Nos. 20-543, 20-544

In The Supreme Court of the United States

STEVEN T. MNUCHIN, Secretary of the Treasury,

Petitioner,

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.,

Respondents.

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

Petitioners,

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE STATE OF ALASKA IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE STATE OF ALASKA[1]

The State of Alaska has a strong interest in ensuring that all of its Alaska Native citizens receive the critical coronavirus relief funds that Congress intended for them. Congress set aside $8 billion of CARES Act relief funds for "Indian Tribes" to help "Indians because of their status as Indians." 42 U.S.C. § 801(a), (g); 25 U.S.C. § 5304(e). But the D.C. Circuit's decision will harm large segments of Alaska's Native populations: specifically, those who either do not belong to any federally recognized tribe or who, primarily because of where they live, do not access services through a tribe, and instead rely on ANCs. Under the D.C. Circuit's decision, these Alaskans are excluded from the benefit of these COVID-19 relief funds, a stunning result that is especially egregious given that Natives appear to be disproportionately affected by COVID-19. Congress simply did not intend to exclude Alaska Natives who access services through ANCs from benefiting from CARES Act relief funds. To the contrary, Congress defined "Indian Tribe" to specifically include both federally recognized tribes *and* ANCs in order to bring *all* Alaska Natives under the umbrella of the CARES Act's critical assistance. The State of Alaska therefore has an immediate concern in assuring these CARES Act funds are provided to the

[1] The filing of this brief satisfies the notice requirements of this Court's Rule 37.

State's sizable Native population through both the tribes and the ANCs that serve them.

In addition to this immediate concern, the State of Alaska has a concomitantly strong interest in ensuring that the federal government fulfills its obligations and longstanding commitments to Alaska Natives. Specifically, the State has a profound interest in assuring that ANCs and their delegees can continue to contract—as they have been doing for the past forty-five years—with the federal government for critical social, health, and human services. The D.C. Circuit's opinion concluded that ANCs are not "Indian tribes" as defined under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. § 5301 *et seq*. This erroneous conclusion has implications beyond the CARES Act context, threatening the validity of contracts with the federal government to provide critical services to Alaska Natives as well as the fulfillment of the federal government's trust responsibilities to Alaska Natives.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress passed the CARES Act in 2020, it included ANCs as "Indian Tribes" that were eligible to receive Title V relief funding related to the ongoing coronavirus pandemic. Congress did not limit its definition of "Indian Tribe" to only "federally recognized tribes"—that is, tribes that are identified in an annual

list published by the Secretary of Interior pursuant to the List Act, 108 Stat. 4791 (1994). A bipartisan Congress instead chose the broader definition from the Indian Self-Determination and Education Assistance Act (ISDA), which expressly includes ANCs. 42 U.S.C. § 801(g); 25 U.S.C. § 5304(e). All three members of Alaska's congressional delegation confirm that Congress deliberately chose this definition from ISDA so that ANCs would be included. *See Amici Br. of Murkowski, Sullivan, and Young*. Judge Henderson of the D.C. Circuit also recognized in her concurrence that Congress "must have had reason to believe" that the definition it chose included ANCs. App-28.

The D.C. Circuit nevertheless subverted this express legislative intent by precluding ANCs from receiving CARES Act relief funding. When faced with two plausible grammatical interpretations of the term "Indian tribe," the D.C. Circuit chose the interpretation that is ahistorical, most textually strained, and clearly not what Congress intended. The D.C. Circuit decision departs from forty-five years of uniform federal practice and Ninth Circuit precedent affirming that ANCs qualify as "Indian tribes" for purposes of ISDA contracting. This decision is harmful not only in that it takes away CARES Act funding from ANCs—and thus from some of the hardest-hit Alaskans in this pandemic—but also in that it serves as precedent to undermine current and future federal contracts with ANCs for social and health services and programs outside the CARES Act context.

The State of Alaska writes to highlight the infirmities of that decision in three respects.

First, historical context demonstrates that when Congress created ANCs, it *never* intended that ANCs would be "recognized" as separate sovereign political bodies, but it *always* intended that ANCs would provide Alaska Natives with health and social services. This history is important because the D.C. Circuit's interpretation of "Indian tribe" hinges on the assertion that "it was highly unsettled in 1975, when [ISDA] was enacted, whether Native villages *or Native corporations* would ultimately be recognized."[2] App-19 (emphasis added). This assertion is inconsistent with the historical record.

