Nos. 20-543 & 20-544

In The Supreme Court of the United States

JANET L. YELLEN,
SECRETARY OF THE TREASURY,

Petitioner,

v.

CONFEDERATED TRIBES OF THE
CHEHALIS RESERVATION, ET AL.

Respondents.

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

Petitioners,

v.

CONFEDERATED TRIBES OF THE
CHEHALIS RESERVATION, ET AL.

Respondents.

**On Writs Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF FOR RESPONDENT UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION

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QUESTION PRESENTED

Whether Alaska Native Corporations are "recognized governing bodies of an Indian Tribe," as required to qualify for direct funding from the United States under Title V of the CARES Act?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. Legal Background 1

1. The CARES Act 1

2. ISDEAA 6

B. Facts And Procedural History 8

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

I. The 574 recognized tribes are the only entities that have a "recognized governing body of an Indian Tribe" 9

A. Federal recognition of a tribe as a government has been the legal foundational requirement for Federal Indian law since the founding of the United States 10

B. Congress' use of the phrase "recognized governing body of an Indian Tribe" expressly includes and incorporates the requirement that the tribe must be "recognized" as that term is used in federal Indian law 15

C. Federal Indian law applies to members of recognized tribes 16

D. The settled law discussed above applies to tribes and tribal members in Alaska 19

E. No ANC has a recognized governing body of an Indian Tribe 21

TABLE OF CONTENTS—Continued

Page

F. Petitioners' argument that "recognized" means "recognized by the ANCs" is without merit 24

II. The plain language meaning of the ISDEAA... 27

III. The Ute Indian Tribe incorporates the Chehalis Tribe's discussion that Congress has not ratified the Petitioners' interpretation of ISDEAA..... 33

IV. The appeals to equity by the ANCs, the State of Alaska, and Alaska's congressional delegation are wrong based upon law and, independently, based upon fact 34

CONCLUSION..... 38

TABLE OF AUTHORITIES

Page

CASES

Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237 (2014) 15

Aleman v. Chugach Support Servs., Inc., 485 F.3d 206 (4th Cir. 2007) 23

Attorney's Process & Investigation Servs. v. Sac Fox Tribe of Mississippi in Iowa, 609 F.3d 927 (8th Cir. 2010) 26

Babb v. Wilkie, 140 S. Ct. 1168 (2020) 9

Barron v. Alaska Native Tribal Health Consortium, 373 F. Supp. 3d 1232 (D. Alaska 2019) 23

Belize Social Dev. Ltd. v. Gov't of Belize, 794 F.3d 99 (D.C. Cir. 2015) 16

California Valley Miwok Tribe v. United States, 515 F.3d 1262 (D.C. Cir. 2008) 16

Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631 (2005) 6

Cherokee Nation v. Georgia, 30 U.S. (9 Pet.) 1 (1831) 13, 17

Conn. Nat. Bank v. Germain, 503 U.S. 249 (1992) 32

Eaglesun Systems Products, Inc. v. Association of Village Council Presidents, No. 13-CV-0438-CVE-PJC, 2014 WL 1119726 (N.D. Okla. Mar. 20, 2014) 23

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TABLE OF AUTHORITIES – Continued

Page

Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983) 26

Mackinac Tribe v. Jewell, 87 F. Supp. 3d 127 (D.D.C. 2015) 16

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Navajo Nation v. Department of the Interior, D.D.C. No. 14-cv-01909 (Order, June 12, 2020) 6

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TABLE OF AUTHORITIES – Continued

Page

Stand Up for Ca.! v. U.S. Dept. of Interior, 204 F. Supp. 3d 212 (D.D.C. 2016) 16

Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017) 9

The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) 11, 12, 13, 17

United States v. Holliday, 70 U.S. 407 (1865) 11, 12, 17

United States v. Lara, 541 U.S. 193 (2004) 11, 13

United States v. Rogers, 45 U.S. 567 (1846) 17

Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018) 25

Worcester v. Georgia, 31 U.S. 515 (1832) 17

CONSTITUTIONAL PROVISIONS

Articles of Confederation IX.....13

Constitution and By-Laws of the Native Village of Unalekleet, Art. 2 (Dec. 30, 1939) (available at https://www.loc.gov/law/help/american-indian-consts/PDF/40029067.pdf) 20

U.S. Const.

Art. I, § 8..... 10, 11, 12, 13

Art. II.....11

Art. II, § 2, Cl. 1.....11

Art. II, § 2, Cl. 2.....11

Art. III 11

Ute Indian Tribe Constitution, Article II 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES

16 U.S.C. §§ 1606-1607 22
25 U.S.C. § 5303(e) 23
25 U.S.C. § 5304 .....28, 31
25 U.S.C. § 5304(e) .....*passim*
25 U.S.C. § 5321 6
28 U.S.C. § 1392 22
42 U.S.C. § 801(a)(1) 2, 3
42 U.S.C. § 801(a)(2)(B) 2
42 U.S.C. § 801(b)(4) 3
42 U.S.C. § 801(c)(7) 4
42 U.S.C. § 801(d) 3
42 U.S.C. § 801(d)(1) 3, 35
42 U.S.C. § 801(f) 3
42 U.S.C. § 801(g)(1) 2, 25
42 U.S.C. § 801(g)(2) 31
42 U.S.C. § 801(g)(5) 2, 10, 16, 24
43 U.S.C. § 1606 21
43 U.S.C. § 1606(g) 22
43 U.S.C. § 1606(h)(2) 22
43 U.S.C. § 1607 21
43 U.S.C. § 1607(c) 22

TABLE OF AUTHORITIES – Continued

Page

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Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, 108 Stat. 4791 (1994) 15

Indian Reorganization Act

Pub. L. No. 73-383, 48 Stat. 984 (1934).....19

Pub. L. No. 74-538, 49 Stat. 1250 (1936) 19

Omnibus Indian Advancement Act, Pub. L. No. 106-568, 114 Stat. 2868 (December 27, 2000).....14

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Ute Indian Tribe Law and Order Code, Title 19 18

RULES AND REGULATIONS

25 C.F.R. Part 83.....14

44 Fed. Reg. 7235.....14

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TABLE OF AUTHORITIES – Continued

Page

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H.R. Rep. 103-781 16

HR 3662 § 121.....30

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https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf 4, 5

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TABLE OF AUTHORITIES – Continued

Page

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Page

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STATEMENT OF THE CASE

A. Legal Background.

1. The CARES Act.

Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), H.R. 748, 116th Cong. (2020), in response to the COVID-19 national public health emergency. President Trump signed the Act into law on March 27, 2020. The total allocation under the Act was two trillion dollars.

