No.

In the Supreme Court of the United States

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, PETITIONER

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Coronavirus Aid, Relief, and Economic Security or CARES Act, Congress directed the Secretary of the Treasury to disburse $8 billion of relief funds "to Tribal governments." Pub. L. No. 116-136, Div. A, Tit. V, § 5001(a), 134 Stat. 501-502 (42 U.S.C. 801(a)(2)(B)). The CARES Act defines a "Tribal government" as "the recognized governing body of an Indian Tribe," 42 U.S.C. 801(g)(5), and provides that "[t]he term 'Indian Tribe' has the meaning given that term in" the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 5301 *et seq.* 42 U.S.C. 801(g)(1). ISDA, in turn, defines "Indian tribe" to mean "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act * * * , which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. 5304(e). The question presented is as follows:

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

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellee below) is Steven T. Mnuchin in his official capacity as the Secretary of the Treasury.

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

In addition, the following parties intervened in the litigation, participated as defendants-appellees below, and are respondents in this Court: Ahtna, Inc.; Akiachak, Ltd.; the Alaska Native Village Corporation Association, Inc.; the Association of ANCSA Regional Corporation Presidents/CEO's, Inc.; Calista Corp.; Kwethluk, Inc.; Napaskiak, Inc.; Sea Lion Corp.; and St. Mary's Native Corp.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Confederated Tribes of the Chehalis Reservation v. *Mnuchin*, Nos. 20-cv-1002, 20-cv-1059, and 20-cv-1070 (June 26, 2020)

United States Court of Appeals (D.C. Cir.):

Confederated Tribes of the Chehalis Reservation v. *Mnuchin*, Nos. 20-5204, 20-5205, and 20-5209 (Sept. 25, 2020)

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Secretary of the Treasury, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is not yet published in the Federal Reporter but is available at 2020 WL 5742075. The opinion of the district court (App., *infra*, 28a-72a) is not yet published in the Federal Supplement but is available at 2020 WL 3489479. The district court's opinions and orders granting a stay pending appeal (App., *infra*, 77a-83a) and granting a preliminary injunction (App., *infra*, 84a-125a) are, respectively, available at 2020 WL 3791874 and reported at 456 F. Supp. 3d 152.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4 of the Indian Self-Determination and Education Assistance Act provides in relevant part:

> 'Indian tribe' means 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) (brackets in original).

The Coronavirus Aid, Relief, and Economic Security or CARES Act provides in relevant part that "[t]he term 'Indian Tribe' has the meaning given that term in section 5304(e) of title 25." 42 U.S.C. 801(g)(1).

Other pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 126a-141a.

STATEMENT

In the midst of the public-health and economic crises precipitated by COVID-19, Congress appropriated $8 billion in aid for "Tribal governments." CARES Act, Pub. L. No. 116-136, Div. A, Tit. V, § 5001(a), 134 Stat. 501 (42 U.S.C. 801(a)(2)). Congress defined a "Tribal government" for these purposes as the "recognized governing body of an Indian Tribe." 42 U.S.C. 801(g)(5). And it specified that the "[t]he term 'Indian Tribe' has the meaning given that term in section 5304(e) of title

25." 42 U.S.C. 801(g)(1). The cross-referenced definition, from the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 5301 *et seq.*, expressly refers to Alaska Native regional and village corporations established pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.* See 25 U.S.C. 5304(e). For nearly 45 years, the federal government has understood Alaska Native corporations to qualify as Indian tribes under the ISDA definition. In this case, the court of appeals interpreted the ISDA definition of "Indian tribe" to exclude Alaska Native corporations, based on another clause in the ISDA definition that had long been recognized as not disqualifying them, thereby making the Native corporations ineligible to receive the relief payments available to Indian tribes under the CARES Act. App., *infra*, 1a-27a.

1. a. In 1971, Congress enacted ANCSA, Pub. L. No. 92-203, 85 Stat. 688 (43 U.S.C. 1601 *et seq.*), to address the "need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims," 43 U.S.C. 1601(a); see S. Rep. No. 925, 91st Cong., 2d Sess. 69-72 (1970). ANCSA "[d]epart[ed] from previous Indian land claims settlement acts" by using a corporate model unique to Alaska. 1 *Cohen's Handbook of Federal Indian Law* § 4.07[3][a] (Nell Jessup Newton ed. 2017) (*Cohen's*). In exchange for extinguishing native land claims and hunting rights and revoking most existing reservations, see 43 U.S.C. 1603, 1618(a), "Congress authorized the transfer of $962.5 million in state and federal funds and approximately 44 million acres of Alaska land to state-charted private business corporations that were to be formed pursuant to the statute," *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 524 (1998).

ANCSA provided for "the creation of two types of corporations to receive this money and land: Alaska Native Regional Corporations and Alaska Native Village Corporations." App., *infra*, 4a. Within each of twelve regions covering all of Alaska, Congress provided for representatives of existing Native associations to "incorporate under the laws of Alaska a Regional Corporation to conduct business for profit." 43 U.S.C. 1606(d). Congress also directed the Secretary of the Interior to prepare a roll of all Alaska Natives showing the region and, if applicable, village in which they resided. 43 U.S.C. 1604(a) and (b). Alaska Natives then received stock in the regional corporation for the region in which they resided. 43 U.S.C. 1606(g)(1)(A). Alaska Natives who lived in villages also received stock in newly formed village corporations, established pursuant to ANCSA for approximately 200 villages. 43 U.S.C. 1607; see 1 *Cohen's* § 4.07[3][b][ii][B].

Through these Alaska Native corporations (ANCs), Congress sought to address the "economic and social needs" of Alaska Natives "without establishing any permanently racially defined institutions." 43 U.S.C. 1601(b). ANCSA thus originally contemplated that shares in the regional and village corporations would be inalienable by their initial Alaska Native shareholders for 20 years and then would be freely transferrable, including to persons other than Alaska Natives. ANCSA § 7(h)(1) and (3), 85 Stat. 692-693; see § 8(c), 85 Stat. 694. The statute was later amended to extend the alienability restrictions indefinitely unless an ANC opts out of them. 43 U.S.C. 1629c.

b. In 1975, Congress enacted ISDA, Pub. L. No. 93-638, 88 Stat. 2203 (25 U.S.C. 5301 *et seq.*). ISDA authorizes "any Indian tribe" to request that the federal

government enter into a contract with a "tribal organization" to provide various government-funded economic, infrastructure, health, and education services to Indians. 25 U.S.C. 5321(a)(1). Under ISDA, a "tribal organization" includes "the recognized governing body of any Indian tribe," 25 U.S.C. 5304(*l*), and "Indian tribe" means

> 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) (brackets in original). In this case, the lower courts referred to the final clause beginning with "which is recognized as eligible" as the "recognition" or "eligibility" clause. App., *infra*, 11a, 41a.

In 1976, the Assistant Solicitor for Indian Affairs in the Department of the Interior issued a memorandum addressing whether ANCs qualify as "Indian tribes" under the definition quoted above. C.A. App. 137-140. The question arose because of the final clause in the ISDA definition: "which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. 5304(e). The Assistant Solicitor noted that, although "Alaska Native * * * regional or village corporation[s] * * * established pursuant to" ANCSA are expressly included in the ISDA definition, *ibid.*, "profit-making regional and village corporations have not heretofore been recognized as eligible for BIA programs and services which are not provided for by the terms of

[ANCSA]," C.A. App. 138. The Assistant Solicitor explained that if the recognition clause in the ISDA definition of "Indian tribe" were to "operate[] to disqualify [ANCs] from the benefits of" ISDA, then "their very mention" in the definition would be "superfluous." *Ibid.* Rejecting that interpretation, the Assistant Solicitor concluded that the recognition clause was not intended to "apply to regional and village corporations," which are therefore Indian tribes "within the scope" of ISDA's definition. *Ibid.*

Since the 1976 memorandum, the Department of the Interior—the "agency in charge of Indian affairs," App., *infra*, 58a—has consistently adhered to the view that ANCs qualify as Indian tribes as defined in ISDA. *Ibid.* The Indian Health Service (IHS), which is part of the Department of Health and Human Services (HHS) and which also administers ISDA, adopted that interpretation in 1977. See *Cook Inlet Native Ass'n* v. *Bowen*, 801 F.2d 1471, 1474 (9th Cir. 1987); see also *id.* at 1473-1476 (agreeing with that view and holding that an ANC is an "Indian tribe" under the ISDA definition). Congress has since reenacted the ISDA definition of "Indian tribe" without change and has incorporated or substantially copied it into other federal statutes. See pp. 20-21, *infra*.

c. In 2020, the COVID-19 pandemic created a "public health emergency and economic crisis" throughout the United States. H.R. Rep. No. 420, 116th Cong., 2d Sess. 2-3 (2020). Congress enacted the CARES Act to address those twin catastrophes—in part by appropriating $150 billion to a coronavirus relief fund for "States, Tribal governments, and units of local government." 42 U.S.C. 801(a)(1). Of those funds, Congress

directed the Secretary of the Treasury to reserve $8 billion specifically "for making payments to Tribal governments." 42 U.S.C. 801(a)(2)(B). The CARES Act defines the term "Tribal government" to mean "the recognized governing body of an Indian Tribe," 42 U.S.C. 801(g)(5), where "[t]he term 'Indian Tribe' has the meaning given that term in section 5304(e) of title 25," *i.e.*, in ISDA. 42 U.S.C. 801(g)(1).

The CARES Act specifies that these funds shall be used to cover the costs of "necessary expenditures incurred" due to COVID-19 that were not "accounted for" in prior budgets and that are "incurred" between March 1, 2020, and December 30, 2020. 42 U.S.C. 801(d)(1)-(3). The Treasury Department has interpreted the term "necessary expenditures" to include "[e]xpenses associated with the provision of economic support" to private businesses "in connection with the COVID-19 public health emergency." U.S. Dep't of the Treasury, *Coronavirus Relief Fund Guidance for State, Local, and Tribal Governments* 4 (rev. Sept. 2, 2020), https://go.usa.gov/x7axA. For example, a state, local, or tribal recipient may use coronavirus relief funds to assist private businesses by "reimburse[ing] the costs of business interruption caused by required closures." *Ibid.* And tribal recipients may use the funds to support tribally owned businesses. See U.S. Dep't of the Treasury, *Coronavirus Relief Fund Allocations to Tribal Governments* 1-2 (May 5, 2020), https://go.usa.gov/x7auz. Relief funds that are not spent on permissible purposes may be recouped by the federal government. 42 U.S.C. 801(f)(2).

