.").

So construed, ISDEAA's definition implicitly *excludes* every ANC despite text explicitly *including* them. The court waved away that glaring superfluity problem by maintaining that "it was highly unsettled in 1975, when [ISDEAA] was enacted, whether Native villages or Native corporations would ultimately be recognized" as sovereign tribes. App.19. The court thus posited that the inclusion of ANCs "does

meaningful work by extending [ISDEAA's] definition of Indian tribes to whatever Native entities ultimately were recognized—even though, as things later turned out, no ANCs were recognized." App.19. The court did not address post-1975 developments that made clear that Congress has repeatedly used the ISDEAA definition with the understanding, often textually expressed, that it included ANCs even after ANCs' ineligibility for formal List Act recognition was established.

Judge Henderson concurred. "It is indisputable," she acknowledged, "that the services ANCs provide to Alaska Native communities—including healthcare, elder care, educational support and housing assistance—have been made only more vital due to the pandemic." App.27. She therefore could "think of no reason that the Congress would exclude ANCs (and thus exclude many remote and vulnerable Alaska Natives) from receiving and expending much-needed Title V funds." App.28. In her estimation, Congress "must have had reason to believe" that ISDEAA's definition "would include ANCs," or it would not have expressly incorporated that definition into Title V. App.28. Yet she nonetheless "join[ed her] colleagues in full," while acknowledging the "harsh result" the decision produced. App.27-28.[1]

---

[1] The appropriation in Title V is "for fiscal year 2020," 42 U.S.C. §801(a)(2)(B), which ended September 30, 2020. While all parties agreed that the Secretary could still expend funds after that date, *see, e.g.*, *City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994), in an abundance of caution, the D.C. Circuit entered a post-decision order "suspend[ing]" "any expiration of the appropriation … set forth in 42 U.S.C. 801(a)(2)(B) … until seven days after final action by [this Court],"

REASONS FOR GRANTING THE PETITION

The decision below openly rejects the longstanding view of the Ninth Circuit and the settled administrative construction of a definition that recurs in dozens of federal statutes and profoundly affects the day-to-day life and well-being of Alaska Natives. It creates an open, acknowledged, and practically untenable circuit split. ANCs are now eligible to participate in dozens of federal programs for Native Americans in their home circuit where aid is actually distributed, yet ineligible for those same programs in the D.C. Circuit where the funds for those programs are disbursed. The resulting situation is entirely unworkable. The alternative to this Court's review is ANCs seeking declaratory judgments of eligibility in the Ninth Circuit, while FRTs file suit in the D.C. Circuit seeking to block ANC participation with respect to program after program. That alternative has nothing to recommend it, especially because the decision below is deeply flawed.

Although the decision below purports to be based on statutory text, it vitiates the single most obvious feature of that text—namely, Congress' express inclusion of ANCs in ISDEAA's definition of "Indian tribe." The panel defeated that express inclusion based on an implication drawn from the eligibility clause's use of "recognized," which the panel interpreted as a term-of-art reference to the formal federal recognition process for sovereign tribes. But if, in 1975, Congress had wanted to limit ISDEAA to

---

on the condition that the government or the ANCs file "a petition for … a writ of certiorari" by October 30, 2020. App.30.

FRTs, it would have simply said so. Instead, Congress expressly included the ANCs it had only recently established in ANCSA in the ISDEAA definition. And it did so by adding ANCs to a definition that already included the eligibility clause. Congress thus plainly did not understand that clause to defeat its express inclusion of ANCs. If the eligibility clause is interpreted according to its ordinary meaning, then ANCs plainly satisfy it, as they have been recognized as appropriate Native entities to distribute federal funds earmarked for Natives going back to ANCSA. And if that clause is given a term-of-art meaning that usefully differentiates among traditional tribes, but would oust every ANC from the statute despite their express inclusion, then it is just as plainly inapplicable to ANCs. The decision below has no adequate response for negating Congress' express decision to include ANCs and has nothing at all to say about subsequent statutes that incorporate the ISDEAA definition while textually indicating an intent that ANCs participate.