Titles I, II, and IV of the CARES Act earmarked hundreds of billions of dollars of relief for corporations. Corporations in Alaska received more than 12 billion dollars in CARES Act funds under the Paycheck Protection Program (PPP),[1] and an unknown amount of that money, at least in the tens of millions of dollars, went to ANCs and their numerous subsidiaries.[2] Nearly all PPP money is the functional equivalent of a grant. ANCs and other corporations received PPP money based upon the amount of wages and other qualifying costs they expected to incur in the months after the money was received. While the PPP money was euphemistically referred to as a loan, all PPP money that was paid as wages or otherwise used as

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[1] https://www.adn.com/business-economy/2020/07/07/alaska-businesses-received-more-than-12-billion-in-federal-ppp-loans-heres-who-they-are/.

[2] ProPublica, Approved Loans for Alaska Organizations, https://bit.ly/2IOwfCJ; AK Public Media, Wealthy and Well-Connected Alaska Firms Among Those Gaining Most from PPP (July 8, 2020); https://sba.app.box.com/s/ox4mwmvli4ndbp14401xr411m8sefx3i.

promised became a grant, with no additional strings attached. 85 Fed. Reg. 33004 (June 1, 2020).

In contrast, Title V of the CARES Act solely provided relief for governments. "There are appropriated for making payment to States, Tribal governments and units of local government under this section $150,000,000 for the fiscal year 2020." 42 U.S.C. 801(a)(1). Eight billion dollars of that amount was reserved for "Tribal governments." *Id.* 801(a)(2)(B). Title V defines a "Tribal government" as "the recognized governing body of an Indian Tribe," *id.* 801(g)(5), and it incorporates the definition of "Indian Tribe," *id.* 801(g)(1) from the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 5304(e).

ISDEAA defines an "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) [43 U.S.C. 1601 et seq.], *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).

For all of the funds allocated under Title V of the CARES Act, the recipient governments could only use the funds to cover previously unbudgeted "necessary expenditures incurred due to the public health

emergency with respect to the Coronavirus Disease 2019 (COVID-19)[.]" 42 U.S.C. § 801(d)(1). Any funds not used for those limited purposes would return to the federal treasury. 42 U.S.C. § 801(d) (Use of Funds); 801(f) (Inspector General oversight; recoupment); 86 Fed. Reg. 4182 (Publishing guidance previously issued to state, tribal, and local governments regarding use of CARES Act funds).

Of the 150 billion dollars of relief to governments under Title V of the CARES Act, 139 billion dollars was earmarked for states. That money was allocated based upon state population, but with a minimum payment of 1.25 billion dollars to each of the 21 states with the smallest populations. All residents—including enrolled Indians and those who have Native American ancestry—residing in Alaska and other states were included in determining state populations. 42 U.S.C. § 801(b)(4). As the state with the third smallest population, Alaska received more money per capita than 47 other states. https://crsreports.congress.gov/product/pdf/R/R46298. Alaska received over four times the amount per capita than the each of the thirty most populous states.[3]

Congress directed that eight billion dollars of funds for governments had to be provided to the recognized governing bodies of Indian Tribes. *Id.* § 801(a)(1),

[3] The 30 states with the largest populations received approximately $385 per capita. Alaska received over $1,700 per capita, approximately 4.4 times more than each of those states (calculating based upon July 1, 2020 census estimates available at https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates.html).

(2).[4] The United States keeps a list of the recognized Tribes, 86 Fed. Reg. 7554 (Jan. 29, 2021), and a related list of the recognized governing bodies of each of those recognized tribes, www.bia.gov/tribal-leaders directory. 229 of the recognized tribes are in the State of Alaska.

For the eight billion dollars allocated to tribal governments, Congress did not provide a specific allocation formula. Instead, it directed the Secretary of the Treasury to divide the eight billion dollars between the recognized governing bodies of the tribes "based on increased expenditures of each such Tribal government (or a tribally owned entity of such Tribal government) relative to aggregate expenditures in fiscal year 2019 by that Tribal government (or tribally owned entity) and determined in such manner as the Secretary determines appropriate. . . ." *Id.* § 801(c)(7).

The Secretary decided that he would allocate 4.8 billion dollars based upon tribal population, and 3.2 billion dollars based upon tribal "employment and expenditure data." https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf. For the 4.8 billion allocated by population, the Secretary decided that he would use the tribal population statistics from the Indian Housing Block Grant

[4] In addition to the 139 billion for states and 8 billion for recognized governing bodies of tribes, the remaining 3 billion under Title V was for the governments of the District of Columbia and federal territories.

program, with a minimum payment to a tribe of one hundred thousand dollars. *Id.*[5]

Each of the federal recognized tribes in Alaska that applied for funds received funds based upon its population, using the above methodology. *Id.*

But the Secretary also decided that in addition to the relief ANCs received under the corporate relief provisions of the CARES Act, and in addition to money that the State of Alaska or tribes would provide to ANCs, the Secretary would directly give the ANCs approximately 533 million dollars, out of the money that Congress had earmarked for governing bodies of Indian Tribes. Of that 533 million dollars, 162 million was based upon the "population" of the ANCs,[6] while the remainder was allocated from the 3.2 billion distributed based upon employment and expenditure data. Brief for Appellee Mnuchin, *Shawnee Tribe v. Mnuchin*, No. 20-5286 (D.C. Cir. Oct. 26, 2020), 2020 WL 6286986, at *7, and *7 n.3.

