Nos. 20-543 and 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.

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

*v.*

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE FEDERAL PETITIONER

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The court of appeals erred in reading Alaska Native regional and village corporations (ANCs) out of the definition of "Indian tribe" in the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 5304(e), and the CARES Act, 42 U.S.C. 801(g)(1). Congress did not deliberately "includ[e]" ANCs in an Alaska-specific clause in the ISDA definition only to then categorically exclude them from eligibility in the

very next clause. 25 U.S.C. 5304(e). Indeed, as respondents do not dispute, the interpretation adopted below would mean that no ANC has *ever* been eligible to be treated as an Indian tribe for ISDA purposes. That interpretation violates the cardinal rule of statutory interpretation that a court should strive to give effect to every word and clause of a statute; defies decades of settled administrative and judicial understandings; and conflicts with the text of other statutes that presuppose that ANCs are eligible to be treated as Indian tribes under the ISDA definition. No principle of statutory interpretation requires such a destructive result, which threatens to deprive Alaska Natives of millions of dollars of coronavirus relief funds during an ongoing public-health emergency.

Respondents' defense of the decision below merely repeats and amplifies the court of appeals' errors. The court posited that its interpretation would not have created a glaring superfluity problem when ISDA was enacted because it was "unsettled" at that time whether ANCs "would ultimately be recognized," though none were. Pet. App. 19a; see Resp. Br. 33-37.[1] But if the recognition clause is understood to refer to formal recognition as a "legal term of art," Pet. App. 13a (citation omitted), then no uncertainty has ever existed about whether ANCs might qualify. ANCs are not, and were not in 1975, repositories of sovereignty. They have never exercised governmental authority over their shareholders or other Alaska Natives. ANCs are distinctly Native entities established pursuant to the

[1] All citations to the petition appendix refer to the appendix in No. 20-543. Except as otherwise noted, citations to respondents' brief are to the brief filed by the Confederated Tribes of the Chehalis Reservation.

Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, but they are not political societies.

The ISDA definition is therefore best read to mean, as its plain text indicates, that Congress included ANCs in the statutory definition because it intended them to be among the entities eligible to enter into agreements with the United States for the delivery of federally funded services to Indians, and that Congress did not subject ANCs to a formal political recognition requirement that none has ever met. Alternatively, if the recognition clause applies to ANCs, it should be read to impose a requirement that Congress itself, in ISDA, deemed ANCs to satisfy. At all events, Congress did not include ANCs "in one breath" only to exclude them in the next. Pet. App. 53a-54a (district court).

When Congress later incorporated into the CARES Act the "meaning given" to the term "'Indian Tribe'" in ISDA, 42 U.S.C. 801(g)(1), Congress made ANCs eligible to receive coronavirus relief funds. Respondent Ute Indian Tribe contends (Br. 21-24) that the CARES Act separately excludes ANCs via its definition of "Tribal government," 42 U.S.C. 801(g)(5). That argument lacks merit. The same language appears in ISDA, and ANCs have long been understood to satisfy it.

## I. ALASKA NATIVE CORPORATIONS ARE ELIGIBLE TO BE TREATED AS INDIAN TRIBES UNDER THE ISDA DEFINITION AND THE CARES ACT

Congress has made ANCs eligible to be treated as Indian tribes for certain limited and specific statutory purposes, including ISDA contracting, even though ANCs are not federally recognized Indian tribes. That has been the settled understanding of the ISDA definition for more than 40 years, and Congress has ratified that understanding in multiple ways.

### A. Respondents' Reading Would Render The Express Inclusion Of ANCs In The ISDA Definition A Nullity

1. As explained in the government's opening brief (at 13), the court of appeals interpreted the recognition clause to require formal recognition—*i.e.*, sovereign, government-to-government relations between the United States and an Indian tribe. Respondents contend (Br. 25-30) that the language of the clause can only bear that meaning. If the recognition clause is understood in that formal sense, then it cannot be applied to ANCs without violating the "surplusage canon—the presumption that each word Congress uses is there for a reason." *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1659 (2017). ANCs are not self-governing political communities but rather corporations that were established "pursuant to" ANCSA—as the ISDA definition of "Indian tribe" recites, 25 U.S.C. 5304(e)—and incorporated under Alaska law, 42 U.S.C. 1606(d), 1607(a). ANCs served as the vehicles by which Congress delivered to Alaska Natives the benefits of the land-claim settlement reflected in ANCSA, and they have a distinct status and role under federal law. Gov't Br. 3-6; see 20-544 Pet. Br. 7-8; Cook Inlet Region, Inc. (CIRI) Amicus Br. 10-13. But ANCs indisputably are not and have never been recognized by the United States for government-to-government relations. Thus, reading the ISDA definition to impose on ANCs a formal recognition requirement would render Congress's deliberate addition of ANCs to the ISDA definition a dead letter. See Gov't Br. 38-43. Respondents' efforts to avoid that surplusage problem are unavailing.