The disruptive practical effect of the decision below on Native life in Alaska is hard to overstate. The amicus participation of the Alaska Federation of Natives, which represents all Alaska Native organizations, including FRTs, in Alaska, and the Alaska Congressional Delegation underscores that ANCs' eligibility under ISDEAA and the programs that incorporate its definition is an ingrained feature of reality in Alaska, not an abstraction. Given the unique history of Alaska and Alaska Natives, there are tens of thousands of Alaska Natives that have an ANC-affiliation but no FRT-affiliation. That does not make them any less an Alaska Native or any less

eligible for special federal programs. It simply reflects the lack of reservations in Alaska and Congress' distinctive approach in ANCSA. In a world without ISDEAA, such Alaska Natives would be served by a facility operated directly by a federal agency. In a world with ISDEAA, those functions are discharged by Native entities—and, in Alaska, those Native entities include ANCs. In some urban areas, ANCs take the lead in distributing medical care and other federal benefits. In more rural areas, where most Natives are affiliated with both a federally recognized Native village and an ANC, ANCs may serve a complementary role. Either way, ANCs play a critical day-to-day role in providing the services and distributing the benefits most needed in a pandemic to a population with disproportionate risk factors. Thus, it was entirely sensible for Congress to make CARES Act funds available to ANCs. By deeming ANCs ineligible under ISDEAA, the decision below not only precludes that desperately needed aid, but upsets the entire infrastructure of Native life in Alaska.

I. The Decision Below Creates An Open And Acknowledged Circuit Split.

1. For more than three decades, it has been settled law in the Ninth Circuit—home to every ANC—that ANCs are Indian tribes within the meaning of ISDEAA. *See Bowen*, 810 F.2d at 1473-76. The plaintiff in *Bowen* was Cook Inlet Native Association (CINA), which was not an ANC, but "an Alaska non-profit corporation" that "had contracted with the BIA and IHS to provide health and education assistance programs" to Alaska Natives before ISDEAA was enacted. *Id.* at 1472-73. The principal non-federal

defendant was an ANC, Cook Inlet Region, Inc. (CIRI). *Id.* at 1473. CINA sued seeking, *inter alia*, a declaratory judgment that "that CIRI is not an Indian tribe under [ISDEAA]." *Id.*

Similar to some, but not all,[2] of the plaintiffs in this case, CINA "assert[ed] that CIRI cannot meet the eligibility requirement included in [ISDEAA's] definition of Indian tribe," arguing that "to be a tribe, [a] corporation must 'be recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.'" *Id.* at 1473-74 (citation omitted). CINA further argued "that recognizing CIRI as a tribe" pursuant to ISDEAA would "subvert[] the intent of Congress and the purposes and policies underlying the … Act." *Id.* at 1473. The Ninth Circuit rejected that argument.

The court first observed that "statutes should not be interpreted to render one part inoperative" or "to defy common sense." *Id.* at 1474. Yet CINA's position would do just that, for "CINA illogically construes the language to mandate a result in one clause, only to preclude that result in the next clause." *Id.* Rather than embrace that nonsensical result, the court

---

[2] In district court, one group of plaintiffs conceded that at least some ANCs qualify as "Indian tribes" under ISDEAA, but argued that ANCs nonetheless lack "Tribal governments" for purposes of Title V of the CARES Act. *See* Pls. Cheyenne River Sioux Tribe et al.'s Mem. in Supp. of Joint Mot. for Summ. J. 4, 11, 18. No court has accepted that argument, which is difficult to square with the reality that Title V defines "Indian Tribe" by reference to ISDEAA for the sole purpose of informing the definition of "Tribal government." Nonetheless, the fact that even some plaintiffs conceded that ANCs qualify as Indian tribes under ISDEAA underscores the prevalence of that understanding.