Under the Secretary's decision, each of the approximately 200 ANCs would have received at least $100,000. The average ANC would have received over

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[5] No party to the current case challenges the Secretary of the Treasury's decision to use that population statistic. It is being challenged in a pending case now before the District Court for the District of Columbia. *Shawnee Tribe v. Yellen*, D.D.C. No. 20-cv-1999.

[6] The record in this case does not contain any information regarding how the Secretary determined the "population" of the approximately 200 corporations.

2.5 million dollars, and the larger corporations would have received tens of millions of dollars under Title V.

2. ISDEAA.

Congress enacted ISDEAA in 1975. It was one of the first major pieces of legislation under the new federal policy of tribal self-determination. The Act directs the Secretary of the Interior, "upon the request of any Indian Tribe by tribal resolution to enter into a self-determination contract with a tribal organization to plan, conduct, and administer" health, education, economic, and social programs that the Secretary otherwise would have administered. 25 U.S.C. § 5321. These include governmental services such as court operations, *Navajo Nation v. Department of the Interior*, D.D.C. No. 14-cv-01909 (Order, June 12, 2020), law enforcement and other emergency services, public health services, education, and other services. 25 U.S.C. § 5321; *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185 (2012); *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 634 (2005). The key exchange in a self-determination contract is that the United States agrees to provide the funding that it would otherwise have expended, and the tribe or tribal organization agrees to provide the services.

As directed by 25 U.S.C. § 5321, services can be provided by a "tribal organization" as long as each tribe that would have otherwise received the services from the United States provides the requisite tribal resolution in support. In both Alaska and the Lower 48

States, tribes frequently provide their governmental authorization for a tribal organization to enter into the self-determination contract. *E.g.*, Indian Health Service Fiscal Year (FY) 2018 Report to Congress on contract funding of Indian Self-Determination and Education Assistance Act Awards at 10-15 (available at https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/60407-1_2018_CSC_Report_to_Congress_10.18.19.pdf) (listing as award recipients numerous tribal organizations, which required supporting tribal resolutions, as recipients); BIA Alaska Region, *Regional Indian Self-Determination Implementation Plan* 1 (Jan. 2015) (available at https://on.doi.gov/3njS6B6) (describing "the processing of [ISDEAA] contracts submitted by the 229 Tribes/Tribal Organizations who are within the Region's jurisdiction").

Petitioners assert that some ANCs enter into ISDEAA contracts, and that therefore *every* ANC is an Indian Tribe under the ISDEAA. Putting aside the lack of record evidence for their assertion regarding ISDEAA contracts, numerous tribal organizations enter into ISDEAA contracts, as discussed above. That does not make a tribal organization a recognized tribe. Instead, to be a tribe under the ISDEAA, an entity would have to meet the definition of Indian Tribe under that statute. As discussed below, ANCs do not meet that definition.

B. Facts And Procedural History.

As it did in the Court of Appeals, the Ute Indian Tribe adopts the Chehalis Tribe's statement of facts and procedural history.

SUMMARY OF THE ARGUMENT

As relevant to this case, CARES Act funding can only be provided to a "recognized governing body of an Indian Tribe." The first issue presented is, therefore, whether each of the approximately 200 ANCs is a recognized governing body of an Indian Tribe, as the Secretary claims. In the phrase "recognized governing body of an Indian Tribe," recognized means recognized by the United States as an Indian Tribe. That has been the meaning of "recognized," when used in relationship to tribes, since the Constitution gave the United States supremacy over commerce with the Tribes. ANCs are not recognized as Indian Tribes by the United States.

Independently, Petitioners are also wrong when they claim that ANCs are "Indian Tribes" as that term is used in ISDEAA. In the CARES Act, Congress incorporated the definition of "Indian Tribe" from the ISDEAA, and the ISDEAA also incorporates the requirement of federal recognition. Under the plain language interpretation of the ISDEAA definition of Indian Tribe, ANCs do not qualify. The ISDEAA uses a common verbal construction. In it, Congress starts with a series of entities that might possibly meet the

qualifier at the end of the definition. The qualifier at the end is the part of the statute that does the most work.

With that type of construction, the most commonly raised issue is whether the qualifier applies only to the last term or to all of the terms in the series. That is the "serial qualifier" rule of construction. In the current case, the serial qualifier rule is not at issue. Instead, the ANCs assert, contrary to basic English and to all case law, that the qualifier applies to all of the terms *except* the last in the series. They claim that because *no* ANC meets the expressly stated statutory qualification for "Indian Tribe" under the ISDEAA definition, *every* ANC is an Indian Tribe. Their argument is wrong.

ARGUMENT

I. The 574 recognized tribes are the only entities that have a "recognized governing body of an Indian Tribe."

"Statutory interpretation, as we always say, begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016), and "[t]he controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). "Where, as here, the words of [a] statute are unambiguous, the judicial inquiry is complete." *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020).

Applying this "unexceptional rule" to the current case is not difficult. In this case, the statutory language at issue is "recognized governing body of an Indian Tribe." 42 U.S.C. § 801(g)(5). If an ANC does not meet that definition, then it cannot receive any funds under Title V of the CARES Act. While the Secretary determined that every ANC is eligible for funds under Title V of the CARES Act, on an equal footing with recognized Tribes, the legal analysis shows that no ANC qualifies for that funding.

A. Federal recognition of a tribe as a government has been the legal foundational requirement for Federal Indian law since the founding of the United States.

Under the United States Constitution, the United States has the power "[t]o regulate Commerce with the Indian Tribes." U.S. Const. Art. I, § 8. There are exactly 574 tribes for which the United States exercises that power, including 229 recognized tribes in Alaska. 86 Fed. Reg. 7554 (Jan. 29, 2021). No Alaska Native Corporation (ANC) is currently one of the recognized Indian Tribes. *Id.* Instead, ANCs are for-profit corporations, governed by the laws of the State of Alaska; and they stand in contrast to the tribes in Alaska and the Lower 48 States, which remain federally recognized.