2. The present controversy arises from the efforts of several Indian tribes to prevent the Secretary of the Treasury from making payments to ANCs as "Indian tribes" under the CARES Act. Between April 17 and

April 23, 2020, "three separate groups of Indian tribes filed lawsuits" against the Secretary in the United States District Court for the District of Columbia, contending that ANCs are not eligible to be treated as Indian tribes for these purposes. App., *infra*, 7a; see *id.* at 33a. The district court consolidated the three pending challenges, and a group of ANCs intervened as defendants. *Id.* at 7a.

On April 20, 2020, the Treasury Department requested the views of the Department of the Interior on ANC eligibility. C.A. App. 142; cf. 42 U.S.C. 801(c)(7). The Interior Department "confirm[ed]" its position that ANCs "are 'Indian tribes' for the specific purpose of [ISDA] eligibility.'" C.A. App. 142. On April 23, the Treasury Department issued public guidance stating that, "[a]fter consultation with the Department of the Interior, Treasury has concluded that Alaska Native regional and village corporations as defined in or established pursuant to ANCSA are eligible" to receive these CARES Act funds. *Id.* at 145.

3. The district court granted a preliminary injunction on April 27, 2020, forbidding Treasury "from disbursing Title V funds to any ANC." App., *infra*, 86a; see *id.* at 84a-125a. On June 26, however, after additional briefing and argument, the court reconsidered its earlier view, dissolved the preliminary injunction, and entered summary judgment in favor of the Secretary and the intervenor ANCs. *Id.* at 28a-72a.

The district court framed the ISDA question as primarily a contest between two competing "canon[s] of statutory construction." App., *infra*, 44a. On the one hand, the plaintiff tribes invoked the "series-qualifier canon," under which "a modifier at the end of [a] list" of parallel nouns or verbs "normally applies to the entire

series." *Id.* at 44a-45a (citation and internal quotation marks omitted). The plaintiff tribes argued that the recognition clause in the ISDA definition of "Indian tribe" modifies each item in the preceding list, including Alaska Native regional and village corporations. On the other hand, the Secretary invoked the canon against surplusage, arguing that the plaintiff tribes' reading would render the reference to ANCs in the definition superfluous. *Id.* at 45a-46a.

The district court concluded that "[t]he series-qualifier canon * * * must give way in this case to the rule against superfluity." App., *infra*, 50a. The court stated that the plaintiff tribes' reading would improperly "render Congress's purposeful inclusion of ANCs in the [ISDA] definition 'wholly superfluous,'" *id.* at 47a (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)), because ANCs are business corporations that have never been formally recognized for purposes of government-to-government relations under principles of federal recognition, *id.* at 47a-50a. The court also determined that ISDA's "drafting history lends support to this conclusion," because "Congress went out of its way to add ANCs to the statutory definition of 'Indian tribe.'" *Id.* at 53a. "It would be an odd result," the court reasoned, "for Congress to include ANCs in one breath only to negate their inclusion in the very next breath through the eligibility clause." *Id.* at 53a-54a. Finally, the court invoked principles of *Skidmore* deference and emphasized that the Interior Department "has long taken the position that ANCs qualify as 'Indian Tribes' for purposes of" ISDA. *Id.* at 57a; see *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

The district court also rejected the plaintiff tribes' alternative argument that by directing the Secretary to

distribute coronavirus relief funds to the "recognized governing bod[ies]" of Indian tribes, 42 U.S.C. 801(g)(5), Congress created an additional requirement that disqualified ANCs, which do not have governments as such. App., *infra*, 63a-72a. The court understood the phrase "recognized governing body of an Indian Tribe" to include the board of directors of an ANC—as the same phrase in ISDA had long been interpreted. See *id.* at 67a-68a (discussing 25 U.S.C. 5304(*l*)).[1]

4. The court of appeals reversed. App., *infra*, 1a-27a. As relevant here, the court held that "ANCs do not satisfy the ISDA definition" of "Indian tribe" and therefore are not eligible to receive payments. *Id.* at 11a. In its view, the "text and structure" of the ISDA definition "make clear that the recognition clause, which is adjectival, modifies all of the nouns listed in the clauses that precede it." *Id.* at 11a-12a. The court reasoned that the recognition clause follows a list of "five synonyms in a grammatically simple list (any 'tribe, band, nation, or other organized group or community')." *Id.* at 12a. The court further reasoned that, through "its usage of 'including,'" the statute "equate[s]" ANCs "with the five preceding nouns," making them all subject to the recognition clause. *Ibid.* The court also observed that the recognition clause "undisputedly" applies to the term "Alaska Native village" in the ISDA definition. *Ibid.* The court deemed it "not grammatically possible for the recognition clause to modify *all* of the five nouns in the listing clause, *plus* the first noun in the more proximate

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[1] On July 7, 2020, the district court granted the plaintiff tribes' request for a stay to prevent the Secretary from disbursing the disputed funds to ANCs. App., *infra*, 77a-83a. The court of appeals later entered a similar injunction pending appeal. *Id.* at 75a-76a.

Alaska clause ('village'), but *not* the one noun in the preceding two clauses that is its most immediate antecedent ('corporation')." *Ibid.*

The court of appeals reasoned that recognition is a "legal term of art" in Indian law, App., *infra*, 13a (citation omitted); that ANCs have never been recognized in that formal sense because the United States does not have "a political relationship with them government-to-government," *id.* at 18a; and that regulations in place since 1978 in fact foreclose formal recognition of business corporations "formed in recent times," *ibid.* (quoting 25 C.F.R. 83.4(a)). The court nonetheless maintained that its interpretation does not render the express reference to ANCs mere surplusage because, according to the court, "it was highly unsettled in 1975, when ISDA was enacted, whether Native villages or Native corporations would ultimately be recognized." *Id.* at 19a. The court acknowledged that its interpretation conflicted with the longstanding position of the Interior Department and with a prior Ninth Circuit decision. See *id.* at 23a-24a (declining to follow *Cook Inlet Native Association*, *supra*).

Judge Henderson concurred but called the result the court of appeals reached "unfortunate" and "unintended." App., *infra*, 26a. She could "think of no reason that the Congress would exclude ANCs (and thus exclude many remote and vulnerable Alaska Natives) from receiving and expending much-needed" coronavirus relief funds. *Id.* at 26a-27a.

The court of appeals issued its decision on September 25, 2020. App., *infra*, 1a. On September 30—the last day of the government fiscal year for which the funds at issue had been appropriated, see 42 U.S.C.

801(a)(1)—the court ordered that, "to ensure an opportunity for orderly review" of its decision, "any expiration of the appropriation for Tribal governments set forth in 42 U.S.C. 801(a)(2)(B) is hereby suspended." App., *infra*, 74a. That order will remain in force pending certiorari. See *ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals erred in concluding that an Alaska Native regional or village corporation established pursuant to the Alaska Native Claims Settlement Act does not qualify as an "Indian tribe" within the meaning given that term in the ISDA definition, 25 U.S.C. 5304(e), which is incorporated into the CARES Act, 42 U.S.C. 801(g)(1). ISDA's definition of "Indian tribe" refers expressly to both types of corporations—references that would be superfluous if ANCs were simultaneously excluded by the recognition clause at the end of the same definition. The decision below thus violates the "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1890 (2019) (quoting *Loughrin* v. *United States*, 573 U.S. 351, 358 (2014)).

Congress deliberately added ANCs to the ISDA definition during the legislative process, in order to ensure that ANCs would be eligible to enter into contracts with the federal government under ISDA on the same terms as federally recognized tribes. The Department of the Interior has understood the ISDA definition that way essentially since ISDA was enacted. In *Cook Inlet Native Association* v. *Bowen*, 810 F.2d 1471, 1473-1474 (1987), the Ninth Circuit likewise determined that ANCs qualify as Indian tribes under the ISDA definition, thus settling the issue for the last thirty years for

the circuit that encompasses all ANCs. Congress later reenacted the ISDA definition without suggesting any disagreement with the prevailing administrative and judicial interpretation. Congress has also incorporated or substantially copied the ISDA definition into other federal laws—including laws that presuppose, in the statutory text, that ANCs are treated as Indian tribes.

Thus, when Congress incorporated the meaning given "Indian tribe" in the ISDA definition into the CARES Act in 2020, it did so against an established understanding that the ISDA definition includes ANCs. Nothing in the CARES Act suggests that Congress departed from that understanding. To the contrary, Congress incorporated the ISDA definition to ensure that urgent coronavirus relief funds are available to ANCs for the benefit of their Alaska Native shareholders and the communities ANCs serve. The decision below contravenes that judgment; avowedly conflicts with the Ninth Circuit's decision in *Cook Inlet Native Association*, *supra*; and calls into question the status of ANCs under other federal statutes. The petition for a writ of certiorari should be granted.

A. ANCs Are Expressly Included In The Definition Of "Indian Tribe" In ISDA And Therefore In The CARES Act

The court of appeals erred in construing the ISDA definition of "Indian tribe" to exclude ANCs. Congress did not expressly *include* ANCs in one clause of the ISDA definition only to then categorically *exclude* them in the very next clause, by imposing a requirement of formal recognition as a sovereign tribe that ANCs could not and do not satisfy. The statutory definition should not be read to be at war with itself. If the recognition clause is read to impose such a requirement, subjecting

ANCs to it—and thereby excluding them from eligibility despite Congress's express inclusion of them—would violate the rule that all terms of a statute must be given effect.