deferred to the Executive's "consistent" position that the eligibility clause does not implicitly negate Congress' express inclusion of ANCs in ISDEAA's definition. *Id.* The Ninth Circuit emphasized that in the immediate wake of ISDEAA's enactment, the Assistant Solicitor for Indian Affairs concluded that "[b]ecause [ANCs] are expressly mentioned in the definition," and "customary rules of construction support their recognition as tribes under [ISDEAA]," the eligibility clause was best read to "modify only the words 'any Indian tribe, band, nation, or other organized group or community,'" not the language expressly including ANCs. *Id.*

The Ninth Circuit concluded that treating ANCs as included in the ISDEAA definition was "reasonable, and consistent with the statutory language and legislative history," particularly because the eligibility clause "was in the law *before* the reference to the native corporations" was added. *Id.* at 1475-76 (emphasis added). As the court explained, "the definition in the original bill included the eligibility clause but did not mention" ANCs. *Id.* at 1474-75 (footnote omitted). "Specific reference to Alaska village and regional corporations was added" later, when the eligibility clause already "was in the law." *Id.* at 1475. Reading the eligibility clause to nullify the addition of language explicitly including ANCs would therefore negate Congress' deliberate effort to include ANCs. *Id.*

Turning to CINA's policy argument that for-profit entities should not be treated as tribes, the court found it notable that ANCs "formed pursuant to" ANCSA "were established to provide maximum participation

by Natives in decisions affecting their rights and property," and to promote Native interests. *Id.* at 1476. "More important, the plain language of" the ISDEAA definition allows "corporations created under [ANCSA] to be recognized as tribes." *Id.* The Ninth Circuit has subsequently affirmed and consistently maintained its holding in *Bowen*. *See, e.g.*, *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 988 (9th Cir. 1999).

2. The D.C. Circuit reached the exact opposite result below, holding that ANCs are not and have never been "Indian tribes" under ISDEAA. In doing so, the court openly acknowledged that it was "declin[ing] to follow" the Ninth Circuit's *Bowen* decision. App.25. The two decisions conflict at every turn. Whereas *Bowen* concluded that "the plain language of the statute" encompasses ANCs, that "common sense" and the anti-superfluity canon buttress that conclusion, and that the Executive's longstanding interpretation is reasonable and entitled to deference, 810 F.2d at 1473-76, the D.C. Circuit held that the plain language of the statute *excludes* ANCs, and it expressly "reject[ed] the government's plea for deference" to its long-held view. App.24.

The resulting split between the Ninth Circuit, home to every ANC, and the D.C. Circuit, home to the federal government, is completely untenable. Not only does it involve the only two circuits where this issue is likely to arise, but it involves two circuits that could claim jurisdiction over almost any dispute over the inclusion of ANCs in a federal program employing the ISDEAA definition. As to any of the dozens of federal statutes employing that definition, ANCs could obtain

a declaration of eligibility within the Ninth Circuit based on *Bowen* and its progeny. For each of those same programs, an FRT could secure a declaration of ineligibility in the D.C. Circuit based on the decision below. Simply put, ANCs cannot simultaneously be "Indian tribes" under ISDEAA in the Ninth Circuit but not "Indian tribes" under ISDEAA in the D.C. Circuit, when virtually all actions relating to ANCs are subject to the jurisdiction of both. Only this Court can redress that untenable dynamic and settle the status of ANCs under ISDEAA once and for all.

II. The Decision Below Is Wrong.

This Court's review is all the more critical because the decision below is deeply flawed. While the decision purports to be based on the statutory text, it negates the single most obvious feature of the text—Congress' express inclusion of ANCs. ANCs are a unique Native entity that Congress itself established just four years before it enacted ISDEAA. It defies logic and sound statutory construction to negate Congress' express inclusion of ANCs by reading a subsidiary clause as requiring a formal recognition of sovereignty that is unavailable to ANCs. As the Ninth Circuit recognized, "constru[ing]" ISDEAA's definition "to mandate a result in one clause, only to preclude that result in the next clause," would "defy common sense." *Bowen*, 810 F.2d at 1474. If Congress simply wanted to limit ISDEAA to FRTs, it would have written a very different, much shorter definition that omitted any mention of ANCs. Instead, Congress not only deliberately added ANCs to ISDEAA, but has incorporated ISDEAA and its ANC-inclusive definition in statute after statute long after ANCs'

eligibility for ISDEAA contracts and ineligibility for List Act recognition was settled, often textually indicating its intent to include ANCs. The decision below ignores all that, ousts ANCs from ISDEAA, and renders them ineligible for dozens of federal programs, including desperately needed CARES Act funds.