During its early history, the United States recognized tribes as separate governments through, inter

alia, treaty-making, U.S. Const. Art. II, § 2, Cl. 2, and military alliances and conflicts, Art. II, § 2, Cl. 1. *E.g.*, Treaty with the Delawares, 1778, II Kapp. 3 (1904 ed) (agreeing, inter alia, to mutual assistance in times of war, *id.* at Art. II, and that the Delawares would permit United States troops to pass through Delaware lands during the Revolutionary War, *id.* at Art. III).

A treaty, per se, established recognition. "Among that number of Indian Tribes with whom the United States did conclude ratified treaties, there was never any question that such tribes were not recognized." William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of A Legal Concept*, 34 Am. J. Legal Hist. 331, 339 (1990). *See also United States v. Lara*, 541 U.S. 193, 200 (2004) (noting that the Indian Commerce Clause and the Treaty Clause provide the primary constitutional bases for federal supremacy in Indian affairs).

Under this Court's decisions, federal recognition is the condition precedent for application of the Indian Commerce Clause to a tribe's government. *United States v. Holliday*, 70 U.S. 407 (1865); *The Kansas Indians*, 72 U.S. 737, 755 (1866).

In *Holliday*, the defendants asserted that Congress lacked constitutional authority to criminalize intrastate off-Reservation sale of alcohol to Indians. This Court rejected that argument, holding that the Indian Commerce Clause provides the requisite constitutional authority if but only if the United States,

through its political branches, recognizes the purchaser as a member of a recognized tribe.

One of the two defendants in *Holliday* made an additional argument based upon facts unique to his case. He asserted the person he had sold alcohol to was not an "Indian" for purposes of the Indian Commerce Clause, and therefore sale to that person was not barred by the federal statute. Defendant claimed this was so for two separate reasons. First, he claimed the tribe's federal recognition had been terminated. Second, he claimed that even if the tribe was recognized, the individual Indian was no longer a member of that tribe. This Court noted that each side was able to marshal some facts supporting its positions on the two subissues; but the Court then held that the political branches' determination is dispositive.

> In reference to all matters of this kind [i.e. recognition of an Indian Tribe], it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

Id. at 419.

In *The Kansas Indians*, the Court similarly held that federal recognition by the political branches brings the tribe and its members within the commerce clause powers.

> If the tribal organization of the Shawnees is preserved intact, and *recognized* by the political departments of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union.

The Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1866) (emphasis added).

The precise relationship between the federally recognized tribe and the United States is debated. The scope of state authority to treat with tribes was also initially debated. *Compare* Articles of Confederation IX *with* U.S. Const. Art. I, § 8. *See generally The Federalist* 42 (James Madison).[7] Fortunately, those issues are not material to the current case. Instead, what is material is the simple incontrovertible point that the federal government has been recognizing tribes since its inception; and that recognition is recognition of the tribe as a separate sovereign government, with a political relationship to the United States.

The recognized relationship is a political relationship between the United States and the tribe. *E.g.*, *Lara*, 541 U.S. at 200; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)); 86 Fed. Reg. 7554. The precise

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[7] *The Federalist* 42 is the only paper which contains an analysis of the Indian Commerce Clause.

nature of that political relationship has changed over time, and parts of that relationship are still debated and disputed. But the fact that it is a political relationship based upon federal recognition as a tribe is not debated.

In the Lower 48 States, many of the tribes that were first recognized by the United States via treaty continue to be recognized. The era of treaty-making ended in 1871. Thereafter, recognition was often based upon federal statutes, and more recently often through the Office of Federal Acknowledgement, under a detailed and demanding administrative process. 25 C.F.R. Part 83. The administrative process does not supplant federal authority to recognize tribes through congressional action. *E.g.*, Omnibus Indian Advancement Act, Pub. L. No. 106-568, 114 Stat. 2868 (Dec. 27, 2000) (Congress recognized or restored recognition to multiple tribes).

Although federal recognition was a foundational requirement for federal Indian law, the United States did not keep a regularly updated list of recognized tribes until 1979. 44 Fed. Reg. 7235. Quinn, *supra*, at 334 (stating that the fact that the United States did not create a comprehensive list of recognized tribes until 1979 is "possibly the most curious aspect of the particular history of the concept and application of federal acknowledgment relative to Indian Tribes.") When it published its list in 1979, the United States noted that it was deferring publication of a list of federally recognized tribes in Alaska. *Id.*

In 1994 Congress directed the Executive Branch to keep an updated list of all of the federally recognized tribes, and to publish that list annually. Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, 108 Stat. 4791 (1994). The most recently published list is found at 86 Fed. Reg. 7554 (Jan. 29, 2021). That annual publication states:

> The listed Indian entities are acknowledged to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such.

B. Congress' use of the phrase "recognized governing body of an Indian Tribe" expressly includes and incorporates the requirement that the tribe must be "recognized" as that term is used in federal Indian law.

"It is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) (quotation marks, citation omitted). "'Recognized' is more than a simple adjective, it is a legal term of art. . . . A formal political act, it permanently establishes a government-to-government relationship between the United

States and the recognized tribe[.]" H.R. Rep. 103-781 at 3-4 (1993). Courts have consistently acknowledged "recognized" means political recognition by the United States as a separate sovereign under the body of case law discussed above. *E.g.*, *Franks Landing Indian Community v. NIGC*, 918 F.3d 610, 613 (9th Cir. 2019) (citing H.R. Rep. No. 103-781, at 2) (" 'Federal recognition' of an Indian Tribe is a legal term of art meaning that the federal government acknowledges as a matter of law that a particular Indian group has tribal status."); *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008); *Stand Up for Ca.! v. U.S. Dept. of Interior*, 204 F. Supp. 3d 212, 288 (D.D.C. 2016); *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 131 (D.D.C. 2015).

In the CARES Act, Congress defined Tribal governments as "the *recognized* governing body of an Indian Tribe." 42 U.S.C. § 801(g)(5) (emphasis added). By using this legal term of art—"recognized"—to define "Tribal government" and qualify the definition of "Indian Tribe," Congress clearly "intended [recognized] to have its established, and constitutionally required meaning." *Belize Social Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 1033 (D.C. Cir. 2015) (quotation marks, citation omitted). That established meaning is federal recognition. ANCs are not federally recognized tribes.