*First*, respondents contend (Br. 31) that the Alaska-specific clause merely "introduces examples of [the] previously listed item[s], and examples are redundant

by nature." But had Congress wished to provide "an illustrative list of examples" of Indian tribes, bands, or other organized groups, *Chickasaw Nation* v. *United States*, 534 U.S. 84, 90 (2001), it would not have singled out "any Alaska Native village or regional or village corporation as defined in or established pursuant to" ANCSA, 25 U.S.C. 5304(e). ANCs and Alaska Native villages exist only in Alaska, and Congress "includ[ed]" them in the ISDA definition specifically to render them eligible, not to illuminate the preceding list of terms. *Ibid.*; see Gov't Br. 19-23. Moreover, respondents' reading would render the ANC-specific language not only redundant, but inexplicable: Congress would have had no reason to indicate that ANCs are "within the definition's reference to 'other organized groups or communities,'" only to then exclude them by imposing a formal recognition requirement that no ANC satisfies or has ever satisfied. Resp. Br. 31 (brackets omitted).

*Second*, respondents contend (Br. 32-33) that the inclusion of ANCs in the ISDA definition is not a nullity under their interpretation because Congress could still recognize ANCs in the future. But federally recognized Indian tribes have always been understood in terms that are not applicable to ANCs. Gov't Br. 42-43. ANCs are creatures of a federal statute and state law; whatever powers they possess spring from those sources and do not inhere in the ANCs as "dependent sovereign[s]." *United States* v. *Lara*, 541 U.S. 193, 203 (2004); see *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978). And, as respondents do not dispute, ANCs exercise no sovereign governmental authority over their shareholders or other Alaska Natives.

Respondents suggest (Br. 33) that a bill proposed in Congress would have formally recognized CIRI, an

ANC, but the cited bill would have merely "deemed" CIRI to "to be an Indian tribal entity" for statutory purposes—a step Congress did not ultimately take, presumably because CIRI was already eligible for such treatment under ISDA and other federal statutes incorporating the ISDA definition. H.R. 3662, 104th Cong., 2d Sess. § 121(a), at 56 (1996); cf. S. Rep. No. 319, 104th Cong., 2d Sess. 57-58 (1996) (describing the bill as clarifying that CIRI "remain[s]" eligible to "administer[] Federal programs"). In any event, any remote possibility of future legislation fails to explain why Congress acted to insert ANCs into the ISDA definition decades ago. Respondents do not explain why Congress would have taken that step in 1975, when any future legislation could itself address ISDA eligibility.

*Third*, respondents reprise (Br. 33-37) the court of appeals' theory that Congress may have been uncertain, at the time of ISDA's enactment, about whether ANCs might be recognized in the future. See Pet. App. 18a-23a. There is no hint of that rationale in ISDA's enactment, and the court identified no historical evidence of uncertainty about ANCs' lack of sovereignty (relying instead on evidence concerning Alaska Native *villages*). To the contrary, experts recognized immediately that ANCs were eligible to contract with the federal government under ISDA even though they lack "tribal sovereignty." 1 American Indian Policy Review Comm'n, 95th Cong., 1st Sess., *Final Report* 495 (Comm. Print 1977); see 43 Fed. Reg. 39,361, 39,362 (Sept. 5, 1978) (Interior's acknowledgement regulations, excluding "corporations * * * formed in recent times"); Alaska Amicus Br. 7, 8-9 (explaining that an ANC "could never be a tribe * * * in the sense of a separate polity," and that the only lingering uncertainty after ANCSA was

"whether Alaska's landless tribes (i.e., Native villages) would be acknowledged as governmental sovereigns").