A. Congress Plainly Meant What It Said When It Expressly "Includ[ed]" ANCs in ISDEAA's Definition of "Indian Tribe."

Congress answered the basic statutory-interpretation question here by expressly including ANCs in ISDEAA's definition of "Indian tribe." ISDEAA 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 (85 Stat. 688)*, 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) (emphasis added). Under a straightforward reading of that text, it plainly includes ANCs.

First and most obviously, the definition *explicitly includes ANCs*—indeed, it does so in a clause expressly designed to be inclusive. No one has ever disputed that the phrase "including any … regional or village corporation … established pursuant to the Alaska Native Claims Settlement Act" refers to ANCs and nothing else. ANCs are unique and sui generis

Native entities established by Congress just four years before ISDEAA in the expressly cross-referenced ANCSA. Their express inclusion in ISDEAA's definition is compelling evidence that nothing in ISDEAA, including the eligibility clause, categorically excludes ANCs. It would have made no sense for Congress to go out of its way to specify that the term "Indian tribe" "includ[es]" ANCs if they were categorically excluded by the only other element of the definition. And make no mistake, the contrary interpretation urged by plaintiffs and adopted by the court below has just that effect: The universe of ANCs, which are FRTs, is the null set. Thus, the decision below does not read the eligibility clause to weed out a subset of ANCs; it reads that clause to exclude *each and every ANC established pursuant to ANCSA*, despite their express inclusion in the definition.

The drafting history of ISDEAA's definition strongly reinforces the inclusive import of the text, for ANCs were added to proposed text that *already* included the eligibility clause. Thus, the Congress that enacted ISDEAA plainly thought either that ANCs satisfied the eligibility clause or that it was inapplicable to them. It plainly did not think its express addition of ANCs to language that already featured the eligibility clause was an empty gesture or a hedge against the possibility that a few recently established, sui generis Native corporations might qualify as FRTs. Indeed, the House Report matter-of-factly explained that the definition was amended "to include [the] regional and village corporations established by the Alaska Native Claims Settlement Act." H.R. Rep. No. 1600.

Consistent with that understanding, ANCs have in fact entered into ISDEAA contracts for "the programs and services provided by the United States to Indians because of their status as Indians" since ISDEAA's inception—indeed, they have entered into scores of ISDEAA contracts with multiple federal agencies over the past four decades. *See, e.g.*, IHS, *Fiscal Year (FY) 2018 Report*, *supra*. That is particularly true in urban areas where there are many Alaska Natives with an ANC-affiliation but without any other tribal affiliation, based in part on the paucity of reservations in Alaska (as Congress well understood and reinforced in enacting ANCSA).

Moreover, Congress reenacted ISDEAA's definition of "Indian tribe" in 1988 without alteration, while making other changes to ISDEAA's definitional section, long after the Executive had made clear ANCs were "Indian tribes" for ISDEAA purposes and just one year after the Ninth Circuit adopted that view. *See* Pub. L. No. 100-472, §103, 102 Stat. 2285 (1988). That 1988 reenactment makes ANCs' actual participation in ISDEAA and the consistent views of the Executive and Ninth Circuit after ISDEAA's initial 1975 enactment highly relevant and underscores Congress' consistent understanding that ANCs are "Indian tribes" under the ISDEAA definition. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) (a "uniform interpretation by inferior courts [and] the responsible agenc[ies]" "is presumed to carry forward" when Congress reenacts statutory text without change); *FDIC v. Phila. Gear Corp.*, 476 U.S. 426, 437 (1986).