C. Federal Indian law applies to members of recognized tribes.

The second primary component of the relationship between the United States and recognized Indians is

tribal membership. As with recognition of a tribe, recognition as an "Indian" for federal Indian law purposes has evolved throughout our history, but little of that prior history or older case law is material to the current case.

One of the two primary points that is material is already made above. For federal Indian law purposes, an Indian is a person that is recognized as having a political relationship with one of the 574 recognized tribes. That has been the required relationship since this Nation was founded. *United States v. Holliday*, 70 U.S. 407 (1865); *The Kansas Indians*, 72 U.S. 737 (1866); *Worcester v. Georgia*, 31 U.S. 515 (1832) (a person who is a citizen of a recognized tribe was not a citizen of the United States); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *but see United States v. Rogers*, 45 U.S. 567 (1846) (holding that even if a tribe adopts a "white man" into the tribe, that person does not become an Indian for purposes of federal criminal jurisdiction).

The other material point is that the federally recognized tribes always have had, and still do have, the sole authority to determine their own membership. *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 327 (2008); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

In older cases, determining whether a recognized tribe considered a person to be a member of the tribe could be difficult; but under current practice it rarely is. Most tribes have constitutional and statutory law governing membership. Tribal descendants, usually

through their parental guardians, apply for membership, and the tribe applies the tribal law to determine whether the application is granted. *E.g.*, Ute Indian Tribe Constitution, Article II; Ute Indian Tribe Law and Order Code, Title 19. *See generally* Kirsty Gover, *Genealogy As Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 Am. Indian L. Rev. 243 (2009) (analyzing membership provisions in 322 constitutions).

These facts are notable for current purposes because they result in many people of Native American ancestry[8] not being enrolled in a tribe, either by choice or because they are members of non-recognized tribes, or because they do not meet the membership criteria of any recognized tribe.

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[8] Throughout this brief, the Ute Indian Tribe uses the term "Indian" as the federal Indian law term of art, to mean people who are members of recognized Tribes. The Ute Indian Tribe uses the term "people of Native American ancestry" to refer to those who are not enrolled or a member in a federally recognized Tribe. As discussed below, that distinction is essential to this case. Notably, the ANCs consistently use the term "Native Alaskans," and assert that Title V of the CARES Act was designed to provide for services to all "Native Alaskans." In many instances, the ANCs use "Native Alaskans" to obfuscate from the fact that they are actually meaning "shareholders of ANCs"—which as noted above, includes Indians, people of Native American ancestry, and non-Indians. In some instances, the ANCs use the phrase to be limited to people of Native American ancestry.

D. The settled law discussed above applies to tribes and tribal members in Alaska.

Tribes in Alaska have existed since time immemorial, but as discussed above, the existence of a tribe is not the material point for federal Indian law. Instead, the material point is whether the tribe is recognized by the United States as an Indian Tribe. The tribes in Alaska are recognized. ANCs are not.

The United States purchased Alaska only a few years before treaty-making with tribes ended in 1871. There is no federally approved treaty between the United States and a tribe in Alaska. Between 1871 and 1934, the process for federal recognition, in Alaska and in the Lower 48 States, was not well defined. For tribes that did not have treaties, defining the political relationship of the tribe to the United States was difficult during that period of time. *E.g.*, Treaty Concerning the Cession of the Russian Possessions in North America, 15 Stat. 539 (Excluding Indians in Alaska from those who could become United States citizens); 19 Pub. Lands Dec. 323 (1894) (discussing status of tribal members in Alaska).

The process for recognition became better defined around the time of the passage of the Indian Reorganization Act in 1934, Pub. L. No. 73-383, 48 Stat. 984 (1934) and the related provisions applicable to tribes in Alaska in 1936. Pub. L. No. 74-538, 49 Stat. 1250 (1936). By then, it had become clear that:

> no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos and other natives are of Indian origin or not as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska, as referred to in the treaty of March 30, 1867, between the United States and Russia, are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States.

Status of Alaska Natives, 53 Interior Dec. 593, 605-06 (1932). *See also* Felix Cohen, *Handbook of Federal Indian Law* at 404 (1942 ed.) ("it is now substantially established that [Alaskan Natives] occupy the same relation to the Federal government as do the Indians residing in the United States.").

Like tribes in the Lower 48 States, the tribes in Alaska define the criteria for membership in their tribes. *E.g.*, Constitution and By-Laws of the Native Village of Unalekleet, Art. 2 (Dec. 30, 1939) (available at https://www.loc.gov/law/help/american-indian-consts/PDF/40029067.pdf).[9]

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[9] https://www.loc.gov/law/help/american-indian-consts/arctic-alaska.php collects approximately 124 constitutions for Alaska Tribes, published by the United States Government Printing Office between 1938 and 1951. Article 2 is very frequently the section governing membership in the Tribe.

Although the history of tribes in Alaska has been different than those in the Lower 48 States, they are now 229 of the 574 recognized tribes. They therefore are 229 of the 574 entities for which the United States has a recognized government-to-government relationship. 86 Fed. Reg. 7554.

E. No ANC has a recognized governing body of an Indian Tribe.

The relationship between ANCs and the United States was unclear when ANCs were created in 1971, but the relationship is now crystal clear. ANCs are not recognized tribes. 86 Fed. Reg. 7554 (the BIA list of all federally recognized tribes does not include any ANC). ANCs do not have a "government-to-government relationship with the United States." *Id.* An ANC's Board of Directors is not a "recognized governing body of an Indian Tribe."

There are two levels of ANCs: regional ANCs and village ANCs. For both regional and village ANCs, they are incorporated as for-profit corporations under the laws of the State of Alaska. 43 U.S.C. § 1606 (regional corporations); 1607 (village corporations).