Alternatively, if the recognition clause is read instead to refer to the Indian and Native entities that have a requisite status under federal law with respect to programs and services to promote the welfare of Indians, then Congress itself made the judgment directly in the ISDA definition that ANCs and Alaska Native villages qualify for purposes of ISDA. ANCs and Native villages were specifically identified or established in ANCSA, as the ISDA definition recites, and together ANCs and Native villages were to perform a role in Alaska under ISDA parallel to that of federally recognized tribes elsewhere in the United States. Congress therefore "include[d]" them in a special Alaska clause in the ISDA definition, 25 U.S.C. 5304(e).

In any event, by the time Congress enacted the CARES Act and incorporated the "meaning given" to the term "Indian tribe" in the ISDA definition, 42 U.S.C. 801(g)(1), the term had long been construed by the Interior Department and IHS to include ANCs; the Ninth Circuit had adopted that interpretation in *Cook Inlet Native Association*; and Congress itself had ratified that interpretation, including by reenacting the ISDA definition of "Indian tribe" without change after the Ninth Circuit's decision. The decision below failed to account for those considerations.

1. Congress deliberately included ANCs in the ISDA definition

The ISDA definition expressly includes Alaska Native regional and village corporations:

> 'Indian tribe' means 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) (brackets in original). The definition also uses ANC-specific language. Of the listed entities, only ANCs are "established pursuant to" ANCSA. *Ibid.* The ISDA definition should therefore be understood to include ANCs as Indian tribes, not to categorically exclude them.

That reading is consistent with the nature and role of ANCs under ANCSA. In ANCSA, to address the unique circumstances and history of federal-tribal relations in Alaska, Congress provided for the formation of Alaska Native regional and village corporations to receive the money and land that the United States paid to settle Alaska Native land claims. See pp. 3-4, *supra*; see also David S. Case & David A. Voluck, *Alaska Natives and American Laws* 179 (3d ed. 2012) (Case & Voluck) (describing this "novel and experimental" approach, unique to Alaska). ANCs are incorporated under state law as business corporations, with Alaska Native shareholders. See 43 U.S.C. 1606(d) (regional corporations); 43 U.S.C. 1607(b) (village corporations). But it was also contemplated that ANCs would perform "social welfare functions" to benefit their shareholders and communities. S. Conf. Rep. No. 581, 92d Cong., 1st Sess. 42 (1971); cf. Act of Oct. 31, 1998, Pub. L. No. 105-333, § 12,

112 Stat. 3135 (adding 43 U.S.C. 1606(r), which "confirm[s]" the authority of ANCs to "promote the health, education, or welfare" of Alaska Native shareholders and their families). It is thus unsurprising that Congress has chosen to treat ANCs on the same terms as formally recognized tribes in certain respects, including under ISDA.

The drafting history of ISDA confirms that Congress included the express reference to ANCs in order to ensure that ANCs, like federally recognized tribes, are eligible to enter into contracts with the federal government under ISDA. As reported in the Senate, the version of the bill that became ISDA included "Alaska Native village[s]" in the definition of "Indian tribe," but not ANCs. S. 1017, 93d Cong., 2d Sess. § 4(b) (Mar. 28, 1974) ("'Indian tribe' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village as defined in [ANCSA], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."). ANCs were added to the definition only later, when the bill was reported in the House of Representatives. S. 1017, 93d Cong., 2d Sess. § 4(b) (Dec. 16, 1974) ("including any Alaska Native village *or regional or village corporation* as defined in *or established pursuant to* [ANCSA]") (amended text emphasized).

The accompanying committee report makes clear that legislators specifically understood the definition as amended "to include regional and village corporations," H.R. Rep. No. 1600, 93d Cong., 2d Sess. 14 (1974), with no suggestion that ANCs would somehow be excluded by the recognition clause. See *Indian Self-Determination and Education Assistance Act: Hearings before the*

Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. 118 (1974) (statement of Chairman Meeds that "[w]hat we are going to have to do is include those regional corporations"). As the district court recognized, "[t]hat Congress went out of its way to add ANCs to the statutory definition of 'Indian tribe' is compelling evidence that Congress intended ANCs to meet that definition." App., *infra*, 53a.

2. Congress has ratified the longstanding administrative and judicial understanding that ANCs satisfy the ISDA definition of "Indian tribe"

When Congress enacted the CARES Act in 2020 and incorporated the "meaning given" to the term "Indian Tribe" in ISDA, 42 U.S.C. 801(g)(1), the ISDA definition had been understood for decades to mean that ANCs are eligible. The agencies charged with administering ISDA have consistently understood the statute that way, and the only court of appeals to address the matter confirmed that interpretation in 1987. Congress itself has modified ISDA and incorporated its definition of "Indian tribe" into other federal laws without suggesting any disagreement with the prevailing interpretation. Indeed, Congress has enacted several laws that presuppose, in the statutory text, that ANCs are treated as Indian tribes under the ISDA definition. By incorporating the settled meaning of the ISDA definition into the CARES Act, Congress made ANCs eligible for the relief payments at issue here.

a. The Interior Department first concluded in 1976—a year after ISDA's enactment—that ANCs constitute "Indian tribes" under the statutory definition. See C.A. App. 137-140. The Department's Assistant So-

licitor for Indian Affairs explained in a 1976 memorandum that "profit-making regional and village corporations have not heretofore been recognized as eligible for" the programs and services for which Indian tribes are eligible because of their status as Indians; that applying the recognition clause to ANCs would "operate[] to disqualify them from the benefits" available under ISDA; and that such a construction would render "their very mention" in the ISDA definition "superfluous." *Id.* at 138. The Department rejected that interpretation as unsound. See *ibid.* Since that time, the Department has consistently "taken the position that ANCs qualify as 'Indian Tribes' for purposes of" ISDA. App., *infra*, 57a (district court opinion); see, *e.g.*, 60 Fed. Reg. 9250, 9250 (Feb. 16, 1995); 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993); *Central Council of Tlingit & Haida Indian Tribes* v. *Chief, Branch of Judicial Servs.*, 26 IBIA 159, 163 (1994). The Indian Health Service in HHS, which also administers ISDA, adopted the same position in 1977. See p. 6, *supra*.

The Ninth Circuit, which hears the large majority of federal appeals involving Alaska Native issues, adopted that same interpretation of ISDA in 1987. See *Cook Inlet Native Association*, *supra*. The court reasoned that the recognition clause should not be read to apply to and therefore exclude ANCs because "the words of a statute should be harmonized internally and with each other," and the definition "should not be interpreted to render one part inoperative." 810 F.2d at 1474. The court correctly recognized this as the "consistent" administrative interpretation. *Ibid.* And the court found that the reference to ANCs had been inserted into the definition during the legislative drafting process "for special consideration by way of amendment," which reinforced the

court's conclusion that the language including ANCs "should be given effect." *Id.* at 1475.

The leading treatise on Indian law likewise explains that "regional and village corporations are included as 'tribes' under some Indian legislation," citing ISDA as a paradigmatic example. 1 *Cohen's* § 4.07[3][d][i]. The Case and Voluck legal treatise on Alaska Natives reflects a similar understanding. See Case & Voluck 233 ("[T]he inclusion of [ANCs] in the definition of 'Indian tribe' [in ISDA] allows such corporations to contract for services to deliver to their respective regions and villages."); cf. Troy A. Eid, *Book Review*, 30 Alaska L. Rev. 223, 223 (2013) (describing the Case and Voluck treatise as "the Alaskan equivalent of the late Felix Cohen's *Handbook*").

b. Congress has revisited ISDA and ANCSA numerous times since the 1970s, including by amending ISDA's other definitional provisions five times, without suggesting any disagreement with the prevailing interpretation.[2] Congress's decision not "to revise or repeal the agency's interpretation" while making those other changes "is persuasive evidence that the interpretation is the one intended by Congress." *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986); see *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013) (upholding interpretation in light of "nearly 40 years" of agency interpretation, no

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[2] See Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, Tit. I, § 102, 108 Stat. 4250; Indian Self-Determination and Education Assistance Act Amendments of 1990, Pub. L. No. 101-644, Tit. II, § 202(1)-(2), 104 Stat. 4665; Act of May 24, 1990, Pub. L. No. 101-301, § 2(a)(1)-(3), 104 Stat. 206; Act of Nov. 1, 1988, Pub. L. No. 100-581, § 208, 102 Stat. 2940; Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 103, 102 Stat. 2286; Case & Voluck 179-197.

judicial disagreement, and six amendments to the statute that left the relevant provision "untouched").

That inference is especially compelling here because Congress did not merely leave the definition undisturbed but in fact reenacted it—nearly two years after the Ninth Circuit's decision in *Cook Inlet Native Association*. See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 103, 102 Stat. 2286; cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change[.]").

c. Congress carried forward the same settled understanding when it incorporated ISDA's definition of "Indian tribe" into the CARES Act. See *Lorillard*, 434 U.S. at 581 ("[W]here * * * Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law[.]"). Indeed, the CARES Act provides that "[t]he term 'Indian Tribe' has the meaning given that term" in ISDA. 42 U.S.C. 801(g)(1). Through many decades of consistent interpretation by the agencies charged with administering ISDA, as well as the Ninth Circuit's decision in *Cook Inlet Native Association*, the settled "meaning given" the term "Indian tribe" in ISDA included ANCs.

Congress has also incorporated or substantially copied the ISDA definition of "Indian tribe" into other statutes addressing a wide array of federal programs. See, *e.g.*, 12 U.S.C. 1715z-13a(*l*)(8) (mortgage assistance); 15 U.S.C. 637(a)(13) (aid to small businesses); 25 U.S.C. 1603(14) (healthcare); 25 U.S.C. 2403(3) (substance-abuse prevention and treatment programs); 25 U.S.C.