Congress has repeatedly enacted legislation confirming that understanding in the statutory text. For instance, as discussed, *see supra* p.9, ITEDSDA defines "Indian tribe" as having "the meaning given the term in [ISDEAA]" as a general matter, but it excludes "any Native Corporation" for certain specified provisions. 25 U.S.C. §3501(4). That express exclusion would be nonsensical if ANCs were already excluded by operation of the eligibility clause. Similarly, CERCLA employs a definition that is otherwise identical to ISDEAA's (including the eligibility clause), except that it *excludes* ANCs for all purposes. 42 U.S.C. §9601(36). There would be no reason to expressly exclude ANCs if the eligibility clause already did that work. More recently, in 2018, Congress employed ISDEAA's definition in an amendment to ITEDSDA, *see* Pub. L. No. 115-325, §202(c)(1)(B), 132 Stat 4445, 4461 (2018), while expressing, in the statutory text, its objective of establishing "a biomass demonstration project for federally recognized Indian tribes *and Alaska Native corporations*," *id.* §202(a), 132 Stat. at 4459 (emphasis added). Thus, long after ANCs' ineligibility for formal recognition via the List Act process was settled, Congress continued to employ the ISDEAA definition with the express understanding that it included ANCs.

As these and other statutes reflect, Congress has long shared the view of the Executive and Ninth Circuit that ANCs qualify as "Indian tribes" under ISDEAA—which is unsurprising since that is what the statute says. Congress presumably shares that view because ANCs satisfy the ordinary meaning of the eligibility clause; they are "recognized" by

Congress itself in ANCSA and by multiple federal agencies "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), and in fact participate in such programs routinely. Or perhaps Congress views the eligibility clause as a term-of-art reference to formal recognition that is useful in weeding out some would-be-sovereign tribes, but is simply inapplicable to the sui generis Native corporations established by ANCSA. Either way, there can be no serious dispute that Congress shares the heretofore-settled view that ANCs come within ISDEAA's definition of "Indian tribe."

In sum, statutory text, context, and history confirm the same conclusion: Congress meant what it said when it expressly stated that ISDEAA's definition of "Indian tribe" "includ[es] Alaska Native … regional [and] village corporation[s] … established pursuant to [ANCSA]." 25 U.S.C. §5304(e).

B. The D.C. Circuit's Contrary View That Congress Negated Its Express and Intentional Inclusion of ANCs via the Eligibility Clause Is Untenable.

Rather than give Congress' express inclusion of ANCs in ISDEAA's definition its self-evident effect, the D.C. Circuit concluded that ISDEAA's eligibility clause—and really just one word in that clause, "recognized"—sufficed to categorically oust every ANC from the statute and disqualify them for desperately needed pandemic-relief funds. According to the D.C. Circuit, "recognized" is a "term of art" in Indian law that "refers to a formal political act confirming the tribe's existence as a distinct political society, and

institutionalizing the government-to-government relationship between the tribe and the federal government." App.14. Since Native corporations established by Congress cannot satisfy that term-of-art concept of recognition, no ANC satisfies ISDEAA's definition, despite Congress' decision to expressly include them.

That reasoning fails at every turn. It renders much of ISDEAA's definition, and all of its express references to ANCs, superfluous. Moreover, there is no basis to conclude that Congress used the term "recognized" or the balance of the eligibility clause in anything other than their ordinary meanings. And even if Congress used "recognized" as a term-of-art reference to FRTs, the logical conclusion would be that the term-of-art qualifier would simply be inapplicable to sui generis Native corporations that Congress only recently established by a separate statute that is expressly cross-referenced in ISDEAA.

1. First and foremost, the D.C. Circuit's decision makes Congress' inclusion of ANCs entirely superfluous. "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Wash. Mkt. Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879); *accord, e.g.*, *Nielsen v. Preap*, 139 S.Ct. 954, 969 (2019); Scalia & Garner, *supra*, at 174. That rule has particular force, moreover, when an alternative construction would render "the express inclusion" of an item in a definitional list a nullity. *See, e.g.*, *Burgess v. United States*, 553 U.S. 124, 132 (2008). Yet under the court of appeals' reading, Congress' express inclusion of ANCs in ISDEAA's definition was a fool's errand, for

ANCs categorically fail to satisfy the D.C. Circuit's term-of-art conception of "recognized."