For the first five years that regional ANCs existed, the federal government had to approve original or restated articles of incorporation and bylaws of the regional corporations, but that requirement no longer applies. 43 U.S.C. § 1606. Unlike states and tribes, ANCs do not have citizens. ANCs have shareholders. Most original shareholders received 100 shares in a

regional and 100 shares in a village corporation. 43 U.S.C. § 1606(g); 43 U.S.C. § 1607(c). Those shares are personal property of the member, subject to testate and intestate succession. 43 U.S.C. § 1606(h)(2); 43 U.S.C. § 1607(c). Many of their shareholders are also enrolled in one of the tribes in Alaska that have received funds under Title 5 of the CARES Act. Many of the ANC shareholders have Native American ancestry but are not enrolled in a tribe—either by choice or because they do not meet the enrollment criteria for a tribe, or for other reasons. Because shares are alienable, ANCs now have shareholders who are not Indians as that term is used in federal Indian law, including shareholders who do not have Native American ancestry.

ANCs owe fiduciary duties, as defined by Alaska state law, to their Indian and non-Indian shareholders. Alaska Stat. § 10.06.450(b); https://www.gao.gov/assets/660/650857.pdf.

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

25 U.S.C. § 5303(e). The Ninth Circuit flatly rejected that argument: "Unlike the Native Alaskan Village in *Native Village of Noatak v. Hoffman* [896 F.2d 1157 (9th Cir. 1990)], [the ANC] is not a governmental unit with a local governing board organized under the Indian Reorganization Act[.] Because [the ANC] is not a governing body, it does not meet one of the basic criteria of an Indian Tribe." *Seldovia*, 904 F.2d at 1350 (citations omitted). Every court since *Seldovia* has reaffirmed that holding. *E.g., Eaglesun Systems Products, Inc. v. Association of Village Council Presidents,* No. 13-CV-0438-CVE-PJC, 2014 WL 1119726, at *6 (N.D. Okla. Mar. 20, 2014) (holding that ANCs "do not possess key attributes of an independent and self-governing Indian Tribe . . . [and] are not governing bodies." (citation omitted)); *Pearson v. Chugach Government Services Inc.*; *cf. Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1240 (D. Alaska 2019) ("While Alaska Native Corporations are owned and managed by Alaska Natives, they are distinct legal entities from Alaska Native tribes." (footnotes omitted)), *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 213 (4th Cir. 2007) ("While the sovereign immunity of Indian Tribes 'is a necessary corollary to Indian sovereignty and self-governance,' Alaska Native corporations are not comparable sovereign entities[.]" (citations omitted)).

As summarized in *Cohen's Handbook of Federal Indian Law* § 4.07[3][d][i], at 353 (Nell Jessup Newton ed. 2012 ed. Sup. 2019)

> Tribal governments, as opposed to regional and village corporations, are the only Native entities that possess inherent powers of self-government. . . . The Native regional and village corporations are chartered under state law to perform proprietary, not governmental, functions.

F. Petitioners' argument that "recognized" means "recognized by the ANCs" is without merit.

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

For the reasons discussed above, Petitioners cannot meet the second requirement. Over 200 years of federal law shows that ANCs are not recognized, as that term is used in Indian law. Recognized means recognized by the United States. Having no convincing response to the Ute Indian Tribe's arguments regarding the CARES Act, Petitioners have consistently and effectively attempted to focus the courts below on the larger, eye-catching interpretation of the ISDEAA. As will be discussed in the next section of this brief, ANCs do not meet the ISDEAA definition, because the

ISDEAA definition redundantly also requires recognition. But this Court should not need to, and therefore should not, decide that broader issue in order to resolve the current case. *See Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1655-56 (2018) ("The source of confusion in the lower courts that led to our review was the one about *Yakima*, and we have dispelled it. That is work enough for the day."). Regardless of whether ANCs meet the ISDEAA definition, the legal standard in this case is the CARES Act, and the CARES Act expressly restricts funding to the recognized governing bodies of Indian Tribes.

To avoid the fact that ANCs are not recognized by the United States, Petitioners assert that this Court should effectively read "recognized governing body" out of the CARE Act, but only for application in Alaska. In all other states, tribally related groups or communities that are not federally recognized would not be eligible for direct funding from the United States under the CARES Act. In those states, "recognized" means recognized by the United States. But in Alaska, they assert, "recognized" means "recognized by the ANCs," or perhaps "recognized by the State of Alaska."

When making this argument below, Petitioners naively and mistakenly asserted that while although the United States recognizes tribes, it does not recognize governing bodies of tribes. In their reply brief, the Tribes showed that Petitioners were wrong. The United States does keep a list of recognized governing bodies of tribes. www.bia.gov/tribal-leaders directory. The reason the BIA keeps a list of recognized tribal

governing bodies is identical to the reason it keeps a list of federally recognized tribes. The BIA has the duty to determine, both for itself and for use by all other federal agencies, which tribes are recognized. Similarly, "[t]he BIA, in its responsibility for carrying on government relations with the Tribe, is obligated to recognize and deal with some tribal governing body." *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). *See also Sac & Fox Tribe of the Miss. in Iowa Election Bd. v. BIA*, 439 F.3d 832, 833-34 (8th Cir. 2006). The governing body recognized by the United States is the entity through which the United States carries on its recognized relationship with the tribe. At times that federally recognized governing body is different from the governing body recognized by the tribe. *E.g.*, *Attorney's Process & Investigation Servs. v. Sac Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 940-41 (8th Cir. 2010).

And, just as ANCs are not on the list of federally recognized tribes, the managers or boards of ANCs are not on the list of federally recognized governing bodies of Indian Tribes. www.bia.gov/tribal-leaders directory.

If we were not dealing with a statutory section that was specifically referring to recognized governing bodies of tribes, perhaps the ANCs interpretation would be permissible. Recognized is a passive voice term, and in other contexts, perhaps the Court could conclude that implied actor was "the ANC." But here, the statute is specific to recognition of a governing bodies of an Indian Tribe. From 200 years of history, and from the constitutional requirement of the Indian

Commerce Clause, we know the implied actor in the passive voice reference. The actor is the United States. The recognition must be by the United States. The United States does not recognize every Board of Directors as a governing body of an Indian Tribe, and therefore the Court of Appeals' decision must be affirmed.