Second, for the past forty-five years, all three branches of the federal government have construed "Indian tribes" under ISDA to include ANCs, but the D.C. Circuit ignored this established landscape and the settled expectations that have grown up around it. For the past forty-five years, ANCs—by virtue of their inclusion as "Indian tribes" under ISDA—have been providing federally-funded health, education, housing, and social services and programs to Alaska Natives throughout the State. It is within this well-established and uninterrupted context that Congress, in crafting the CARES Act, chose to use ISDA's familiar definition

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[2] The term "Native village" came initially from the Alaska Native Claims Settlement Act (ANCSA), which defined Native village as "any tribe, band, clan, group, village, community or association in Alaska" that was listed in the Act and met certain requirements. ANCSA § 3(c) (43 U.S.C. § 1602(c)).

of "Indian tribe" instead of a different statutory definition that would exclude ANCs. The D.C. Circuit nevertheless focused only on what it speculated Congress was doing in 1975 when it passed ISDA. The correct focus is on what Congress was doing in 2020, when it passed the CARES Act.

Finally, the D.C. Circuit's "confiden[ce]" in the State of Alaska's or the United States Department of Health and Human Services' ability "to fill the void" in immediately assisting the Alaska Natives who are served by the ANCs rather than federally recognized tribes is misplaced. App-26. The State is not responsible for fulfilling the federal government's trust responsibilities. Nor is it financially or administratively capable of suddenly providing the programs and services ANCs and other "Indian tribes" have long provided. Congress and the Treasury Secretary set aside a portion of the $8 billion earmarked for Indian tribes for this very purpose. 42 U.S.C. § 801(a)(2)(B).

ARGUMENT

I. Contrary to the D.C. Circuit's assertion otherwise, it was settled in 1971 that ANCs were not and never would be sovereign entities.

The D.C. Circuit ignored critical historical facts when it read ANCs out of the definition that expressly includes them. The CARES Act defines "Indian Tribe" as having the meaning given to the term in ISDA, 42 U.S.C. § 801(g)(1). ISDA 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). The D.C. Circuit construed this definition's final clause (which it referred to as the "recognition clause") as describing a separate sovereign that enjoys a government-to-government relationship, and is therefore "recognized" as a federally recognized tribe. App-13–18. (The State does not agree with this reading, but assumes it is correct for the sake of this section's argument.) The panel found that it made grammatical sense for this clause to modify the entire preceding list of all Indian entities, including ANCs. App-13. And the panel avoided reading Congress's explicit inclusion of ANCs as surplusage by positing that "in 1975, it was substantially uncertain whether the federal government would recognize Native villages, Native corporations, both kinds of entities, or neither." App-22–23. The panel then reasoned that ANCs were only included on the list in case they ever were recognized as tribes—which they never were. App-24.

The problem with the panel's reasoning is that it is factually incorrect. It certainly was unsettled for decades after passing the Alaska Native Claims

Settlement Act (ANCSA), 43 U.S.C. § 1601 *et seq.*, whether Alaska *Native villages* (traditional tribes) would be recognized as separate sovereigns despite not having any territory. But it was unequivocally settled in 1971 when Congress enacted ANCSA that Alaska Native *corporations* (ANCs) were not and never would be recognized as separate sovereigns. Therefore, if the eligibility clause means what the D.C. Circuit believes it does, it is *impossible* that ANCs could ever satisfy it, making the inclusion of ANCs in the definition of Indian tribe mere surplusage. That impossibility was evident in 1971 when Congress created ANCs. That impossibility existed in 1975 when Congress passed ISDA. And that impossibility continued through 2020 when Congress passed the CARES Act. The D.C. Circuit's interpretation means that Congress expressly listed ANCs in the definition of "Indian tribe" for no reason at all.