What meager evidence respondents do offer cuts the other way. For example, respondents cite (Br. 34-35) a failed proposal by Senator Stevens to amend the definition of "Indian tribe" in the Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400, which parallels the ISDA definition, see 25 U.S.C. 1603(14); Gov't Br. 32 n.5. But Senator Stevens made clear that he understood the "present definition" to render ANCs eligible to be treated as Indian tribes. 122 Cong. Rec. 29,480 (1976). And his proposal was prompted by hearings about ISDA's definition of "Indian tribe" as applied to Alaska (see *ibid.*), at which all parties agreed that ANCs were eligible. See *Problems of Definition of Tribe in Alaska Relating to Public Law 93-638: Hearings before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. 2, 26, 40-41, 137 (1976). Likewise, the Interior Department's 1993 list of federally recognized Indian tribes (see Resp. Br. 35) explained that ANCs "lack tribal status in a political sense" but are nonetheless eligible to be treated as Indian tribes "under specific statutes," 58 Fed. Reg. 54,364, 54,365 (Oct. 21, 1993), such as ISDA. See Gov't Br. 43.[2]

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[2] Respondents suggest that Interior recently indicated that it was "unaware of any entity in Alaska" that would be ineligible for acknowledgment. Br. 37 (citation omitted). In fact, Interior stated that it was unaware of any entity that would be ineligible for acknowledgement by virtue of "legislation that has expressly terminated or forbidden a government-to-government relationship." 85 Fed. Reg. 37, 44 (Jan. 2, 2020). The same rulemaking confirmed that ANCs are ineligible for other reasons. See *id.* at 47.

Finally, the "history of federal recognition in Alaska" (Resp. Br. 35) does not help respondents. Respondents identify nothing in the Alaska provision of the Indian Reorganization Act, 25 U.S.C. 5119—which neither respondents nor the court of appeals discussed below—to suggest any uncertainty about recognition for ANCs. ANCs lack any sovereign status. The fact that Congress and the Interior Department have disagreed about the governmental powers and status of a different entity (see Resp. Br. 36-37) says nothing about ANCs.

2. The court of appeals relied primarily on the so-called "series-qualifier canon" to exclude ANCs. Pet. App. 12a. Respondents barely mention (Br. 20) that interpretive guide—and for good reason, because it cannot "bear the weight" that the court placed on it here. *Lockhart* v. *United States*, 577 U.S. 347, 355 (2016). As the government's opening brief demonstrates (at 43-46), the court's rigid application of the series-qualifier proposition led it to overlook the "fundamentally contextual" question of how best to read the statute and all of its constituent parts. *Lockhart*, 577 U.S. at 356; see *United States* v. *Hayes*, 555 U.S. 415, 425-426 (2009). This Court recently reiterated that the utility of the series-qualifier canon "depends on the particular statutory text and context at issue." *Facebook, Inc.* v. *Duguid*, No. 19-511 (Apr. 1, 2021), slip op. 7 n.5. When that canon would lead to a "contextually implausible outcome," *id.* at 9, courts should not follow it into error, as the D.C. Circuit did here.

For their part, respondents focus (Br. 21-22) on the term "including," 25 U.S.C. 5304(e), which they take to compel reading the ISDA definition to subject ANCs to the recognition clause to the same extent that the clause

applies to the preceding list of terms—"any Indian tribe, band, nation, or other organized group or community," *ibid.* But "[i]n definitive provisions of statutes" the word "'include'" can be used "as a word of extension or enlargement rather than as one of limitation or enumeration." *American Sur. Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). For example, the Dictionary Act, 1 U.S.C. 1, uses the term "include" to expand the meaning of the preceding language. See *ibid.* ("words importing the masculine gender include the feminine as well"). So too, "when Congress says something like 'a State includes Puerto Rico and the District of Columbia,'" Congress is using the term not in the "literal" sense of identifying parts or members of a group but rather to expand the group. *Advocate Health Care Network*, 137 S. Ct. at 1658 (some internal quotation marks omitted); see *Adams* v. *Dole*, 927 F.2d 771, 777 (4th Cir.) ("If we say that 'all licensed drivers, including *applicants* for driver's licenses, shall take an eye exam,' the word 'including' means 'and' or 'in addition to.'"), cert. denied, 502 U.S. 837 (1991).