2511(4) (educational grants); 25 U.S.C. 4103(13)(B) (housing assistance); 28 U.S.C. 524 note (law enforcement grants); 34 U.S.C. 12291(a)(16) (Violence Against Women Act grants); 42 U.S.C. 15855(a)(2) (renewable energy).[3] Congress has also sometimes defined "Indian tribe[s]" in terms that clearly *exclude* ANCs, including in the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, Tit. I, 108 Stat. 4791. See 25 U.S.C. 5130(2) ("The term 'Indian tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe."). Congress could have incorporated one of those other preexisting definitions into the CARES Act if ANCs were to be excluded, but it chose instead to employ the ISDA definition that has long been understood to encompass ANCs. Cf. Senator Murkowski et al. C.A. Amici Br. 5.

d. Finally, the CARES Act and the ISDA definition that it incorporates should be understood "in the context of the *corpus juris* of which they are a part." *Branch* v. *Smith*, 538 U.S. 254, 281 (2003) (opinion of Scalia, J.); see *FDA* v. *Brown & Williamson Tobacco*

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[3] Some federal agencies that administer statutes with definitions that incorporate or substantially mirror the ISDA definition, including the Department of Housing and Urban Development (HUD) and the Department of Energy (DOE), have indicated that they understand the statutory language to mean that ANCs qualify as "Indian tribes." See Office of Native American Programs, HUD, *About ONAP*, https://go.usa.gov/xfecz; Office of Pub. & Indian Hous., HUD, *Lender Section 184 Resources*, https://go.usa.gov/xfexb; Office of Indian Energy Policy & Programs, DOE, *Current Funding Opportunities*, https://go.usa.gov/xfexj; DOE, *Department of Energy Announces Up To $15 Million for Tribes to Deploy Energy Technology*, https://go.usa.gov/xfexW (Mar. 27, 2020).

Corp., 529 U.S. 120, 133 (2000) ("A court must * * * interpret [a] statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'") (citations omitted). Congress has enacted several statutes that, in their text, presuppose that ANCs meet the ISDA definition of "Indian tribe." The court of appeals did not attempt to reconcile its interpretation with those other statutes.

In 2018, for example, Congress "establish[ed] a biomass demonstration project for federally recognized Indian tribes *and Alaska Native corporations* to promote biomass energy production." Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, Pub. L. No. 115-325, § 202(a), 132 Stat. 4459 (emphasis added). To carry out that project, Congress directed the federal government to enter into agreements with "Indian tribe[s]," defined by cross-reference to the same ISDA definition at issue here. § 202(c)(1)(B) and (c)(2), 132 Stat. 4461. Congress thus plainly understood ANCs to fall within the ISDA definition.

Likewise, the Indian Tribal Energy Development and Self-Determination Act of 2005, Pub. L. No. 109-58, Tit. V, § 503(a), 119 Stat. 764, incorporates ISDA's definition of "Indian tribe" but adds that, for certain purposes, "the term 'Indian tribe' does not include any Native Corporation," 25 U.S.C. 3501(4)(A) and (B)—a carve-out that would make no sense under the court of appeals' understanding of ISDA.

And in 1997, Congress authorized certain Alaska regional health entities to form a consortium to enter into ISDA contracts for the provision of statewide health services, "without further resolutions from the Regional Corporations, Village Corporations," or tribes

that the entities represented. Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 325(a), 111 Stat. 1597. That provision presupposes that ANCs qualify as "Indian tribes" from which authorizing resolutions might otherwise be required under ISDA. See 25 U.S.C. 5304(*l*). Section 325(d) of the same 1997 statute allowed Cook Inlet Region, Inc. (an ANC), through a designated entity, to enter into contracts or funding agreements under ISDA to provide select services at certain locations in Alaska—again, without needing to submit "any further authorizing resolutions from any other Alaska Native Region [or] village corporation." 111 Stat. 1598.[4]

This broader *corpus juris*, including statutes that incorporate the ISDA definition, confirms that ANCs are "Indian tribes" for purposes of the CARES Act as well.

3. The court of appeals erred in reading ANCs out of the ISDA definition and the CARES Act

The court of appeals erred in nevertheless reading the recognition clause of the ISDA definition to exclude ANCs because they are not formally recognized Indian tribes in the political sense of federal recognition. That reading of the definition cannot be correct because it would render the express reference to ANCs in the definition a dead letter, in contravention of the statutory text and the deliberate insertion of ANCs into that text during the drafting process to ensure their coverage. *A fortiori*, Congress did not exclude ANCs when

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[4] The 1997 statute settled a controversy regarding an ISDA compact involving Cook Inlet Region, Inc. See *Cook Inlet Treaty Tribes* v. *Shalala*, 166 F.3d 986, 989-990 (9th Cir. 1999). In dismissing that controversy as moot in light of the 1997 statute, the Ninth Circuit observed that Cook Inlet Region, Inc. qualified as an Indian tribe under the ISDA definition. See *id.* at 988.

it later incorporated the ISDA definition into the CARES Act.

a. The court of appeals determined, as the government argued, that the recognition clause—*i.e.*, the clause concerning entities "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)—uses language that generally refers to recognition as a legal term of art in Indian law, meaning "a 'formal political act confirming the tribe's existence as a distinct political society.'" App., *infra*, 13a (citation omitted); see *id.* at 13a-16a. Recognition in that sense is a formal act by which the federal government acknowledges a "government-to-government relationship" with an Indian tribe as a "political society." 1 *Cohen's* § 3.02[3].

If the recognition clause is understood in that sense, reading it to apply to ANCs (and thereby excluding them from eligibility) would violate the "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Parker Drilling*, 139 S. Ct. at 1890 (citation omitted); see, *e.g.*, *Nielsen* v. *Preap*, 139 S. Ct. 954, 969 (2019) (endorsing "the idea that 'every word and every provision is to be given effect and that none should needlessly be given an interpretation that causes it * * * to have no consequence'") (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (Scalia & Garner)) (brackets omitted).

ANCs are not and have never been recognized in that formal, government-to-government sense. If the ISDA definition were read to mean that an ANC may contract with the federal government under ISDA only if the ANC is recognized as a tribe in the sovereign sense,

then no ANC has ever been or ever will be eligible (absent an Act of Congress)—despite practice to the contrary under ISDA for many years. See 43 Fed. Reg. 39,361, 39,361-39,364 (Sept. 5, 1978) (explaining that "a political relationship" is "indispensable" for recognition and that "corporations * * * formed in recent times" are not eligible to petition for acknowledgment under Interior's regulations); 25 C.F.R. 83.4(a), 83.11, 83.12 (similar); see also Case & Voluck 198 (explaining that ANCs are "generally subject to state law and are not federally recognized as 'tribes' *in the political sense*," even if they are "eligible as 'tribes' for certain Native American services and programs under several statutes") (emphasis added). Reading the recognition clause to exclude ANCs from eligibility would be particularly jarring because the recognition clause follows directly after the express mention of ANCs. As the district court explained, "[i]t would be an odd result indeed for Congress to include ANCs in one breath only to negate their inclusion in the very next breath." App., *infra*, 53a-54a.

b. The court of appeals did not dispute that, under its interpretation, the inclusion of ANCs in the ISDA definition is a null set. But it reasoned that its interpretation would not have violated the rule against superfluity *at the time ISDA was enacted*, positing that "it was highly unsettled in 1975 * * * whether Native villages or Native corporations would ultimately be recognized" as tribes, "even though, as things later turned out, no ANCs were recognized." App., *infra*, 19a.

That effort to avoid the rule against superfluity is unavailing. The evidence of purported uncertainty on which the court of appeals relied pertained to the status of Alaska Native villages. See App., *infra*, 19a-20a. Of course, since 1993 the list of formally recognized Indian

tribes published by the Interior Department has included Native villages, as defined in ANCSA and referred to in the ISDA definition of "Indian tribe." See 58 Fed. Reg. at 54,365; App., *infra*, 22a. But even before the 1993 list, Alaska Native villages were treated as eligible to enter into contacts, or to designate organizations to do so on their behalf, with the federal government under ISDA. See 46 Fed. Reg. 27,178, 27,179 (May 18, 1981); 47 Fed. Reg. 53,130, 53,133-53,135 (Nov. 24, 1982); *Cook Inlet Native Ass'n*, 810 F.2d at 1474.

Whatever the import of that pre-1993 evidence with respect to Native villages, however, it does not suggest any uncertainty about the status of ANCs—newly formed business corporations that are plainly not sovereign entities. Indeed, a 1977 report cited by the court of appeals explained that "village and regional corporations organized pursuant to" ANCSA meet "the definition of 'Indian tribe' used in" ISDA, even though ANCs are not "repositories of tribal sovereignty." 1 American Indian Policy Review Comm'n, 95th Cong., 1st Sess., *Final Report* 495 (Comm. Print 1977) (AIPRC Report); see *id.* at 490 (distinguishing between "historic and traditional tribal entities," which are eligible for formal federal recognition, and "Native corporations organized under" ANCSA, which are not).

The court of appeals also erred in suggesting that the standards for formal federal recognition in the political sense were so "unsettled" as of ISDA's enactment as to explain away any superfluity. App., *infra*, 21a. Formally recognized Indian tribes have always been understood in terms not applicable to ANCs. See, *e.g.*, *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (tribes are "domestic dependent nations"); *Worcester* v.

Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) ("distinct, independent political communities"); *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 377 (1st Cir. 1975) ("a particular Indian community as a dependent tribe under [federal] guardianship"); Felix S. Cohen, *Handbook of Federal Indian Law* 271 (1942) (identifying the principal factors for federal recognition, including "treaty relations," "ethnological and historical" bonds, and whether "the group has exercised political authority over its members"). And when Congress enacted ISDA in 1975, recognition decisions were based primarily on historical precedent—*i.e.*, "whether at some point in a tribe's history it established a formal political relationship with the Government of the United States." 1 AIPRC Report 462. None of the newly formed ANCs had ever established such a formal political relationship.

The court of appeals observed that ANCs were included for a time on a list of "native entities within the State of Alaska recognized and eligible to receive services from the United States Bureau of Indian Affairs." App., *infra*, 22a (quoting 53 Fed. Reg. 52,829, 52,832-52,833 (Dec. 29, 1988)). But that list only underscores the court's error. The Interior Department explained at the time that ANCs were included on that list precisely because ISDA "specifically include[d]" them. 53 Fed. Reg. at 52,833. ANCs were later removed from that list to forestall any confusion, with Interior explaining that ANCs "lack tribal status in a political sense" and had been listed previously "because of their eligibility to participate in Federal programs under specific statutes." 58 Fed. Reg. at 54,365.