ANCs are not and never could be separate sovereigns because they are created by federal statute and organized under state law. 43 U.S.C. § 1602(g), (j). Because an ANC's authority and existence springs from federal and state statutory grants of power, it could never be a tribe (in the sense of a separate polity)—the sovereignty of which is inherent and predates the United States. *See United States v. Wheeler*, 435 U.S. 313, 322–23 (1978) (discussing tribes' powers of sovereignty as "inherent" and existing "[b]efore the coming of the Europeans"); *Cape Fox Corp. v. United States*, 456 F. Supp. 784, 797–98 (D. Alaska 1978), *rev'd on other grounds*, 646 F.2d 399 (9th Cir. 1981) (concluding

jurisdiction existed, but not under 28 U.S.C. § 1362, because that provision grants jurisdiction to tribes and bands "possessing the power of a sovereign to regulate their internal and social relations" and "Native corporations are not tribes or bands"). This distinction was explicitly recognized by Alaska's Senator Ted Stevens during the Senate ANCSA proceedings in which he commented that ANCs "are not governmental entities" in the sense of separate political sovereigns, but rather they are entities that "are incorporated under the laws of Alaska." 117 Cong. Rec. Senate 46,964 (Dec. 14, 1971).

The leading treatises on Indian law similarly disprove the D.C. Circuit's assertion that it was unclear in 1975 whether "the historic villages" or "the newer corporations" would be "the ultimate repository of Native sovereignty." App-24. ANCSA threw into question only "the future role of preexisting [tribal] entities." Felix S. Cohen, *Handbook of Federal Indian Law* 752 (1982 ed.). The 1982 edition of Cohen's *Handbook*, the first edition that was published after ANCSA's passage, explained that if tribes (*i.e.*, Native villages) were recognized as sovereign governments, the scope of tribal jurisdiction would depend "upon the scope of activities that fit within the rubric of self-government" and the extent to which Indian country existed in Alaska. *Id.* at 755, 763–67. Cohen's discussed how tribal sovereigns "control membership, sanction individual conduct through customary law, and regulate affairs or property that are uniquely tribal." *Id.* at 755. Cohen's distinguished the functions of sovereign

entities from ANCs, which serve proprietary functions, hold land, and administer benefits. *Id.* at 753, 755. The leading treatise on Alaska Indian law likewise distinguishes ANCs, creations of federal and state law, from "preexisting tribal governments," which having been "left without any land, struggled for recognition and definition of their political existence and jurisdiction" in the 1980s and 1990s. David S. Case and David A. Voluck, *Alaska Natives and American Laws* 166 (2d ed. 2002); *see also State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988) (analyzing whether the Native Village of Venetie was an Indian tribe, in the sovereign polity sense); 58 Fed. Reg. 54,364, 54,364–65 (Oct. 21, 1993) (noting that until 1993, the sovereign status of Alaska tribes (i.e., villages) was disputed). The lingering question after ANCSA's passage was therefore only whether Alaska's landless tribes (i.e., villages) would be acknowledged as governmental sovereigns—*not* whether ANCs might be federally recognized in the same way.

By creating ANCs, Congress "gave Alaska Natives an innovative way to retain their land and culture without forcing them into a failed reservation system." *John v. Baker*, 982 P.2d 738, 753 (Alaska 1999). But Congress made sure that Alaska Natives "remain[ed] eligible for all Federal Indian programs on the same basis as other Native Americans." 43 U.S.C. § 1626(a), (d). Notably, *all* Alaska Natives have historically been eligible for the special services and programs provided by the federal government, whereas in the lower 48, these services were historically provided to Natives

living on or near a reservation. *See Morton v. Ruiz*, 415 U.S. 199, 210, 212 (1974) (discussing scope of recipients served under the Synder Act, 42 Stat. 208 (1921), the authorizing legislation for most BIA activities until the 1970s). And when Congress enacted ISDA, shifting from directly delivering Federal Indian programs to empowering "Indian tribes" to deliver those programs themselves, it included ANCs as "Indian tribes" for purposes of delivering services to Alaska Natives. 25 U.S.C. § 5304(e).

Because Congress knew full well in 1975 that ANCs could never satisfy the "recognition clause" as the D.C. Circuit construed it, it would have made no sense for Congress to have added ANCs to the list of "Indian tribes" if Congress meant that ANCs were Indian tribes only if ANCs were someday recognized as separate sovereigns. Congress did not act so absurdly. Instead, it listed ANCs because it meant to include them. And with good reason: ANCs are critical vehicles for delivering the much needed services and programs to Alaska Natives to which they are entitled by virtue of their status as Natives. And ANCs have provided these services for the past forty-five years.

II. Since 1975, all three branches of the federal government have considered ANCs "Indian tribes" under ISDA, and ANCs have acted as such.