Respondents contend that, even if the term "including" is used in the sense of enlargement, ANCs should still "'receive the same treatment' as the items previously identified" and thus are subject to the same formal-recognition requirement. Resp. Br. 22 (citation omitted); cf. Pet. App. 12a. But the additive sense of "including" does not presuppose that ANCs are subject to the exact same qualifiers or modifiers as the preceding terms. To reprise an example given above, the phrase "all licensed drivers, including applicants for driver's licenses," means that applicants are included even though they are not "licensed," *i.e.*, without being subject to the same modifier that applies to "drivers." Likewise, if

Congress were to provide disaster-relief funds in the wake of a hurricane to all "States, including the District of Columbia, which border the Atlantic Ocean," the natural inference would be that the District of Columbia is eligible to receive the funds—not that Congress made it eligible only if it satisfies a condition it cannot meet.

The force of these examples comes from context; the reader knows, for example, that an applicant for a driver's license is not yet licensed. Cf. *Advocate Health Care Network*, 137 S. Ct. at 1660-1661; *Facebook, Inc.*, slip op. 2-3 (Alito, J., concurring in the judgment). Here, the dispositive contextual consideration is that Congress would not have gone to the trouble of deliberately inserting ANCs into the ISDA definition and reciting that they were "established pursuant" to ANCSA, only to then subject them to a requirement of formal recognition beyond what ANCSA confers. 25 U.S.C. 5304(e).

Indeed, respondents agree (Br. 24) that ANCs would *not* be subject to the recognition clause had Congress "listed ANCs *after* the clause." But the term "including" would function the same way under either arrangement of the clauses: Congress defined "Indian tribe" for ISDA purposes to mean federally recognized Indian tribes "including" ("and," "in addition") ANCs. Congress thereby ensured that Indian tribes that have been formally recognized for government-to-government relations and ANCs established pursuant to ANCSA all "receive the same treatment," in the sense that they are all included among the entities eligible to enter into ISDA agreements. Resp. Br. 22 (citation omitted).

3. Respondents' interpretation is also contrary to the statutory purpose and history. When ISDA was enacted, Congress had recently established ANCs as part of a settlement designed to advance "the real economic

and social needs" of Alaska Natives with their "maximum participation * * * in decisions affecting their rights and property." 43 U.S.C. 1601(b). Congress therefore had good reason to include ANCs among the entities eligible to contract with the federal government under ISDA. Gov't Br. 20-23. Respondents observe (Br. 23-24) that a draft of what would become ISDA's definition of "Indian tribe" contained a version of the recognition clause *before* legislators inserted the express reference to ANCs in the Alaska-specific clause. But that sequence of events only underscores that legislators did not anticipate that the recognition clause would operate to exclude all ANCs from qualifying; otherwise, the deliberate insertion of ANCs would have been pointless.

### B. Respondents' Reading Is Inconsistent With Decades Of Settled Understandings Ratified By Congress

1. For nearly 45 years, the agencies that administer ISDA—the Interior Department and the Indian Health Service (IHS)—have understood ISDA's definition of "Indian tribe" to make ANCs eligible to enter into self-determination contracts; the Ninth Circuit, which includes every ANC, adopted that interpretation in 1987; and expert commentators have uniformly endorsed that understanding. Gov't Br. 24-28. Respondents' contrary view (Br. 37-48) is unmoored from history. The district court considered respondents' same arguments and found, correctly, that respondents "have identified no point in time in [the] last four decades in which the Department of Interior has not treated ANCs as 'Indian Tribes'" for purposes of the ISDA definition. Pet. App. 59a. Moreover, respondents fail to identify any evidence that, before the decision below, any court,

agency, or commentator had ever adopted the interpretation of the ISDA definition that respondents now espouse. When that interpretation was proposed by the plaintiff in *Cook Inlet Native Ass'n* v. *Bowen*, 810 F.2d 1471 (1987), the Ninth Circuit correctly rejected it, see *id.* at 1474-1476.

Respondents assert (Br. 39-40) that Interior failed to reconcile its 1976 memorandum—in which the agency first determined that ANCs are eligible to be treated as Indian tribes for ISDA purposes—with the language of an earlier regulation. But the earlier regulation merely paralleled the statutory language, and Interior addressed that language in its memorandum. J.A. 44-45; see 40 Fed. Reg. 51,282, 51,287 (Nov. 4, 1975).