Reading the ISDA definition to subject ANCs to a formal-recognition requirement would also serve no

purpose in this context (other than to exclude them). With respect to the other entities listed in the opening clause of the ISDA definition, formal recognition can serve to distinguish groups of Indians that have merely identified themselves as a tribe, or are recognized as a tribe only by a State, from those groups of Indians that the federal government has acknowledged to have the requisite special status under federal law. See 1 *Cohen's* § 3.03[3] (discussing recognition). But at the time of ISDA's enactment, ANCs already had a special status under federal law as "Native" entities, conferred directly by ANCSA. That special status is incorporated into the ISDA definition, which expressly "include[s]" Native villages and ANCs "as defined in or established pursuant to" ANCSA. 25 U.S.C. 5304(e). Inclusion of ANCs therefore creates no tension with the role of the recognition clause—to exclude groups that merely self-identify as tribes, or are recognized only by a State, without any federal imprimatur.

c. The court of appeals also erred in viewing its interpretation to be compelled by the "series-qualifier canon," which provides that a modifier that follows a "straightforward, parallel construction" of nouns or verbs in a series may be read to apply to each item in the series. App., *infra*, 12a (citation omitted). That principle cannot "bear the weight" the court placed on it. *Lockhart* v. *United States*, 136 S. Ct. 958, 965 (2016). To be sure, that principle supports reading the recognition clause to apply to "any Indian tribe, band, nation, or other organized group or community," 25 U.S.C. 5304(e), and not merely the last item in that series, because those terms are a single, integrated list. Cf. *Jama* v. *ICE*, 543 U.S. 335, 344 n.4 (2005). But as the district court recognized, also subjecting ANCs to a formal

recognition requirement "that [they] cannot meet" would render their inclusion within the definition mere "surplusage." App., *infra*, 47a, 50a. Congress did not specifically include ANCs in a special Alaska clause in the ISDA definition only to then exclude them via the recognition clause.

In short, applying the series-qualifier canon to the recognition clause while construing it to require political recognition, and thereby excluding ANCs from eligibility, would "run[] headlong into the rule against superfluity." *Lockhart*, 136 S. Ct. at 966. Canons of construction, it bears repeating, are "no more than rules of thumb that help courts determine the meaning of legislation." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). This Court has cautioned, including in the particular context of Indian law, that such canons should not be applied in "formalistic disregard of congressional intent." *Rice* v. *Rehner*, 463 U.S. 713, 732 (1983); cf. *United States* v. *Hayes*, 555 U.S. 415, 425-426 (2009) (declining to apply a modifier to the immediately preceding phrase where doing so would render a statutory term "superfluous"); Scalia & Garner 150 (stating that the series-qualifier canon "is highly sensitive to context," and that "[o]ften the sense of the matter prevails"). The court of appeals lost sight of these principles, according dispositive weight to a canon of construction that produces a result demonstrably at odds with Congress's express inclusion of ANCs.[5]

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[5] The court of appeals suggested that, because the clause regarding ANCs is introduced by the term "including," it necessarily introduces terms that should be "equate[d]" with the preceding list of nouns. App., *infra*, 12a. 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*

The court of appeals was similarly wrong to suggest that reading the recognition clause not to apply to ANCs would be "grammatical * * * nonsense." App., *infra*, 12a. The recognition clause is a restrictive relative clause, introduced by the relative pronoun "which." Separating such a clause from its antecedent is not necessarily ungrammatical. See Sidney Greenbaum, *The Oxford English Grammar* 222 (1996) (examples); cf. Bryan A. Garner, *Garner's Modern English Usage* 784-786 (4th ed. 2016) (advising against "remote relatives" but calling "lapses * * * extremely common" and giving examples from published works). And in any event, rules of grammar are "a valuable starting point" for interpretation, but they are "violated so often by so many of us that they can hardly be safely relied upon as the end point." *Payless Shoesource, Inc.* v. *Travelers Cos.*, 585 F.3d 1366, 1372 (10th Cir. 2009) (Gorsuch, J.) (interpreting a contract containing a list of terms followed by a limiting clause). Here, the other textual and contextual evidence weighs strongly in favor of not reading the recognition clause to exclude ANCs.

d. Alternatively, if the recognition clause is not read to impose a requirement of formal recognition as a sovereign—but rather to refer to entities that have a requisite status under federal law with respect to programs and services to promote the welfare of Native peoples—then the inclusion of ANCs in the ISDA definition reflects a judgment by Congress that ANCs, like

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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"). In any event, the critical point here is that Congress would not have added ANCs to the definition only to then categorically exclude them.

Native villages, qualify for purposes of ISDA. Native villages and ANCs were specifically identified in ANCSA, the foundational law for the governing of Native affairs in Alaska. See 43 U.S.C. 1602(c), 1606(d), 1607. And Native villages and corporations "as defined in or established pursuant to" ANCSA are, in turn, expressly included in the ISDA definition of "Indian tribe." 25 U.S.C. 5304(e). That inclusion reflects a judgment that Native villages and corporations together were to perform a role on behalf of the Native population in Alaska under ISDA parallel to that of federally recognized tribes elsewhere in the United States. See Pet. at 29-32, *Alaska Native Village Corp. Ass'n, Inc.* v. *Confederated Tribes of the Chehalis Reservation*, No. 20-___ (filed Oct. 21, 2020).

e. Whichever way the recognition clause is read, however, the fundamental point is that Congress made an express and deliberate judgment to include ANCs (and Native villages) in a special Alaska clause in the ISDA definition of "Indian tribe." That special Alaska clause follows the listing of the tribal entities in the opening clause and reflects both the unique framework for the administration of Native affairs in Alaska under ANCSA and the special roles Native villages and corporations were intended to fulfill under ANCSA and ISDA on behalf of Alaska Natives.

B. This Case Warrants Review

This Court should grant the petition for a writ of certiorari to restore uniformity to federal law. Sup. Ct. R. 10(a). In the decision below, the D.C. Circuit expressly "decline[d] to follow" the Ninth Circuit's holding in *Cook Inlet Native Association* that ANCs qualify as "Indian tribes" for ISDA purposes. App., *infra*, 24a;

see *Cook Inlet Native Ass'n*, 810 F.3d at 1473-1476 (discussed at pp. 18-19, *supra*). To be sure, this case arises in the context of the CARES Act, whereas *Cook Inlet Native Association* involved an ISDA contract dispute. But nothing in the D.C. Circuit's decision turned on that distinction. The court held that ANCs "are not Indian tribes under ISDA." App., *infra*, 18a. Moreover, because the Ninth and D.C. Circuits encompass Alaska and the seat of the federal government, respectively, the ANC question is most likely to arise in those circuits, and additional percolation is unlikely to yield further insights from other courts.

The question presented is also of significant practical importance. The decision below, if allowed to stand, will exclude ANCs from receiving hundreds of millions of dollars in coronavirus relief funds that Congress directed the Secretary of the Treasury to reserve for Indian tribes. 42 U.S.C. 801(a)(2)(B); see App., *infra*, 7a, 81a. Those funds are intended to offset to some extent the devastating and unexpected financial impact of the COVID-19 pandemic on Indian tribal institutions, including ANCs. See 42 U.S.C. 801(c)(7) (authority to make payments to account for "increased expenditures of each * * * Tribal government (or tribally-owned entity of such Tribal government) relative to aggregate expenditures in fiscal year 2019"). As Judge Henderson noted in her concurring opinion, "no reason" exists to suppose that "the Congress would exclude ANCs (and thus exclude many remote and vulnerable Alaska Natives) from receiving and expending much-needed" relief funds during the pandemic. App., *infra*, 26a-27a.

Depriving ANCs of coronavirus relief funds may impede their ability to "promote the health, education, [and] welfare" of the Alaska Natives they serve.

43 U.S.C. 1606(r). Providing relief funds to ANCs also serves as a form of economic stimulus. The Treasury Department has confirmed, for example, that the relief payments at issue here may be used to provide economic assistance to private businesses, including tribally owned businesses, harmed by the COVID-19 pandemic. See p. 7, *supra*; cf. 166 Cong. Rec. E344 (daily ed. Mar. 31, 2020) (statement of Rep. Torres noting that many Indian tribes "did the right thing" and "clos[ed] their businesses" during the pandemic, resulting in "catastrophic" losses).

The court of appeals noted that Alaska Native villages are still eligible to receive relief funds. App., *infra*, 24a. In the proceedings below, however, amici ANCs reported that thousands of Alaska Natives who receive benefits from ANCs are not enrolled in any federally recognized tribe. See Cook Inlet Region, Inc. C.A. Amicus Br. 1-2; see also *id.* at 11-18. With respect to such individuals, the court expressed confidence that, "if there are Alaska Natives uncared for because they are not enrolled in any recognized village, either the State of Alaska or [HHS] will be able to fill the void." App., *infra*, 25a. But such a void should not exist at all. Properly construed, the CARES Act itself ensures that coronavirus relief funds can flow equitably to all Alaska Natives, including those served by ANCs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5204
Consolidated with 20-5205 and 20-5209

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL., APPELLEES

UTE TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, APPELLANT

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF U.S. DEPARTMENT OF THE TREASURY, ET AL., APPELLEES

Argued: Sept. 11, 2020
Decided: Sept. 25, 2020

Appeals from the United States District Court
for the District of Columbia
(No. 1:20-cv-01002)
(No. 1:20-cv-01059)
(No. 1:20-cv-01070)

Before: HENDERSON, MILLETT, and KATSAS, *Circuit Judges*.

Opinion of the Court filed by *Circuit Judge* KATSAS.

Concurring Opinion filed by *Circuit Judge* HENDERSON.

KATSAS, *Circuit Judge*: Title V of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) makes certain funds available to the recognized governing bodies of any "Indian Tribe" as that term is defined in the Indian Self-Determination and Education Assistance Act (ISDA). Alaska Native Corporations are state-chartered corporations established by Congress to receive land and money provided to Alaska Natives in settlement of aboriginal land claims. We consider whether these corporations qualify as Indian Tribes under the CARES Act and ISDA.