The court of appeals tried to explain away this glaring superfluity problem by hypothesizing that while ANCs were not "recognized" as "sovereign Indian tribe[s]" when ISDEAA was enacted, there might have been some confusion about ANCs' status, and Congress might have wanted to preserve their eligibility on the off-chance that an ANC was ultimately recognized as a sovereign tribe. App.14-15. But that speculation is squarely refuted both by the contemporaneous evidence of Congress' *actual* intent in "including" ANCs and by the scores of subsequent federal statutes that would make no textual sense based on the D.C. Circuit's misguided reading.

As for the contemporaneous evidence, the court of appeals ignored the reality that Congress itself established ANCs in ANCSA in 1971. While there may have been some lingering questions four years later when it enacted ISDEAA about exactly how Alaska Native entities would interact in administering federal programs for Native Americans, Congress could not have thought that the unique Native corporations it had just established could satisfy the D.C. Circuit's narrow conception of sovereign recognition, which since "at least 1936" has turned significantly on a tribe's "historic" status. *Rosales v. Sacramento Area Dir.*, 32 IBIA 158, 165 (1998). Moreover, when Congress expressly added ANCs to proposed statutory language that already included the eligibility clause and its reference to recognition, it did not indicate that it was doing so on the off-chance that some subset of ANCs might

someday qualify for full-blown sovereign recognition. Instead, the House Report matter-of-factly explained that it made the change "to include [the] regional and village corporations established by the Alaska Native Claims Settlement Act." H.R. Rep. No. 1600.

The D.C. Circuit's theory is equally contradicted by Congress' subsequent actions. As noted, Congress reenacted ISDEAA's definition of "Indian tribe" verbatim in 1988, *after* both the Executive and Ninth Circuit had confirmed that the definition included ANCs. It also *twice* amended ITEDSDA in ways that make textually obvious that it understood ANCs to satisfy ISDEAA's definition of "Indian tribe." *See supra* p.9. Those actions long post-dated any possible confusion about whether ANCs could satisfy the D.C. Circuit's narrow conception of recognition.

2. The decision below suffers a more basic defect: It is premised on the mistaken view that Congress always uses the term "recognized" in Indian law as a term-of-art reference to sovereign status or List Act recognition. In fact, Congress has routinely used the term "recognized" (and even "federally recognized tribe") in ways that are impossible to reconcile with the D.C. Circuit's narrow, term-of-art construction.

For example, a mere two years after it enacted the List Act, Congress enacted the Native American Housing Assistance and Self-Determination Act (NAHASDA), Pub. L. No. 104-330, 110 Stat. 4016 (1996) (codified as amended at 25 U.S.C. §§4101-4212), to "help[] tribes and their members to improve their housing conditions and socioeconomic status," 25 U.S.C. §4101(5). NAHASDA includes the following definitional provision:

> The term "federally recognized tribe" means 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 [ISDEAA]*.

Id. §4103(13)(B) (emphases added). ANCs have long participated in NAHASDA, and many ANCs continue to play a critical role in NAHASDA programs today. *See* 24 C.F.R. §1000.302(4) (expressly including "regional corporation[s]," *i.e.*, ANCs, in the block grant formula).

By the D.C. Circuit's logic, however, not only would those grants seem to be impermissible, but NAHASDA would seem utterly incomprehensible. If anything is a "term of art" in Indian law, it is the phrase "federally recognized tribe," not the mere word "recognized." Indeed, if "recognized" always meant "federally recognized tribe," the latter phrase would be hopelessly redundant. Yet, in NAHASDA, Congress not only used that phrase, but expressly defined it to include ANCs. That does not mean that ANCs are "federally recognized tribes" for all purposes, but it does strongly caution against reading a term like "recognized" as having a common term-of-art meaning whenever it appears in a statute addressing Indian law. And the problems with NAHASDA under the court of appeals' approach do not end there. Congress passed NAHASDA after the List Act and after ANCs'

ineligibility for List Act recognition was settled, yet Congress plainly wanted ANCs to be eligible for NAHASDA and plainly thought their eligibility under ISDEAA was settled. Moreover, Congress thought that tribes could be "recognized as eligible … pursuant to ISDEAA." Thus, NAHASDA plainly does not use "recognized" as a term-of-art reference to formal recognition under the List Act, and there is no more reason to think that ISDEAA used the word in that term-of-art sense.