Respondents next assert (Br. 40) that IHS issued contracting guidelines in 1981 "recognizing Native villages as the 'Indian tribes' in Alaska," but respondents misunderstand the import of those guidelines. Under a proviso in 25 U.S.C. 5304(*l*), an ISDA agreement to provide services "benefiting more than one Indian tribe" requires "the approval of each such Indian tribe." In the guidelines, IHS reasonably determined that the "actual benefit" of healthcare services should be viewed as "accru[ing] to residents of individual villages," 46 Fed. Reg. 27,178, 27,178 (May 18, 1981), as opposed to shareholders in the relevant ANCs. Cf. J.A. 47 (Interior's statement in 1976 that "it is not clear" what it would mean for an ISDA contract "to 'benefit' a village corporation, as opposed to the Native village from which that corporation takes its stockholders"). But IHS also determined that, in the absence of a village council, it would look to "the village profit corporation" or "the regional profit corporation" to grant approval under the statutory proviso on behalf of the village. 46 Fed. Reg. at

27,179. The guidelines thus presuppose and confirm that ANCs are eligible to be treated as "Indian tribes," since only an "Indian tribe" may grant the necessary approval. Gov't Br. 26.

As respondents recognize (Br. 41-42), IHS and the Bureau of Indian Affairs (BIA) entered into ISDA agreements *after* the 1981 guidelines under which CIRI—an Alaska Native regional corporation established pursuant to ANCSA—was treated as an "Indian tribe," designating two of its affiliates to provide healthcare and other federally funded services to thousands of Alaska Natives in the Anchorage area. See *Cook Inlet Native Ass'n*, 810 F.2d at 1473; see also CIRI Amicus Br. 3, 13-19.

Respondents describe (Br. 41) the treatment of CIRI as "anomalous" and "controversial," but they offer no evidence to support those pejoratives. To be sure, the agencies' treatment of CIRI as an "Indian tribe" for ISDA purposes was challenged in *Cook Inlet Native Ass'n*, *supra*, but that decision only undercuts respondents' position. The Ninth Circuit endorsed the agencies' settled interpretation of the ISDA definition as including ANCs and further explained that the agencies' interpretation is "consistent" with the contracting guidelines respondents invoke here. See 810 F.2d at 1474, 1476-1477. And when a further controversy later arose between certain villages and CIRI after CIRI entered into an ISDA compact in 1994—a compact that refutes respondents' suggestion (Br. 45) that ANCs are ineligible to be treated as "Indian tribes" for purposes of ISDA compacting—Congress acted to ensure that CIRI could continue to authorize ISDA agreements as an "Indian tribe." See *Cook Inlet Treaty Tribes* v. *Shalala*, 166 F.3d 986, 988-990 (9th Cir. 1999); Gov't Br.

36 & n.7; see also 25 U.S.C. 450f note (1994) (Tribal Self-Governance Demonstration Project) (statutory basis for 1994 compact).

Moreover, the Interior Department has reiterated its view that ANCs qualify to be treated as "Indian tribes" for ISDA purposes on multiple occasions over the years—including in formal agency documents, such as notices published in the *Federal Register*, that cannot be dismissed as mere "passing statements" (Resp. Br. 44). See Gov't Br. 25 (collecting citations).

Respondents assert (Br. 44-45 & n.8) that IHS and Interior do not, at present, have significant ISDA agreements with ANCs—setting aside the federally funded healthcare services that CIRI has designated an affiliate to provide to tens of thousands of Alaska Natives. Cf. Pet. App. 62a-63a (district court's observation that, "[e]ven if actual agency practice is to rarely contract with ANCs" under ISDA, "the fact remains that ANCs are 'Indian tribes' for purposes of * * * *eligibility*"). But respondents fail to address the evidence of extensive, current participation by ANCs in other statutory programs based on ISDA's definition of "Indian tribe." For example, ANCs receive millions of dollars in annual housing-assistance funds under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. 4101 *et seq.*, which contains a definition of "Indian tribe" that parallels the ISDA definition in pertinent part, see 25 U.S.C. 4103(13)(B). Gov't Br. 33; see Ass'n of Alaska Hous. Auths. Amicus Br. 4-13; Alaska Fed'n of Natives Amicus Br. 17-18; CIRI Amicus Br. 18-19; Alaska Amicus Br. 17, 21-22. Respondents do not explain how their interpretation of the ISDA language could be squared

with existing practice under NAHASDA or other similar statutes.