When Congress passed the CARES Act in 2020, it deliberately incorporated the definition of "Indian

tribe" from ISDA because that definition has, for forty-five years, been understood to include ANCs.

ANCs are not like other for-profit corporations. As this Court has repeatedly acknowledged, "Alaska is different from the rest of the country" and is often "the exception, not the rule." *Sturgeon v. Frost*, 139 S. Ct. 1066, 1072 (2019) (internal quotation marks omitted). ANCs are different from other for-profit corporations in that they were created to respond to "the real economic and social needs of Natives." 43 U.S.C. § 1601(b). To make sure ANCs would continue to benefit generations of Alaska Natives, ANCSA restricted ANC original shareholders to Alaska Natives, placed limitations on transfers of shares to non-Natives, and prohibited non-Natives from become voting shareholders. 43 U.S.C. § 1606(h). ANCs engage in a unique profit-sharing arrangement so that Alaska Natives broadly benefit from the ceded aboriginal land claims: seventy percent of profits from timber and mineral resources from each regional ANC are shared among all regional ANCs, and thus their shareholders. 43 U.S.C. § 1606(i). Regional ANCs, although incorporated under state law, are different from typical corporations in that they "provide benefits . . . to promote the health, education, [and] welfare" of their Native shareholders and shareholders' families. 43 U.S.C. § 1606(r). And Congress directed village ANCs to manage land and other rights and assets for and on behalf of Native villages. 43 U.S.C. § 1602(j). Although corporate in structure, ANCs share a common mission of promoting the economic, social, and cultural well-being of Alaska

Natives. *See*, *e.g.*, Declarations from Village and Regional ANCs in Case No. 20-cv-1002 (D.D.C.), ECF No. 45 (Att. #1 Decl. Schutt ¶2; Att. #2 Decl. Mallot ¶3; Att. #3 Decl. Glenn ¶3; Att. #4 Decl. Hegna ¶3; Att. #5 Decl. Buretta ¶9; Att. #6 Decl. Minich ¶6; Att. #7 Decl. Westlake ¶4; Att. #8 Decl. Andrew ¶5; Att. #9 Decl. Harris ¶4; Att. #10 Decl. Blair ¶4; Att. #11 Decl. Gould ¶7; Att. #12 Decl. Herndon ¶4; Att. #13 Decl. Avner ¶4).

And that is precisely what ANCs do. They provide—both directly and indirectly—critical socioeconomic, health, education, and cultural services to Alaska Natives. For example, ANCs provide direct monetary assistance to Alaska Native shareholders by way of dividends, grants, and scholarships. *See*, *e.g.* Decl. Schutt ¶7; Decl. Mallott ¶¶2, 3; Decl. Glenn ¶¶5, 6, 8, 11; Decl. Hegna ¶¶3–5; Decl. Buretta ¶¶4, 7; Decl. Westlake ¶¶6–8, 12. ANCs provide much needed infrastructure in rural Alaska. *See*, *e.g.*, Glenn Decl. ¶7. Some ANCs run the only food and gas markets in their area, and operate at a loss to make sure their community's needs are being met. *See*, *e.g.*, Decl. Herndon ¶3. Most relevant here, ANCs, by virtue of their status as "Indian tribes" under ISDA, contract with the federal government (or delegate to their affiliated nonprofit corporations to so contract) to provide the services and programs to which Alaska Natives are entitled because of their Native status. *See*, *e.g.*, Decl. Schutt ¶¶9–11; Decl. Mallott ¶7; Decl. Hegna ¶4; Decl. Buretta ¶¶3, 11; Decl. Minich ¶¶6–14, Decl. Westlake ¶15.

For the past forty-five years, the federal agencies tasked with carrying out ISDA have consistently and

rightfully interpreted ANCs as non-sovereign entities that Congress has nonetheless made statutorily eligible for the special services and programs available to Indians because of their status as Indians. The D.C. Circuit erred in giving no deference to the agencies' consistent forty-five year interpretation of "Indian tribe." *See Barnhart v. Walton*, 535 U.S. 212, 220 (2002) ("[T]his Court will normally accord particular deference to an agency interpretation of 'longstanding' duration.").