That is especially so because of ISDEAA's drafting history. While the Senate version of ISDEAA used the term "recognized," the eligibility clause in the House version simply references Native entities "for which the Federal Government provides special programs and services because of its Indian identity." H.R. 6372, 93d Cong., §1 (1973). While Congress ultimately adopted the Senate version of the eligibility clause with its reference to "recognized," there is no indication that Congress thought that the difference in language was substantive, let alone that the use of the word "recognized" had the extraordinary effect of negating Congress' later decision to include ANCs in the definition.

The court of appeals' reading is also at odds with the formulations used in statutes that *do* incorporate the List Act or are limited to FRTs. Those statutes typically do not employ an ambiguous and passive reference to "recognized," but refer to "recognition" or "acknowledgment" "*by the Secretary*," *e.g.*, 42 U.S.C. §5122(6) (emphasis added). For example, the Indian Gaming Regulatory Act (IGRA) defines "Indian tribe" to mean a group "recognized as eligible *by the*

Secretary," 25 U.S.C. §2703(5)(A) (emphasis added), which has been recognized as "a key qualifier." *Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 918 F.3d 610, 616 (9th Cir. 2019).

Finally, the court of appeals' construction of the ISDEAA definition as limited to FRTs prompts the question why Congress did not simply define "Indian tribes" as "federally recognized tribes," or "tribes recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." After all, given the court of appeals' construction of the eligibility clause, there was no reason for Congress to have any other clause in the ISDEAA definition and certainly no reason to reference ANCs. The D.C. Circuit thus converted the subsidiary eligibility clause into the only operative portion of the definition. It is not like there is an entity that is a FRT but is not a "band" or "community" of Natives. In reality, Congress in 1975 enacted more than an eligibility clause, and it expressly cross-referenced ANCSA and expressly included ANCs in the definition. It reenacted that definition in 1988 after ANCs participation in ISDEAA was apparent and Ninth-Circuit approved, and in 2020, long after ANCs' ineligibility for List Act recognition was settled, Congress chose that ANC-inclusive ISDEAA definition in lieu of definitions that expressly limit the universe of tribes to FRTs. That express congressional choice has to be given effect.

3. As even that small sampling of the complex body of Indian law drives home, "[t]here is no universally recognized legal definition of the phrase ['Indian tribe'], and no single federal statute defining

it for all purposes." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272 (9th Cir. 2004). Nor is there any single way in which Congress employs the word "recognized," for while the List Act may make clear how an entity becomes "recognized" as a "sovereign Indian tribe" "by the Secretary," statutes like ITEDSDA and NAHASDA make clear that "recognized" does not always have that term-of-art meaning. Those differences are not owing to poor drafting or confusion on Congress' part. They reflect instead that Congress understands that no one-size-fits-all approach is appropriate for all federal programs or can account for the disparate circumstances and history of Alaska Natives.

There is no better illustration of that than ANCSA, in which Congress concluded that the tribal reservation system employed in the Lower 48 was a poor fit for Alaska Natives. Yet Congress specifically amended ANCSA to make crystal clear that its unique approach to the institutions serving Alaska Natives was not intended to box Alaska Natives out of benefits available to members of tribes in the Lower 48, declaring that "Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans" "[n]otwithstanding any other provision of law." Pub. L. No. 100-241, §15(d), 101 Stat. 1788, 1812 (1988) (codified at 43 U.S.C. §1626(d)). The decision below, however, has just that effect and would penalize the thousands of Alaska Natives who rely on ANCs for many of the same critical services that other Native Americans receive from tribes simply because Congress and Alaska Natives declined to embrace a reservation model for Alaska.