The regulations cited by respondents (Br. 46) do not call into question the longstanding administrative interpretation. Most merely repeat the substance of the ISDA definition, followed by a cross-reference to Interior's list of formally recognized tribes: "See annually published [BIA] list of Indian Entities Recognized and Eligible to Receive Services." 2 C.F.R. 200.1, 200.54; see 45 C.F.R. 75.2. Those regulations do not purport to exclude ANCs from the ISDA definition, and Interior has separately confirmed that ANCs are eligible for ISDA contracting even though they are not included on the annual list of formally recognized tribes. Gov't Br. 43. Respondents' reliance (Br. 46) on a Treasury regulation implementing a community-banking program, 12 C.F.R. 1805.104, is similarly misplaced. Although respondents are correct that the underlying statutory language is the same, Treasury was not purporting to interpret ISDA, a statute administered by Interior and IHS. And when the CARES Act prompted Treasury to consider the ISDA definition, Treasury determined—in accordance with Interior's longstanding view—that ANCs are eligible to be treated as "Indian tribes" for this specific statutory purpose. J.A. 49-54.

2. Congress has ratified the settled administrative and judicial construction in multiple ways, including by reenacting the ISDA definition of "Indian tribe" without material change in 1988, a year after the Ninth Circuit's decision in *Cook Inlet Native Ass'n*, *supra*. Gov't Br. 29-34. Thus, Congress had decisively rejected respondents' alternative reading by the time the CARES Act incorporated "the meaning given" to the term "'Indian Tribe'" under ISDA. 42 U.S.C. 801(g)(1).

Respondents contend (Br. 37-38) that Congress's reenactment of the ISDA definition in the face of a settled interpretation is immaterial because "the statutory text is plain." But the "plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole." *Yates* v. *United States*, 574 U.S. 528, 537 (2015) (opinion of Ginsburg, J.) (brackets and citation omitted). Here, as discussed above, respondents' purported plain-meaning approach would render the ANC-specific language in the definition a nullity and thus would produce a result demonstrably at odds with the text itself and with Congress's manifest purpose to include ANCs.

Respondents also speculate (Br. 42-44, 47) that Congress may not have been specifically aware of the administrative or judicial construction of the ISDA definition and therefore did not ratify it. But Congress is "presumed to be aware" of such an interpretation when it legislates against the backdrop of settled law, *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1762 (2018) (citation omitted), and this Court has applied that presumption to longstanding administrative constructions even when accompanied by few or no judicial decisions, see Gov't Br. 30 (examples). In any event, the legislative record indicates that the Congress that reenacted the ISDA definition in 1988 was, in fact, aware of the administrative interpretation, which was reflected in a prepared statement by a CIRI representative describing CIRI's existing ISDA contracts. *Ibid.*; cf. S. Rep. No. 508, 100th Cong., 2d Sess. 3 (1988) (committee report from the same Congress stating that, "[w]ith the enactment of [ISDA]," "Alaska Native regional

health and village corporations have begun to assume the responsibility for the provision of health care under contract with" IHS). Respondents assert (Br. 43) that the CIRI statement "adds nothing," but again do not explain why the Court should ignore the most significant example of ISDA contracting in Alaska.

When Congress enacted the CARES Act, it also had readily available to it other preexisting definitions of "Indian tribe" understood to *exclude* ANCs—including the definition in the Federally Recognized Indian Tribe List Act of 1994 (List Act), Pub. L. No. 103-454, Tit. I, 108 Stat. 4791. Gov't Br. 34. Respondents suggest (Br. 33 n.4) that ANCs are not actually excluded by that definition, but the List Act defines "Indian tribe" to be limited to those tribes Interior "acknowledges to exist" as sovereigns, 25 U.S.C. 5130(2)—a group that does not include ANCs, who are ineligible for acknowledgment. See 25 C.F.R. 83.4, 83.11. Had Congress wished to exclude ANCs from eligibility under the CARES Act, it could have incorporated that definition or similar language. Cf. Senators Murkowski et al. Amici Br. 20. Indeed, that is how Congress proceeded when it determined not to include ANCs in later-enacted coronavirus relief legislation. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, Tit. IX, Subtit. M, § 9901(a), 135 Stat. 223 (42 U.S.C. 802(g)(7)).