II. The plain language meaning of the ISDEAA.

The 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) [43 U.S.C. § 1601 et seq.], *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).

The plain language shows that while this definition includes Alaska Native villages or regional or village corporations, it does so only when those entities are also "*recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians*." *Id.* (emphasis added). That is the plain meaning. By basic rules of English language, the qualifier applies to all of the terms before.

This is a commonly used form of construction in writing, including legal writing. In it, the writer begins with a series that seeks to capture any entity that the

writer thinks *might* satisfy the qualifier at the end. When drafting that clause, the concern is not over-inclusion. It is under-inclusion—omitting from the series an entity that might be able to satisfy the qualifier.

Once the group is captured, the qualifier clause does the bulk of the work in the statute. It takes the array of entities and narrows them down. In 25 U.S.C. § 5304, there are hundreds of thousands of "organized groups or communities" in the United States. As the statute states, ANCs are included in that large set of "organized groups or communities." But for each of those groups or communities, it is not an Indian Tribe unless it then also meets the requirement of the qualifier at the end of the definition.

In this case, the United States admits that the qualifier applies to tribes and bands. U.S. Br. at 43. There are tribes and bands that do not meet the qualifier—*e.g.*, state recognized tribes, or bands within many of the confederated tribes. Those tribes and bands therefore do not meet the definition of Indian Tribe. Petitioners also would have to admit that the qualifier applies to "organized groups or communities."

That exact same analysis applies to ANCs. They are caught in the widely cast net at the start of the definition, but then are cast out when the qualifier is applied.

Notably, all case law governing construction of series qualifiers is contrary to Petitioners' argument. As shown in the cases applying the series qualifier canon of construction, there can be uncertainty whether a

qualifier applies to the terms other than the last term, but under all of the case law, the qualifier applies to the last term in the series. Here, Petitioners acknowledge the qualifier applies to the earlier terms, but they argue it does not apply to the last term.

Instead of fitting within any existing canon of statutory construction, Petitioners argue that this Court should create a brand-new rule for statutory interpretation. Where a writer provides a series of types of entities and uses a series qualifier, courts must engage in a new analysis. If the qualifier weeds out all of the members of any group in the series, then the qualifier does not apply to that group. The end result is that the statute is interpreted exactly opposite of the writer's intent. Under their proposed new rule, the writer still has to make sure the series at the start is not underinclusive; but the writer now also has to make sure the list is not overinclusive.

As an example of Petitioners' new proposed rule of statutory construction, suppose an attorney submitted a discovery requested for "all letters, memos, electronic communications, including emails, tweets, and Facebook posts, from January 1, 2000 to December 31, 2005." Under the plain language reading, the writer's intent is obvious. The writer is seeking communications within the applicable date range.

But, according to the Petitioners, the writer is actually seeking all tweets, *without regard to date*. Under their new rule, the series qualifier regarding dates would not apply to tweets, because the first tweet did

not occur until 2006. Because tweets are specifically listed, but then would be excluded by the qualifier, the qualifier does not apply to tweets.

Notably in the example above, the writer could have definitively determined that the first tweet was after December 31, 2005 by consulting an online or written reference. In contrast, in the present case, someone writing the definition of "Indian Tribe" in ISDEAA had no way to readily determine whether the newly created ANCs might, at that time or in some later decade, meet the qualifier. *E.g.*, U.S. Br. at 39, ANC Br. at 7 (suggesting that the United States could recognize ANCs as tribes); HR 3662 § 121 (seeking to have CIRI included on the list of federally recognized tribes); 122 Cong. Rec. 29,480 (Sept. 9, 1976) (Senators Steven and Jackson both discuss the uncertainty regarding whether ANCs might qualify as tribes).[10]

Identical to the proposed discovery request discussed above, but more significantly, the definition immediately following "Indian Tribe" in the CARES Act contains this same type of verbal construction that Congress used in the ISDEAA definition.

> The term "unit of local government" means a county, municipality, town, township, village, parish, borough, or other unit of general

[10] As discussed above, there are currently two paths to recognition as a tribe—an administrative path and a congressional path. Congress can designate an entity as a tribe. Requiring a bill drafter in 1975 to know what Congress might do in 2000, or 2020 or 2040 regarding recognition of tribes is not a sound basis for a rule of statutory construction.

> government below the State level with a population that exceeds 500,000.

42 U.S.C. § 801(g)(2).

In the definition of local government, Congress cast a wide net, listing by name multiple types of governmental entities that might qualify, and the qualifier at the end—"exceeds 500,000"—applies to all types of entities. There is no parish over 500,000. Congress could have determined that fact much easier in 2020, than it could have guessed, in 1975, whether ANCs might qualify (either at the time or in later years) 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. There also is no village, township, or borough that qualified under the definition of "local government." https://home.treasury.gov/system/files/136/Eligible-Units.pdf. Additionally, and unlike with the ISDEAA, the CARES Act provided one-time funding, and Congress therefore did not have to attempt to predict future changes in population or future legal changes. It could have determined that there were no parishes over 500,000 through a simple search of census data.

But under Petitioners' new rule for statutory interpretation, Congress meant that *every* township, village, or parish in the United States was to receive money directly from the United States, instead of as a passthrough from their state. Unexpectedly, it would also mean that although every village would receive money directly from the United States, towns would

not, because the Town of Hempstead, New York has over a population exceeding 500,000.

As one would hope and expect, no township, village, parish, or borough used its limited governmental resources to file a suit based upon the new rule of construction that Petitioners urge this Court to adopt. Yet the ANCs, which are not even governments, claim they qualify for tribal government funding under the CARES Act because none of them qualify as a tribal government.

As Judge Katsas discussed in the appealed decision, Petitioners sought to pit the surplusage canon of construction, as urged by Petitioners, against the plain meaning canon, as urged by Respondent. But the Court below concluded it did not even need to decide which canon would prevail,[11] because there was simply no surplusage. When ISDEAA was adopted, Congress could not know with certainty whether ANCs, either then or later, would ever meet the qualifier. Listing them in the series was not "surplusage. It was proper statute drafting, for the reasons discussed above. But even if it had been unnecessary to include them, the meaning was clear, because the qualifier that followed was clear.