III. The Question Presented Is Exceptionally Important.

The decision below has fallen upon Alaska as a profound shock. Its devastating and unsettling effect on Alaska Natives and their institutions starts, but by no means ends, with desperately needed emergency-relief funds to combat the ongoing pandemic. "It is indisputable that the services ANCs provide to Alaska Native communities—including healthcare, elder care, educational support and housing assistance—have been made only more vital due to the pandemic," which, unfortunately, "has disproportionately affected American Indian and Alaska Native communities." App.27. Yet despite that disproportionate suffering, ANCs have not received a single penny of Title V funds because of this lawsuit.

And, to be clear, the victims of shutting out ANCs from Title V funds are not ANCs themselves, but the Alaska Natives they serve. The critical role that ANCs play in delivering services to Alaska Natives, even in ordinary times, is a direct result of Alaska's unique history and Congress' innovative approach in ANCSA. Unlike in the Lower 48, where reservations are prevalent and some reservation tribes have substantial infrastructure, Alaska lacked extensive reservations, and Congress eschewed their creation in ANCSA. Instead, Congress established ANCs and understood that many Alaska Natives would have an ANC-affiliation but no village affiliation, especially in urban areas. Moreover, even in rural areas settlement funds were vested in ANCs, and so distributing benefits became a shared enterprise with important components of the infrastructure in the hands of

ANCs. Thus, as a practical matter in Alaska, many of the services most needed in the current crisis, from medical and educational to financial and logistical, are services provided by ANCs. Congress' decision to use an expressly ANC-inclusive definition in Title V of the CARES Act was thus perfectly understandable, and cutting ANCs out of the ISDEAA definition and thus Title V directly frustrates Congress' effort to get emergency-relief funds to Alaska Natives.

The court below expressed "confiden[ce] that, if there are Alaska Natives uncared for because they are not enrolled in any recognized village, either the State of Alaska or the Department of Health and Human Services will be able to fill the void." App.26. That confidence is misplaced, for there is no existing mechanism through which the Treasury Secretary could move Title V funds initially earmarked for ANCs to the State or HHS. Leaving the decision below standing thus would mean that thousands of Alaska Natives will never receive *any* federal emergency assistance at all—in defiance of ANCSA's clear mandate that all "Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans." 43 U.S.C. §1626(d).

But the decision below does far more than cut off ANCs—and, by extension, the Alaska Natives who rely on them—from much-needed emergency-relief funds. Dozens of federal statutes incorporate ISDEAA's definition of "Indian tribe," which has always been understood by the Executive (and the Ninth Circuit) to authorize ANC participation. And the D.C. Circuit went out of its way to rely on ISDEAA, rather than any language unique to the CARES Act,

in reading ANCs out of the law. By ruling on the broadest possible grounds, the D.C. Circuit had the greatest possible unsettling effect on reliance interests and the basic infrastructure of how Alaska Natives participate in dozens of federal programs. To be sure, ANCs remain eligible for all those programs under the Ninth Circuit's *Bowen* decision. But the decision below provides an invitation to go to the source of all those federal programs and seek to preclude ANCs' participation, contrary to long-settled expectations. Leaving that circuit split in place is untenable, and if such a fundamental reordering of Alaska Native life is to come from any court, it should be this Court.

Even Judge Henderson conceded there was "no reason" to think that Congress intended to "exclude ANCs (and thus exclude many remote and vulnerable Alaska Natives)" from the suite of special federal Indian programs that incorporate ISDEAA's definition. App.28. To the contrary, Congress enacted statute after statute incorporating ISDEAA's definition with the clear understanding that it was including ANCs. The practical reality on the ground reflects Congress' evident intent. The decision below casts all those settled expectations and reliance interests aside based on a misguided statutory construction in avowed conflict with decades of agency construction and law from the ANCs' home circuit. That profoundly unsettling decision is wrong and fully merits this Court's plenary review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
RAGAN NARESH
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioners

October 21, 2020