### C. Respondents' Reading Cannot Be Squared With The Text Of Multiple Post-ISDA Statutes

The court of appeals failed to consider the multiple post-ISDA statutes that presuppose in their text that ANCs meet the ISDA definition of "Indian tribe," including through the express exclusion of ANCs. Gov't Br. 35-37. Respondents implausibly suggest (Br. 50) that Congress has expressly carved out ANCs from the

ISDA definition in some statutes in order to make clear that ANCs are "forever excluded" from eligibility, even if the federal government were somehow to formally recognize ANCs for government-to-government relations in the future. But the far simpler and correct explanation for such express exclusions is that Congress has long understood the ISDA definition to include, not exclude, ANCs.

The 1997 statute resolving a controversy regarding CIRI's ISDA compact also presupposes, in its text, that ANCs are eligible to be treated as "Indian tribes" under the ISDA definition. See pp. 13-14, *supra*. Respondents describe (Br. 49-50) aspects of that statute but fail to address the multiple ways in which it presupposes that ANCs satisfy the ISDA definition. See Gov't Br. 35-36. For example, the 1997 statute waived a requirement for any further authorizing resolutions "from the Regional Corporations, [or] Village Corporations," before certain tribal healthcare entities could enter into ISDA agreements. Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 325(a), 111 Stat. 1597. ISDA requires such approvals only from an "Indian tribe," 25 U.S.C. 5304(*l*), so the 1997 statute necessarily contemplates that ANCs qualify as "Indian tribes" for ISDA purposes. Gov't Br. 35. Respondents also have nothing to say about the appropriations riders Congress has continued to enact since then, which likewise presuppose that ANCs are eligible to enter into ISDA agreements. *Id.* at 36.

Respondents err in contending (Br. 50-51) that "recently enacted legislation" points the other way. In the Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, 128 Stat. 1193, Congress authorized federal assistance to "non-Federal public entities,

including Indian tribes (as defined in [ISDA]),” for certain Arctic development projects, *id.* § 2105(a), 128 Stat. 1279. In the WIIN Act, Pub. L. No. 114-322, 130 Stat. 1628, Congress amended that language to clarify that “Native village[s], Regional Corporation[s], [and] Village Corporation[s]” are eligible, see *id.* § 1202(c)(1), 130 Stat. 1684. That amendment does not help respondents because it refers to both ANCs and Native villages and thus is redundant on either parties’ reading of the ISDA definition. Respondents’ other examples (Br. 51) involve statutes that include ANCs while excluding Native villages—a policy choice that says nothing at all about the ISDA language at issue here. See 40 U.S.C. 502(c)(3)(B); 44 U.S.C. 3601(8).

Of course, a given statute incorporating the ISDA definition may otherwise indicate that ANCs are ineligible or that the statue has no practical application to ANCs. Gov’t Br. 33-34; cf. Resp. Br. 48. But the existence of such statutes simply demonstrates that Congress may, through other language, render ANCs ineligible. It did not do so here.

### D. If The Recognition Clause Applies To ANCs, Then ANCs Satisfy It

Alternatively, if the recognition clause is interpreted to refer not to being formally recognized by the federal government for government-to-government relations, but rather to having the requisite status under federal law with respect to delivering programs and services to promote the welfare of Indians, then Congress’s decision to include ANCs in an Alaska-specific clause in the ISDA definition of “Indian tribe” demonstrates that Congress itself has already determined that ANCs have that status. Gov’t Br. 47-48. ANCs were specifically

established, and Alaska Native villages were specifically defined, in ANCSA, as the ISDA definition of "Indian tribe" recites. 25 U.S.C. 5304(e). The recognition clause can be reasonably read to refer to both formal, political recognition and the distinct and lesser recognition that Congress itself afforded to the entities listed in the Alaska clause when it deliberately included them in the ISDA definition after it established and defined them by statute in ANCSA.