The sophistry of the Petitioners' argument is a thing of beauty, but deconstructing leaves us with Petitioners asserting that because no ANC qualifies,

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[11] The plain meaning canon would have prevailed. *E.g.*, *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992).

every ANC qualifies. That is not the rule for statutory interpretation, and it is literally unprecedented. This Court must reject it. Instead, exactly as the ISDEAA definition is written, the qualifier applies to all of the items in the series.

III. The Ute Indian Tribe incorporates the Chehalis Tribe's discussion that Congress has not ratified the Petitioners' interpretation of ISDEAA.

The United States and ANCs contend that even if their interpretation of the ISDEAA is wrong, this Court cannot correct the Secretary's misinterpretation because, they contend, Congress has ratified their misinterpretation. The Chehalis Tribe provides a detailed and correct discussion of why Petitioners are wrong on that point of law. The Ute Indian Tribe incorporates and adopts that argument.

The Ute Indian Tribe further notes that Petitioners' argument for ratification does not apply to the CARES Act. Petitioners only claim that ratification applies to their anti-textual interpretation of the ISDEAA. For the reasons discussed above, the Court should not even need to reach the ISDEAA issue in order to decide this case.

IV. The appeals to equity by the ANCs, the State of Alaska, and Alaska's congressional delegation are wrong based upon law and, independently, based upon fact.

In hyperbole more suited for a jury trial, the ANCs argue, "Worst of all, by upending the long-settled legal landscape the decision below shatters the basic infrastructure of Native life in Alaska, threatening to leave tens of thousands of Alaska Natives exclude from scores of special -federal-Indian law programs," and preventing those "Alaska Natives" from receiving COVID-relates services available to others in Alaska. Their factually unsupported appeal to equity does not change the Indian Commerce Clause and does not change the plain language of the statute.

Petitioners and amicus below made those same arguments, and the Circuit Court succinctly and correctly dismissed those arguments. ANC App. 26. The Court correctly responded that the issue presented is one of statutory interpretation, based upon the statutory text, not one of public policy. If Congress had decided to give Alaska 535 million dollars more, the court would enforce that, but here it decided to give that 535 million to the recognized governing bodies of Indian Tribes, which includes tribes in Alaska and throughout the Lower 48 States. The arguments by one state or one state's congressional delegation that they should be given more money was an issue for all of Congress. Every state and every tribe in the United States is being harmed by COVID-19. Congress decided to give Alaska more Title V CARES Act funds per capita than

all but two other states. The ANC and their support's argument that entities in Alaska should get more is not material to the issue before this Court.

The ANC and Alaska's appeal to equity is also belied by the facts. Although Alaska already received far more per capita than most other states to provide benefits and services *all* Alaska residents, and although it can use those funds for any "necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19)[.]" *Id*. § 801(d)(1), Alaska, its congressional delegation, and the ANCs predicably assert that the United States should directly send another $553,000,000 to the ANCs in Alaska, based upon, inter alia, the "population" of each of those corporations, the number of employees, and other factors. The ANCs and Alaska devote most of their firepower to discussion of how the ANCs provide services to people who are *not* Indians (as that term is used in federal law) but who are of Native American descent or how they can supplement the services which the tribes in Alaska provide. That is simply immaterial to the statutory construction issue presented.

Presumably, no party to this case doubts that a few of the ANCs could provide services related to COVID, just as no party would doubt that every hospital, clinic, medical supplier, food bank, etc. has actually provided such services during this pandemic. But that is why the CARES Act itself permits the State of Alaska to use as much of its *1.25 billion dollars* to pay the for-profit ANCs for such services, just as the State of Alaska and

other states can also use those funds to pay for services from other entities, or to provide direct, targeted relief to hard-hit communities. It is also why tribes in Alaska can use the money they received directly from the United States for those same services, both to tribal members and to others living in their communities. The structure of Title V of the CARES Act provides money directly from the United States to the States, tribal governments and large local units of government. Those *governments* then determine, based upon local needs and conditions, how best to use or distribute that money to combat the human and economic fallout from the pandemic.

Contrary to the ANCs and their supporting State and congressional delegation, Alaska is not at all unique in this regard. Every other state has citizens who are ethnically Native American. In fact, the percentage of enrolled Indians who live in their tribal communities is substantially higher in Alaska than it is in the Lower 48 States.[12] Similarly, there are many people of Native American ancestry in Alaska who are not enrolled, but the same is equally true in the Lower 48 States.[13] Every other state should provide, and one

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[12] The BIA website states that its most recent statistical analysis showed that that only about 44% of those who identified as racially Indian were enrolled. https://www.bia.gov/frequently-asked-questions, "How Large is the national American Indian and Alaska Native population?"

[13] Nationwide, 22% of Indians live within Tribal statistical areas. https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf at 13. In Alaska, over 50% live within their tribal statistical area

would hope is providing, services to all of their citizens, regardless of race. The impression the ANCs, Alaska, and Alaska's congressional delegation provide is that the State of Alaska is not going to use the 1.25 billion dollars for tribal members in Alaska or for unenrolled Native Americans in Alaska. They give the impression that even though they think ANCs can provide valuable COVID-related services, those services will only be provided to people in need if the ANCs, unique among non-governments, receive Title V funding directly from the United States instead of via passthrough from an actual government. If so, that would be morally wrong, wrong as government policy, and probably also unlawful. As is material here, it is not a sufficient basis to divert $533,000,000 from the recognized governing bodies of tribes throughout the United States to the for-profit corporations in Alaska, when Congress directed that those funds were to go to the recognized governing bodies of Indian Tribes, for those tribes to then pass that money through to service providers and members of their community.

(78,141 out of 138,312) their tribal statistical area. *Id.* at tables 2 and 5.

CONCLUSION

For the foregoing reasons, Respondents urge this Court to affirm the Court of Appeals' decision.

Respectfully submitted,

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