In 1976, the Department of the Interior, which administers ISDA, clarified that ANCs are "Indian tribes." Memorandum of Charles Soller, Assistant Solicitor for Indian Affairs, to Commissioner of Indian Affairs (May 21, 1976). The Department explained that the final clause did not modify ANCs because they were not recognized as eligible for BIA programs and services, and if that clause "operates to disqualify them from the benefits of [ISDA], their very mention is . . . superfluous." *Id.* The following year, the Indian Health Service, which also administers ISDA, adopted Interior's interpretation. *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1474 (9th Cir. 1987). In 1981, the Indian Health Service issued guidelines for how to prioritize contracts among federally recognized tribes, traditional village councils, village ANCs, and regional ANCs. 46 Fed. Reg. 27,178, 27,179 (May 18, 1981). In doing so, the agency again affirmed that ANCs are indeed "Indian tribes" under the ISDA definition. *Id.*

The Bureau of Indian Affairs (BIA), tasked with carrying out the United States' trust responsibility to

Alaska Natives, has consistently interpreted ANCs as "Indian tribes" under ISDA. In 1976 and 1977, the BIA published bulletins and self-determination guidance recognizing ANCs as "Indian tribes" for the purpose of ISDA. *Bowen*, 810 F.2d at 1474 (listing publications). In 1982, when the BIA added Alaska villages to its list of "historical tribes" that are eligible to receive services, the BIA explained that "unique circumstances have made eligible additional entities in Alaska"—i.e., ANCs—"which are not historical tribes." 47 Fed. Reg. 53,130, 53,133–35 (Nov. 24, 1982). In 1988, the BIA included ANCs on the list of tribes eligible to receive services to clarify that ANCs, "previously unlisted," continued to be "statutorily eligible for funding and services" from the BIA, despite their lack of sovereignty. 53 Fed. Reg. 52,829, 52,832 (Dec. 29, 1988). The BIA explained that ANCs are not historical tribes that went through the Federal Acknowledgement Procedures (i.e., they were not what we today call "federally recognized tribes"). *Id.* Rather, ANCs were added to the list because "Indian statutes, such as the Indian Self-Determination Act, specifically include Alaska Native villages, village corporations and regional corporations defined or established under the Alaska Native Claims Settlement Act (ANCSA)." *Id.* at 52,833.

In 1993, the BIA took a different approach to its list of tribes, but it did not change its interpretation of "Indian tribe" under ISDA. Instead of listing tribes and organizations eligible for BIA funding and services, the 1993 list was a narrower list of "federally acknowledged tribes"—i.e., a list of traditional Native

governments with inherent sovereignty. 58 Fed. Reg. 54,364 (Oct. 21, 1993). The list of "federally acknowledged tribes" is the progenitor of today's list of "federally recognized tribes" under the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 25 U.S.C. § 479a (1994). The BIA removed ANCs from the list because ANCs do not enjoy "a government-to-government relationship with the United States" or have "inherent" authority like other tribes do. 58 Fed. Reg. at 54,366. Despite this removal, the BIA clarified that ANCs are nevertheless "made eligible for Federal contracting and services by statute and their non-inclusion on the list . . . does not affect the continued eligibility of the entities for contracts and services." *Id*. The BIA explained that while Alaska Native "corporations are not governments," "they have been designated as 'tribes' for the purposes of some Federal laws, primarily the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450b(b)." *Id.* at 54,364.

In 1995, in updating the list of federally recognized tribes, the BIA reiterated that "[t]he regional, village and urban corporations organized under state law in accordance with the Alaska Native Claims Settlement Act (ANCSA) (43 U.S.C. 1601 et seq.) were not listed although they had been designated as 'tribes' for the purposes of some Federal laws, primarily the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450b(b)." 60 Fed. Reg. 9,250, 9,250 (Feb. 16, 1995). This interpretation persists today.

The definition of "Indian tribe" in the Native American Housing Assistance and Self-Determination Act (NAHASDA) is identical in all relevant respects to the ISDA definition. *Compare* 25 U.S.C. § 4103(13)(B), *with* 25 U.S.C. § 5304(e). And the Department of Housing and Urban Development, which administers NAHASDA, considers ANCs to be "Indian tribes" for purposes of housing block grants. *See* HUD's Indian Housing Block Grant Formula, *Formula Response Forms FY 2021*, https://ihbgformula.com/fy2021/ (list of ANCs in Alaska drop down tab) (all internet materials as last visited on Oct. 31, 2020).