I

A

Since the Alaska Purchase in 1867, the United States has taken shifting positions on the political status of Alaska's indigenous populations. Initially, the government thought that Alaska Natives had no distinct sovereignty. *See, e.g.*, *In re Sah Quah*, 31 F. 327, 329 (D. Alaska 1886) ("The United States has at no time recognized any tribal independence or relations among these Indians. . . . "). Over time, it came to view Alaska Natives as "being under the guardianship and protection of the Federal Government, at least to such an extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians." *Leasing of Lands Within Reservations Created for the Benefit of the Natives of Alaska*, 49 Pub. Lands Dec. 592, 595 (1923). Those laws recognize and implement the unique trust relationship between the federal government and Indian tribes as dependent sovereigns, and the distinct obligations that relationship imposes. *See, e.g.*, *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175-76

(2011). But Alaska Natives differed from other Indians in their "peculiar nontribal organization" in small, isolated villages. Op. Sol. of Interior, M-36975, 1993 WL 13801710, at *18 (Jan. 11, 1993) ("Sansonetti Op.") (quoting H.R. Rep. 74-2244, at 1-5 (1936)).

For over a century, the federal government had no settled policy on recognition of Alaska Native groups as Indian tribes. Instead, it dealt with that question "in a tentative and reactive way," with "decisions on issues concerning the relationship with Natives [being] postponed, rather than addressed." Sansonetti Op. at *2. Because of the "remote location, large size and harsh climate of Alaska," there was no pressing need "to confront questions concerning the relationship between the Native peoples of Alaska and the United States." *Id.* But in 1958, the Alaska Statehood Act provided for a large transfer of land from the federal government to the soon-to-be State. Pub. L. No. 85-508, § 6, 72 Stat. 339, 340-43. And in 1968, oil was discovered on Alaska's North Slope, requiring construction of a pipeline system running across the entire State. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 241-42 & n.2 (1975). These developments forced the federal government to confront at least the question of Native claims to aboriginal lands. *See* Sansonetti Op. at *43.

In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), a "comprehensive statute designed to settle all land claims by Alaska Natives." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523 (1998). Rather than set aside land for reservations, as Congress often had done in the lower 48 states, it "adopted an experimental model initially calcu-

lated to speed assimilation of Alaska Natives into corporate America." 1 *Cohen's Handbook of Federal Indian Law* § 4.07(3)(b)(ii)(C) (2019). Among other things, ANCSA "completely extinguished all aboriginal claims to Alaska land" and abolished all but one Native reservation in Alaska. *Native Vill. of Venetie*, 522 U.S. at 524. "In return, Congress authorized the transfer of $962.5 million in state and federal funds and approximately 44 million acres of Alaska land to state-chartered private business corporations that were to be formed pursuant to the statute." *Id.*

As relevant here, ANCSA authorized the creation of two types of corporations to receive this money and land: Alaska Native Regional Corporations and Alaska Native Village Corporations, which we collectively refer to as ANCs. First, the statute divided Alaska into twelve geographic areas, each sharing a common heritage and interests, and it created a regional corporation for each area. 43 U.S.C. § 1606(a). Second, ANCSA required the Alaska Native residents of each "Native village"—defined as any community of at least twenty-five Alaska Natives, *id.* § 1602(c)—to organize as a village corporation to receive benefits under the statute. *Id.* § 1607(a). Village corporations "hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village." *Id.* § 1602(j).

Like other corporations, ANCs have boards of directors and shareholders. 43 U.S.C. §§ 1606(f)-(h), 1607(c). The initial ANC shareholders were exclusively Alaska Natives; each Native received one hundred shares of the regional and village corporation operating where he or she lived. *Id.* §§ 1606(g)(1)(A), 1607(c). ANCSA initially prohibited the transfer of stock to non-Natives for

twenty years, 43 U.S.C. § 1606(h)(1) (1971), but Congress later made the prohibition continue unless and until an ANC chose to end it, 43 U.S.C. § 1629c(a). ANCs may freely sell land to non-Natives and need not use the land "for Indian purposes." *Native Vill. of Venetie*, 522 U.S. at 533. Regional ANCs may provide "health, education, or welfare" benefits to Native shareholders and to shareholders' family members who are Natives or Native descendants, without regard to share ownership. 43 U.S.C. § 1606(r).

B

In 1975, Congress enacted ISDA to "help Indian tribes assume responsibility for aid programs that benefit their members." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 753 (2016). ISDA authorizes the federal government to contract with Indian tribes to provide various services to tribal members. *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185 (2012). Under these "self-determination" contracts, the government provides money to an individual tribe, which agrees to use it to provide services to tribal members. *See Menominee Indian Tribe*, 136 S. Ct. at 753.

Specifically, ISDA directs the Secretary of the Interior or the Secretary of Health and Human Services, "upon the request of any Indian tribe," to contract with an appropriate "tribal organization" to provide the requested services. 25 U.S.C. § 5321(a)(1). ISDA 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), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Id. § 5304(e). ISDA further defines a "tribal organization" to include "the recognized governing body of any Indian tribe." *Id.* § 5304(*l*).

C

On March 27, 2020, Congress passed the CARES Act to provide various forms of relief from the ongoing coronavirus pandemic. Title V of the CARES Act appropriated $150 billion "for making payments to States, Tribal governments, and units of local government." 42 U.S.C. § 801(a)(1). These payments cover "necessary expenditures incurred due to the public health emergency." *Id.* § 801(d)(1). Congress directed the payments to be made within 30 days. *Id.* § 801(b)(1).

Of these funds, the CARES Act reserved $8 billion "for making payments to Tribal governments." 42 U.S.C. § 801(a)(2)(B). The CARES Act defines a "Tribal government" as "the recognized governing body of an Indian Tribe." *Id.* § 801(g)(5). It further defines "Indian Tribe" as bearing "the meaning given that term" in ISDA. *Id.* § 801(g)(1).

II

On April 13, 2020, the Department of the Treasury published a form seeking tribal data to help apportion Title V funds. The Department requested each tribe's name, population, land base, employees, and expenditures. The form suggested that ANCs would receive funding. For example, in seeking population information, the form requested the total number of tribal

citizens, members, *or shareholders*. On April 22, the Department confirmed its conclusion that ANCs were eligible to receive Title V funds.

Between April 17 and 23, three separate groups of Indian tribes filed lawsuits challenging that decision. Collectively, the plaintiffs encompass six federally recognized tribes in Alaska and twelve federally recognized tribes in the lower 48 states. The tribes argued that ANCs are not "Indian Tribes" within the meaning of the CARES Act or ISDA because they do not satisfy the final requirement of the ISDA definition—*i.e.*, because they are not "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 23 U.S.C. § 5304(e). The government agreed that ANCs have not been so recognized, and it further argued that ANCs could not be so recognized. But, the government reasoned, Congress expressly included ANCs within the ISDA definition, and we must give effect to that decision.

The district court consolidated the three cases and granted a preliminary injunction prohibiting the distribution of any Title V funds to ANCs. In finding that the tribes were likely to succeed on the merits, the court reasoned that any "Indian tribe" under ISDA must be "recognized" as such and that Alaska Native corporations, unlike Alaska Native villages, have not been so recognized. As a result of the preliminary injunction, the government has withheld distribution of more than $162 million in Title V funds that it otherwise would have provided to ANCs. Several ANCs and ANC associations then intervened as defendants.

The district court ultimately granted summary judgment to the defendants. After further consideration, the court agreed with the government: ANCs must qualify as Indian tribes to give effect to their express inclusion in the ISDA definition, even though no ANC has been recognized as an Indian tribe.

To permit orderly review, the district court granted the tribes' motion for an injunction pending appeal, subject to the tribes seeking expedition in this Court. The injunction prohibited the distribution of Title V funds to ANCs until the earlier of September 15 or a merits decision by this Court. We granted expedition, heard oral argument, and extended the injunction pending our decision.

III

The government first contends that its decision to provide CARES Act funds to ANCs is not judicially reviewable. The Administrative Procedure Act provides a cause of action to persons "adversely affected or aggrieved by agency action," 5 U.S.C. § 702, but withdraws the action to the extent that "statutes preclude judicial review," *id.* § 701(a)(1). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). Any preclusion must be "fairly discernible in the statutory scheme," *id.* at 351, and must appear "with sufficient clarity to overcome the strong presumption in favor of judicial review," *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1373 (2020) (quotation marks omitted).

Nothing in the CARES Act expressly precludes review of spending decisions under Title V. Nonetheless, the government argues that the statute precludes judicial review by implication. It highlights three structural or contextual considerations: the short deadline for disbursing funds, the urgency of providing relief funds quickly, and the lack of any requirement for advance notice of funding decisions.

We are unpersuaded. To begin, the government cites no case in which short statutory deadlines have been held to preclude judicial review by implication. To the contrary, in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), the Supreme Court held that judicial review was available despite a 60-day deadline for the relevant administrative action. *Id.* at 563 n.2, 567. Likewise, in *Texas Municipal Power Agency v. EPA*, 89 F.3d 858 (D.C. Cir. 1996), we rejected a claim that "short statutory deadlines," combined with the need "to compile enormous amounts of data and allocate allowances to 2,200 utilities" within the deadline, made the claim at issue unreviewable. *See id.* at 864-65. The government cites *Morris v. Gressette*, 432 U.S. 491 (1977), where the plaintiffs sought to challenge an administrative failure to object to a state voting measure under section 5 of the Voting Rights Act. But the Act provided other means to obtain judicial review of the underlying legal question, *see id.* at 504-05, and the case involved the same kind of enforcement discretion later held to be generally unreviewable in *Heckler v. Chaney*, 470 U.S. 821 (1985). The government also cites *Dalton v. Specter*, 511 U.S. 462 (1994), but that case turned on the fact that presidential action is not subject to APA review. *See id.* at

471-76. As for urgency, the government frames its argument as only a slight variation on its point about the need for speed.