Respondents maintain (Br. 25-28) that the recognition clause must be read to refer only to formal, political recognition for government-to-government relations. Although the language used in the recognition clause has come to be associated with formal recognition in that term-of-art sense, respondents fail to show that Congress used it in that specific manner—so as to exclude ANCs that had only recently been established by Congress itself—when enacting ISDA in 1975. Respondents do not identify any pre-ISDA statute using the phrase "recognized as eligible" in the term-of-art sense; like the court of appeals, they rely instead on termination statutes referring to the benefits or services provided by the United States to Indians "because of their status as Indians." Resp. Br. 25-26 (citation omitted); see Pet. App. 14a-15a. In the end, the critical point is that Congress deliberately included ANCs in the ISDA definition in order to make them eligible to contract with the federal government; the recognition clause should not be interpreted to render that inclusion a dead letter.

## II. THE UTE INDIAN TRIBE'S ALTERNATIVE THEORY LACKS MERIT

Respondent Ute Indian Tribe contends (Br. 9-27) that the CARES Act separately renders ANCs ineligible to receive the funds at issue because the funds are to be paid to a "Tribal government," which the CARES Act defines as "the recognized governing body of an Indian Tribe," 42 U.S.C. 801(g)(5). The court of appeals did not reach that contention, instead resting its decision exclusively on the flawed conclusion that "ANCs do not satisfy the ISDA definition." Pet. App. 11a. The Court should reject the Ute Indian Tribe's argument as an alternative ground for affirmance. See Gov't Br. 40 n.8.

As the district court explained, see Pet. App. 67a-68a, the CARES Act's definition of "Tribal government" is materially indistinguishable from a portion of ISDA's definition of a "tribal organization." Compare 42 U.S.C. 801(g)(5) ("recognized governing body of an Indian Tribe"), with 25 U.S.C. 5304(*l*) ("recognized governing body of any Indian tribe"). An ANC has long been understood to have a "recognized governing body" under that language; for example, each regional corporation has a board of directors, in whom management responsibilities are vested. 43 U.S.C. 1606(f); see, *e.g.*, J.A. 45 (Interior's 1976 memorandum on ANC eligibility, explaining that the "corporation's board of directors * * * is its 'governing body'" for these purposes). That construction flows from the plain meaning of the statutory language. Corporations are commonly understood to have a "governing body." See, *e.g.*, *Black's Law Dictionary* 839 (11th ed. 2019) (defining "governing body" to mean "government" or "[a] group of (esp. corporate)

officers or persons having ultimate control") (capitalization and emphasis omitted).

The Ute Indian Tribe contends (Br. 15-16) that ANCs lack a "recognized governing body," 42 U.S.C. 801(g)(5), on the theory that the term "recognized" as used here incorporates a requirement of formal, political recognition. But that term-of-art usage is not suited to this context, for reasons the district court explained at length. Pet. App. 68a-70a & n.17. Members of a tribe may disagree about its leadership. The "recognized" governing body of an Indian tribe is simply the governing body that the United States recognizes (accepts) as the tribe's governing body. See, *e.g.*, *The American Heritage Dictionary of the English Language* 1469 (5th ed. 2016) (defining "recognize"). In this context, that includes the leadership of an ANC.

The Ute Indian Tribe also stresses (Br. 21-24) that ANCs do not exercise governmental powers and are not sovereign. Congress was free, however to define the term "Tribal government" in the CARES Act more broadly than the ordinary meaning of those words might otherwise suggest. See, *e.g.*, *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 490 (2020) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from a term's ordinary meaning.") (citations and internal quotation marks omitted).

Congress had good reason to choose to treat ANCs as eligible to receive coronavirus relief funds also available to sovereign, federally recognized Indian tribes. ANCs play a distinct role with respect to Alaska Natives, and supporting ANCs during the current public-health emergency will redound to the benefit of the Alaska Native communities in the geographic regions

the ANCs cover. The decision below upends that policy decision and should be reversed.[3]

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Acting Solicitor General*

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[3] The Ute Indian Tribe adverts (Br. 5) to separate litigation challenging Treasury's methodology for calculating the amount of payments made to eligible tribal recipients, including ANCs. In *Shawnee Tribe* v. *Mnuchin*, 984 F.3d 94 (2021), the D.C. Circuit concluded that the plaintiff tribes were likely to succeed in showing that Treasury had acted arbitrarily in allocating an initial round of payments on the basis of tribal population figures drawn from a preexisting housing block-grant program, see *id.* at 101-103. Those proceedings are currently on remand in district court, and Treasury is in the process of formulating a new methodology that could result in lower payments to ANCs than previously contemplated.