In short, over the past forty-five years, every relevant federal agency has consistently considered ANCs to be "Indian tribes" under ISDA.

Courts have likewise affirmed the longstanding view that ANCs are "Indian tribes" under ISDA. In 1987, a nonprofit corporation argued otherwise, but the Ninth Circuit affirmed that ANCs are indeed "Indian tribes" for ISDA purposes. *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1473–76 (9th Cir. 1987). Even the D.C. Circuit previously acknowledged that ANCs are "Indian tribes" under ISDA, although their status was not questioned in that case. *Am. Fed'n of Gov't Employees, AFL-CIO v. United States*, 330 F.3d 513, 516 (D.C. Cir. 2003). Despite this established history and caselaw, this panel drew the opposite conclusion, splitting from the Ninth Circuit to conclude that ANCs are not "Indian tribes" under ISDA. This circuit split threatens the validity of current ISDA contracts and

calls into question the legality of future contracts with ANCs.

Congress has repeatedly shown that it intends for ANCs to be included in ISDA's definition of "Indian tribe." ANCs were not specifically referenced in the definition of "Indian tribe" in the original versions of the bill, but were deliberately added by amendment to the bill that became law. *Bowen*, 810 F.2d at 1474–75 & nn.4–5 (citing proposed Act, original bill, and amendment specifically adding ANCs into the definition of "Indian tribe"). Two years after ISDA's passage, a congressional commission published a report on Indian affairs that analyzed, among other things, the status of Alaska Natives. Am. Indian Policy Review Comm'n, Final Report, vol. 1, 489–503 (May 17, 1977), https://catalog.hathitrust.org/Record/102258706. The report discussed how both village and regional ANCs were "Indian tribes" under ISDA, notwithstanding the fact that ANCs were *not* "repositories of tribal sovereignty." *Id.* at 495. The report noted that "a native corporation organized under the Settlement Act might well be the form or organization best suited to sponsor certain kinds of federally funded programs." *Id.* The report understood that the overlapping entities eligible for the special programs and funding might create conflict, but stressed that "the solution is not to disqualify certain kinds of Alaska Native organizations but to assign priorities among them." *Id.* "To limit benefits of programs only to Natives who could apply through a conventional tribal organization might disqualify certain Alaska Natives who no longer adhere to such

organizations but who are organized currently in other forms, such as regional and village corporations under the Settlement Act." *Id.* at 495 n.21. Aware of agency practice, Ninth Circuit precedent, and this specially-commissioned Congressional report, Congress chose not to disqualify ANCs.

Instead of acting to disqualify ANCs in any of its repeated amendments to ISDA, Congress chose to maintain the definition of "Indian tribe." In its first major amendment, one year after the Ninth Circuit confirmed that ANCs are "Indian tribes" under ISDA, *Bowen*, 810 F.2d 1471, Congress expressly reenacted ISDA's definition of "Indian tribe." Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100-472, § 103, 102 Stat. 2285 (1988) (adding definitions to 25 U.S.C. § 450b, and reenacting unchanged the original definition of "Indian tribe"). And in 1994, when Congress amended several other definitions within ISDA, it again chose to maintain the definition of "Indian tribe." Indian Self-Determination Act Amendments of 1994, Pub. L. 103-413, § 102, 108 Stat. 4250 (1994). Congress's repeated decisions to amend ISDA but not to amend the definition of "Indian tribe" is "persuasive evidence" that ISDA's "longstanding administrative interpretation," upheld by the Ninth Circuit, "is the one intended by Congress." *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

Not only have all three branches of the federal government long understood ANCs as eligible to contract for programs and services as "Indian tribes"

under ISDA, but ANCs have long acted on that eligibility. ANCs, either directly or indirectly through nonprofit affiliates or subsidiaries to which they delegate authority, regularly contract with the federal government to deliver services to Alaska Natives.