Finally, while the government may be correct that judicial review would be difficult had it simply disbursed the funds with no prior warning, *see City of Hous. v. HUD*, 24 F.3d 1421, 1424 (D.C. Cir. 1994), that should hardly preclude review where, as here, the government *did* take prior agency action in time to afford review. To be sure, the government might have argued that the actions taken here, including a solicitation of information, were not final agency action reviewable under the APA. We take no position on that question because finality in this context bears on the scope of the plaintiff's cause of action; it is a forfeitable objection that the government did not press here. *See Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012).

IV

On the merits, the district court held that ANCs are Indian tribes within the ISDA definition and thus are eligible for funding under Title V of the CARES Act. We review de novo this legal ruling, which was appropriately made on summary judgment. *Stoe v. Barr*, 960 F.3d 627, 629 (D.C. Cir. 2020). In considering the difficult legal question now before us, we have benefitted greatly from the district court's two thoughtful opinions, rendered under severe time constraints, which carefully assess the arguments on both sides.

Title V of the CARES Act makes funding available "to States, Tribal governments, and units of local government." 42 U.S.C. § 801(a)(1). Alaska Native Cor-

porations are neither "States" nor "units of local government" in Alaska. ANCs thus are eligible to receive Title V funds only if they are "Tribal governments." Title V defines a "Tribal government" as "the recognized governing body of an Indian Tribe," *id.* § 801(g)(5), and defines "Indian Tribe" as bearing "the meaning given that term" in ISDA, *id.* § 801(g)(1). So ANCs are eligible for Title V funding only if they qualify as an "Indian tribe" under ISDA. As explained below, ANCs do not satisfy the ISDA definition.

A

ISDA defines an "Indian tribe" as

> [1] any Indian tribe, band, nation, or other organized group or community, [2] 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), [3] which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

25 U.S.C. § 5304(e). The first, listing clause sets forth five kinds of covered Indian entities—any "tribe, band, nation, or other organized group or community." The second, Alaska clause clarifies that three kinds of Alaskan entities are covered—"any Alaska Native village or regional or village corporation." The third, recognition clause restricts the definition to a subset of covered entities—those "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

The text and structure of this definition make clear that the recognition clause, which is adjectival, modifies

all of the nouns listed in the clauses that precede it. Under the series-qualifier canon, "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." A. Scalia & B. Garner, *Reading Law* 147 (2012); *see*, *e.g.*, *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016) (canon applies where "the listed items are simple and parallel without unexpected internal modifiers"); *Jama v. ICE*, 543 U.S. 335, 344 n.4 (2005) (same where "modifying clause" appears "at the end of a single, integrated list"). This canon applies to the listing clause, which ticks off five synonyms in a grammatically simple list (any "tribe, band, nation, or other organized group or community"). Moreover, through its usage of "including," the Alaska clause operates to equate its two parallel nouns ("village" and "corporation") with the five preceding nouns. And given the obvious similarities between the Indian entities in the listing clause and Alaska Native villages—more than 200 of which have been recognized as tribes—the recognition clause undisputedly modifies "village" as well as the five previously listed Indian groups. Finally, it is not grammatically possible for the recognition clause to modify *all* of the five nouns in the listing clause, *plus* the first noun in the more proximate Alaska clause ("village"), but *not* the one noun in the preceding two clauses that is its most immediate antecedent ("corporation"). If possible, we construe statutory text to make grammatical sense rather than nonsense. *See* Scalia & Garner, *supra*, at 140-43 ("Grammar Canon"). For these reasons, an ANC cannot qualify as an "Indian tribe" under ISDA unless it has been

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

B

Because no ANC has been federally "recognized" as an Indian tribe, as the recognition clause requires, no ANC satisfies the ISDA definition.

"[I]t 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 was taken." *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) (quoting *FAA v. Cooper*, 566 U.S. 284, 292 (2012)). We adhere to this presumption unless the statute contains some "contrary indication." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

In the context of Indian law, "recognition" is a "legal term of art." *Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 918 F.3d 610, 613 (9th Cir. 2019). It refers to a "formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quotation marks omitted). Federal recognition both establishes the tribe as a "domestic dependent nation" and "requires the Secretary [of the Interior] to provide a panoply of benefits and services to the tribe and its members." *Frank's Landing*, 918 F.3d at 613-14 (quotation marks omitted); *see Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 211 (D.C.

Cir. 2013) ("Federal recognition is a prerequisite to the receipt of various services and benefits available only to Indian tribes."); *Miwok Tribe*, 515 F.3d at 1263-64 (noting "the federal benefits that a recognized tribe and its members may claim"); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57 (2d Cir. 1994) ("After passage of the Indian Reorganization Act recognition proceedings were necessary because the benefits created by it were made available only to descendants of 'recognized' Indian tribes."). Given the well-established meaning of "recognition" in Indian law, and its connection to the provision of benefits to tribal members, we interpret ISDA's requirement that an Indian tribe be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" to require federal recognition of the putative tribe.

Several pre-ISDA statutes bolster this conclusion. During the 1950s and 1960s, Congress sought to assimilate Indians by terminating federal recognition of various tribes, thereby ending the special relationship that existed between the federal government and the tribes as sovereigns. *Felter v. Kempthorne*, 473 F.3d 1255, 1258 (D.C. Cir. 2007). By rote formula, these statutes provided that, upon termination, members of the former tribe "shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians." *See*, *e.g.*, An Act to Provide for the Division of the Tribal Assets of the Catawba Indian Tribe of South Carolina, Pub. L. No. 86-322, 73 Stat. 592, 593 (1959); An Act to Provide for the Distribution of the Land and Assets of Certain Indian Rancherias and Reservations in California, Pub. L. No. 85-671, 72 Stat. 619, 621 (1958); An Act to Provide for the Termination of

Federal Supervision Over the Property of the Ottawa Tribe of Indians in the State of Oklahoma, Ch. 909, 70 Stat. 963, 964 (1956).[1] These statutes confirm that, long before ISDA was enacted, there was an established connection between recognition and sovereignty. Likewise, in text that closely mirrors ISDA's recognition clause, they confirm that with recognition comes various benefits provided "by the United States for Indians because of their status as Indians." In sum, they confirm that not only the general concept of recognition, but also the specific phrase used to describe it in ISDA, are terms of art denoting federal recognition of a sovereign Indian tribe.

The Federally Recognized Indian Tribe List Act of 1994 (List Act) further reinforces this conclusion. It charges the Secretary of the Interior with "keeping a list of all federally recognized tribes." Pub. L. No. 103-454, § 103(6), 108 Stat. 4791, 4792. The list must be "accurate, regularly updated, and regularly published," so that all federal agencies may use it "to determine the eligibility of certain groups to receive services from the United States." *Id.* § 103(7), 108 Stat. at 4792. The list also must "reflect all federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.* § 103(8), 108 Stat. at 4792. Repeating this language, the List Act's only substantive section, titled "Publication of list of recognized tribes," requires the Secretary to publish annually a list of "all Indian tribes which the

[1] This precise formulation, or close variants of it, appears in at least sixteen termination statutes enacted between 1954 and 1968.

Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5131(a). Thus, in language that twice tracks ISDA's recognition clause almost *verbatim*, the List Act equates federal recognition of Indian tribes with eligibility for "the special programs and services provided by the United States to Indians because of their status as Indians."

To be sure, the List Act post-dates ISDA. But during the time between those two statutes, the Secretary of the Interior consistently recognized Indian tribes on the same terms and listed them as so recognized. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361, 39,362 (Sept. 5, 1978) ("[A]cknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. Such acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes. . . . ") (codified at 25 C.F.R. § 83.2 (1978)). Given the strikingly similar language between the List Act and ISDA, the term-of-art nature of that language, and its usage in administrative practice spanning several decades, we conclude that the List Act and ISDA must reflect the same understanding of tribal recognition.

The intervenors urge a different understanding of what kind of recognition ISDA requires. Rejecting the term-of-art understanding laid out above, the interve-

nors contend that an Alaska Native group is "recognized" within the meaning of ISDA if it receives any Indian-related funding or benefits, regardless of whether the federal government has acknowledged a sovereign-to-sovereign relationship with the group. Because some statutes fund programs for Alaska Natives in part through ANCs, *see*, *e.g.*, 20 U.S.C. § 7453(b) (Alaska Native language immersion schools), the intervenors contend that that ANCs are therefore recognized Indian Tribes for ISDA purposes.

The intervenors' proposed interpretation cannot be reconciled with the text of ISDA. *First*, ISDA's recognition clause does not simply require the group to be "recognized as eligible" for *any* special program or service "provided by the United States to Indians because of their status as Indians." Instead, it requires the group to be "recognized as eligible for *the* special *programs and services* provided by the United States to Indians because of their status as Indians" (emphases added). Use of the definite article ("the") indicates that what follows "has been previously specified by context." *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019). Here, the only "special programs and services" (in the plural) plausibly specified by context are the "panoply of benefits and services" to which "recognized" tribes are entitled. *Frank's Landing*, 918 F.3d at 613-14. *Second*, the intervenors would read recognition out of ISDA; whereas the statute requires a group to be "recognized as eligible" for various special programs, the intervenors would read it to require only that the group be "eligible" to receive benefits or funding.

The ANCs have not satisfied the recognition clause as we construe it. They do not contend that the United

States has acknowledged a political relationship with them government-to-government. Nor could they, for in 1978, the Interior Department promulgated regulations making "corporations . . . formed in recent times" ineligible for recognition. *See* 25 C.F.R. § 83.4(a). Under that regulation, which remains in effect, no ANC appears on the Secretary of the Interior's current list of recognized Indian tribes. *See* Indian Entities Recognized by and Eligible To Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5,462 (Jan. 30, 2020). And because ANCs are not federally recognized, they are not Indian tribes under ISDA.