For example, because Cook Inlet Region, Inc. (CIRI) is considered an "Indian tribe," it or its affiliated nonprofit organizations are able to provide critical health and social services to approximately 60,000 people. Decl. Minich ¶¶6–14. To put that number into perspective, 60,000 people represents more than half of Alaska's Native population. U.S. Census Bureau, Alaska, https://data.census.gov/cedsci/profile?g=0400000US02 (almost 16 percent of Alaskans are American Indian or Alaska Native alone). But CIRI is not the only ANC contracting with the federal government. To name just a few others, Doyon, Limited, the regional corporation for Interior Alaska, headquartered in Fairbanks, and representing over 20,000 shareholders, has for over forty years been considered an "Indian tribe" for the purpose of executing contracts under ISDA, NAHASDA, and other federal laws incorporating this definition of "Indian tribe." Decl. Schutt ¶¶3, 9–12. Sealaska, the regional corporation for Southeast Alaska representing more than 23,000 Tlingit, Haida, and Tsimpshian shareholders, has contracted with the federal government as an "Indian tribe" as well. Decl. Mallott ¶¶4, 7. Koniag, the regional corporation for the Kodiak archipelago, and subsidiaries of Koniag, have received federal grants and contract awards based on Koniag's status as an "Indian tribe." Decl. Hegna ¶¶2, 4.

Chugach Alaska Corporation's (the regional corporation for Southcentral Alaska) eligibility as an "Indian tribe" has enabled it, and the nonprofit corporations it designates, to contract with the federal government for services and funding. Decl. Buretta ¶¶3, 11. And NANA Regional Corporation, representing 14,000 Inupiaq shareholders from Northwest Alaska, currently holds at least one ISDA contract. Decl. Westlake ¶¶14, 15.

To be clear, ANCs are by no means the only entities that may enter into ISDA contracts with the federal government. Nor do ANCs necessarily have priority in administering these contracts over federally recognized tribes. The Indian Health Service guidelines establish an order of precedence for ISDA contracting, with federally recognized tribes at the top of that list, and ANCs lower down. 46 Fed. Reg. at 27,179. But just because there is an order of precedence does not mean that ANCs are disqualified to participate as "Indian tribes." In fact, the ordering proves just the opposite: ANCs are, and always have been, eligible to contract with the government because of their status as "Indian tribes."

III. The State cannot simply step in and provide services to Alaska Natives on an emergent basis in the same way as, and in place of, ANCs.

It bears repeating that Alaska is "different" from the Lower 48. *Sturgeon*, 139 S. Ct. at 1072. The needs

of its people, the manner in which those needs can be met, the entities best positioned to provide for those needs, and the federal government's significant role in the state all differ significantly from sister states in the Lower 48. In Alaska, a patchwork of entities provide health and social services to Alaskans, including the federal government, the State, tribes, municipalities, nonprofit corporations, and ANCs. In addition to providing general services to its citizens, the federal government has unique, significant trust responsibilities to Alaska Natives—responsibilities that ANCs have assisted the government in meeting for years.

Alaska's unique geography is one reason why ANCs are so important in fulfilling the federal government's trust responsibilities towards Alaska Natives. Many Alaska Natives live in urban areas hundreds of miles away from their tribal villages. *See*, *e.g.*, Decl. Westlake ¶14; Decl. Andrew ¶6; Decl. Harris ¶3; Decl. Avner ¶6. This means that the tribes in the often remote villages are not necessarily situated to provide services to all Alaska Natives. In the Lower 48, a reservation might be a short drive away, but in Alaska, villages are largely off the road system. For many Alaskans, accessing services in a village requires plane travel with multiple legs. It is impossible for many Alaska Natives to travel to their villages to receive COVID-19 related services from their tribes, given that many villages are not even accessible by commercial plane travel, plane travel is often prohibitively expensive, and some villages have excluded nonresidents from even entering during the COVID-19

pandemic. *See*, *e.g.*, Decl. Andrew ¶4, Decl. Hegna ¶8; Alaska Public Media, *Scores of Alaska Villages Implement Travel Restrictions Amid Pandemic* (April 13, 2020), https://www.alaskapublic.org/2020/04/13/scores-of-alaska-villages-implement-travel-restrictions-amid-pandemic/. For these Alaskans, regional ANCs in urban centers and their nonprofit arms provide health and social services and programs.

ANCs are also critical in administering the special services and programs delivered to Alaska Natives because thousands of Alaska Natives belong to ANCs but not to federally recognized tribes. *See*, *e.g.*, Decl. Schutt ¶12; Decl. Minich ¶5; Decl. Buretta ¶3. For instance, because of its status as an "Indian tribe," Chugach Alaska Corporation is able to provide federally-funded services for Alaska Natives who live in Seward and Valdez where there are no federally recognized tribes. Decl. Buretta ¶3. If ANCs are excluded from the definition of "Indian tribe," Alaska Natives who do not belong to federally recognized tribes will not receive the coronavirus relief fund support Congress intended for them, and will face difficulties even after the current pandemic if ANCs are no longer permitted to contract with the federal government as Indian tribes under ISDA.

For those Alaska Natives who do not or cannot receive services through federally recognized tribes located in remote villages in Alaska, regional ANCs in urban areas and their affiliates provide much needed on-the-ground services. For instance, because CIRI, a regional ANC, is an "Indian tribe" under ISDA, it and

its nonprofit affiliates contract with the federal government to provide health and social services to nearly 60,000 Alaska Natives spread across Anchorage and the Matanuska-Susitna Valley. Decl. Minich ¶7. CIRI is the only "Indian tribe" servicing these communities: there are no federally recognized tribes representing this area that could receive Title V CARES Act funds.[3] CIRI provides a broad spectrum of health care services, housing assistance, substance abuse services, academic programs, child and family support, job training, and food support. Decl. Minich ¶¶8–13. Critically, these services are provided to Alaska Natives without regard to their ANC or village affiliation. Decl. Minich ¶8.

The programs and services CIRI and other ANCs are providing are being strained by COVID-19 as Alaska Natives, who are often some of Alaska's most vulnerable citizens, are being disproportionately affected by the pandemic. Decl. Minich ¶9. Congress recognized that American Indians and Alaska Natives are being particularly hard-hit by the pandemic. Accordingly, Congress allocated more than five percent of the Title V CARES Act relief funds to "Indian tribes," even though less than two percent of the United States population is American Indian or Alaska Native alone or in combination with other races. 42 U.S.C. § 801(a); U.S. Census Bureau, ACS Demographic and Housing

[3] The Native Village of Eklutna office is located in Chugiak within the Municipality of Anchorage. But that tribe is not the "Indian tribe" under ISDA for the broader Anchorage/Mat-Su area. CIRI is.

Estimates, https://data.census.gov/cedsci/table?q=United%20States&g=0100000US&tid=ACSDP1Y2017.DP05.

The D.C. Circuit's "confiden[ce]" that the State of Alaska can fill in the gap caused by excluding ANCs from the definition of "Indian tribe" is misplaced. App-26. State-run programs are already financially strained, and Alaska—a state which derives much of its revenue from tourism and natural resource production and is thus already acutely impacted by the pandemic—is no different. Cutting off funding to the ANCs, which provide services to tens of thousands of Alaska Natives, will create a chasm that the State simply will be unable to fill—especially given the immediacy of the needs presented by the ongoing pandemic.

The State has already fully allocated all of the federal CARES Act funds it received, and already committed most of those funds to municipal assistance, small business relief, homeless assistance, nonprofit relief, and general health/pandemic response. The State is unable, contrary to the panel's suggestion, to somehow pick up the tab the panel's decision creates, and step into the shoes of the federal government. The State cannot reallocate any of its limited, remaining non-committed CARES Act funds to the ANCs because there is no state legislative authorization in place to allow for this type of reallocation, the state is already using those funds to respond to a spike in cases statewide, and also because of the impending Congressional deadline for spending coronavirus relief funds, which requires the funds be expended by the end of the year.

While the State always strives to help all of its citizens, it is not the State's duty to fulfill the federal government's unique trust responsibilities to Alaska Natives. The federal government has obligations that it alone must be expected to assume, and which Congress plainly intended for it to meet by including ANCs within the definition of "Indian Tribe" in the CARES Act.

CONCLUSION

The purpose of ISDA, and the dozens of acts that incorporate its definition of "Indian tribe"—including the CARES Act—is to fulfill the United States' obligations to Native peoples, including Alaska Natives. The D.C. Circuit contravened that purpose by reading ANCs out of the definition of "Indian tribe." If the D.C. Circuit's new interpretation of that definition stands, the immediate result is that thousands of Alaska Natives will be denied the benefit of essential CARES Act funding at a time when they most need it. And the long-term result will ripple through current and future ISDA contracts, depriving thousands of Alaska Natives of their right to receive the special services and programs in dozens of other acts that incorporate ISDA's definition of "Indian tribe." This Court should grant the petitions for writ of certiorari to resolve these

important questions and to allow fulfillment of the federal government's trust responsibilities to Alaska Natives.

Respectfully submitted,

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