C

The government agrees that ANCs have not been "recognized" as ISDA requires. Indeed, it stresses that ANCs, which have never enjoyed any sovereign-to-sovereign relationship with the United States, could never be so recognized. For the government, the upshot is that ANCs need not satisfy the recognition clause to qualify as Indian tribes. Otherwise, the government reasons, Congress would have accomplished nothing by expressly adding "any Alaska native village *or regional or village corporation*" (emphasis added) to the list of possible recognized tribes. Given what the government describes as a misfit between the last noun in the statutory list ("corporation") and the adjectival clause that follows (including "recognized"), the government contends that the adjectival clause must be read to modify *every* listed noun *except* its immediate antecedent.

Fortunately, we need not choose between the government's interpretation, which produces grammatical incoherence, and a competing interpretation that would

produce equally problematic surplusage. For we conclude that, although ANCs cannot be recognized as Indian tribes under current regulations, it was highly unsettled in 1975, when ISDA was enacted, whether Native villages or Native corporations would ultimately be recognized. The Alaska clause thus does meaningful work by extending ISDA's definition of Indian tribes to whatever Native entities ultimately were recognized—even though, as things later turned out, no ANCs were recognized.

For over a century, claims of tribal sovereignty in Alaska went largely unresolved. Soon after the Alaska Purchase, many courts held that Native villages were not sovereigns in control of some distinct "Indian country." *United States v. Seveloff*, 27 F. Cas. 1021, 1024 (C.C.D. Or. 1872); *Kie v. United States*, 27 F. 351, 351-52 (C.C.D. Or. 1886); *see also In re Sah Quah*, 31 F. at 329 ("The United States at no time recognized any tribal independence or relations among these Indians. . . . "). That view changed over the first half of the 20th century, yet there were still few occasions for the federal government to develop political relationships with the remote and isolated Native villages. Sansonetti Op. at *9, *15-16. Accordingly, the government addressed questions of Native sovereignty only "in a tentative and reactive way." *Id.* at *2. And when land disputes came to the fore in ANCSA, Congress complicated the question of Native sovereignty even more. As a general matter, Indian tribes must control a particular territory. *See*, *e.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982); *Montoya v. United States*, 180 U.S. 261, 266 (1901). But ANCSA terminated 22 of the 23 existing reservations in Alaska, 43 U.S.C. § 1618(a); extinguished all aboriginal land claims of Native individuals or tribes,

id. § 1603; and transferred settlement proceeds not to the Native villages previously thought to have at least arguable sovereignty, but to newly-created corporations chartered under and thus subject to Alaska law, *id.* §§ 1605(c), 1606(d).

After the enactment of ISDA, questions persisted for nearly two more decades about the nature of tribal sovereignty in Alaska. In 1977, a congressional commission concluded that the sovereign powers of Alaska Native villages had been placed "largely in abeyance at the present time because the tribes currently do not possess tribal domains." 2 Am. Indian Pol'y Rev. Comm'n, No. 93-440, *Final Report*, 489, 490-491 & n.12 (1977). In 1988, the Alaska Supreme Court held that Alaska Native villages had "not been accorded tribal recognition" (except for the tribe inhabiting the one remaining reservation) and thus lacked tribal sovereign immunity. *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32, 39-41 (Alaska 1988). And as late as January 1993, the Solicitor of Interior concluded that Alaska Native villages enjoyed some attributes of tribal sovereignty, but only after conducting an exhaustive historical survey and analysis of various conflicting considerations. Sansonetti Op. at *5-35, *75-76. Even then, the Solicitor concluded that this sovereignty did not extend to control over the lands transferred by ANCSA to the regional and village corporations. *Id.* at *75.

Moreover, ANCSA charged the new ANCs with a handful of functions that would ordinarily be performed by tribal governments, making potential future recognition of ANCs more plausible. For one thing, ANCs were the vehicle for implementing a global settlement encompassing all land claims that any Native individual

or sovereign could bring against the United States. 43 U.S.C. § 1601(a). Moreover, the village corporations were charged with managing the land transferred by the United States not on behalf of their shareholders, but "on behalf of a Native village." *Id.* § 1602(j). And the regional corporations were authorized to "promote the health, education, or welfare" of Alaska Natives. *Id.* § 1606(r). That function is currently performed by two large cabinet agencies, the Department of Health and Human Services and the Department of Education, which at the time of ANCSA were constituted as a single Department of Health, Education, and Welfare. The intervenors themselves characterize ANCs as performing functions "that one would most naturally describe as governmental." Intervenor-Appellees' Br. at 35.

When ISDA was enacted, the standards and procedures for the United States to recognize Indian tribes also were unsettled. At that time, recognition occurred in an "an ad hoc manner," with petitions for recognition evaluated "on a case-by-case basis," *Mackinac Tribe v. Jewell*, 829 F.3d 754, 756 (D.C. Cir. 2016), and "at the discretion" of the Interior Department, Procedures Governing Determination that Indian Group Is a Federally Recognized Indian Tribe, 42 Fed. Reg. 30,647, 30,647 (June 16, 1977). It was not until 1978 that the Department first promulgated regulations establishing uniform standards to govern the question whether to grant "formal recognition" to specific Indian groups. *Mackinac Tribe*, 829 F.3d at 756.

But even after promulgating those regulations, Interior still had difficulty sorting out whether to recognize Native villages, corporations, or both. In 1979, Interior published its first list of tribes recognized under the

new regulatory criteria. The list contained no Alaska Native entities, which the agency said would be addressed "at a later date." Indian Tribal Entities that Have a Government-To-Government Relationship with the United States, 44 Fed. Reg. 7,235, 7,235 (Feb. 6, 1979). In 1988, Interior included both villages and corporations in a single list designated as "native entities within the State of Alaska recognized and eligible to receive services from the United States Bureau of Indian Affairs." Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 53 Fed. Reg. 52,829, 52,832-33 (Dec. 29, 1988) (cleaned up). Finally, Interior changed course in October 1993, publishing a substantially revised list of recognized Native entities that included over 200 Alaska Native villages, but no Alaska Native corporations. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364 (Oct. 21, 1993). In the preamble to that list, Interior analogized Native corporations to "tribal organizations" in the lower 48 states, which were not recognized as Indian tribes. *See id.* at 54,365. Moreover, it expressed concern that recognizing Native *corporations* as sovereign entities would undercut the case for so recognizing the traditional Native *villages*. *See id.* As the leading Indian-law treatise explains, "the question of federal recognition of Alaska tribes" thus was not "definitively settled" until Interior published this "revised list of federally recognized tribes" in October 1993. *Cohen's Handbook*, *supra*, § 4.07(3)(d)(ii).

In sum, when Congress enacted ISDA in 1975, it was substantially uncertain whether the federal government would recognize Native villages, Native corporations,

both kinds of entities, or neither. In the face of this uncertainty, Congress expanded the term "Indian tribe" to cover any Native "village or regional or village corporation" that was appropriately "recognized." By including both villages and corporations, Congress ensured that any Native entities recognized by Interior or later legislation would qualify as Indian tribes. There is no surplusage problem simply because, almost two decades later, Interior chose to recognize the historic villages but not the newer corporations as the ultimate repository of Native sovereignty.

Finally, we reject the government's plea for deference. The government does not contend that its interpretation of ISDA is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), presumably because that interpretation has never been formally expressed, *see United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Instead, the government claims deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), to the extent that its position is persuasive. The government's position in this case traces back to an internal agency memorandum written by an Assistant Solicitor of Interior, who simply asserted that ANCs must be exempt from ISDA's recognition clause in order to avoid statutory surplusage. That memorandum did not address any of the textual or historical considerations set forth above. Moreover, it appears inconsistent with a binding regulation adopted by the Department of the Treasury, the agency before the Court on this appeal. The regulation provides that, under ISDA, "[e]ach such Indian Tribe" covered by the definition—"including any Alaska Native village or regional or village corporation" as defined in ANCSA—"must be recognized as eligible for special

programs and services provided by the United States to Indians because of their status as Indians." 12 C.F.R. § 1805.104. Because the Interior Department's administrative interpretation of ISDA has little persuasive power, we afford it no deference. Likewise, we decline to follow *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471 (9th Cir. 1987), in which the Ninth Circuit accepted that interpretation. *See id.* at 1473-76.

For these reasons, we read the ISDA definition to mean what it says, that Alaska Native villages and corporations count as an "Indian tribe" only if "recognized" as such.

D

The ANCs suggest that a ruling for the tribes would produce sweeping adverse consequences. They worry that such a ruling would disentitle them not only from CARES Act funding, but also from funding under ISDA and the many other statutes that incorporate its "Indian tribe" definition. This is far from obvious, for ISDA makes funding available to any "tribal organization," upon request by any "Indian tribe." 25 U.S.C. § 5321(a)(1). And it further defines "tribal organization" to include not only "the recognized governing body of any Indian tribe," but also "any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body." *Id.* § 5304(*l*). The parties disagree on whether ANCs, if requested to provide services by a recognized Native village, may receive ISDA funding as an "organization of Indians" that was "sanctioned" by the village to provide the services. We need not resolve that question, and so we leave it open.

The ANCs further claim flexibility to provide coronavirus relief to Alaska Natives who are not enrolled in any recognized village. Given the urgent need for relief, the ANCs say, we should broadly construe the CARES Act to direct funding to the entities best able to provide needed services. The short answer is that we must of course follow statutory text as against generalized appeals to sound policy. But we also note that ANCSA expressly preserves "any governmental programs otherwise available to the Native people of Alaska as citizens of the United States or the State of Alaska." 43 U.S.C. § 1626(a). We are confident that, if there are Alaska Natives uncared for because they are not enrolled in any recognized village, either the State of Alaska or the Department of Health and Human Services will be able to fill the void.

V

We hold that Alaska Native Corporations are not eligible for funding under Title V of the CARES Act. We thus reverse the grant of summary judgment to the government and the intervenors, as well as the denial of summary judgment to the plaintiff tribes.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring: It is, was and always will be, this court's duty "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), but that does not mean we should be blind to the impact of our decisions. The COVID-19 pandemic is an unprecedented calamity, subjecting Americans to physical and economic suffering on a national scale. The virus respects no geographic or political boundaries and invades nearly every facet of life. And as the virus has swept through our Nation, it has disproportionately affected American Indian and Alaska Native communities.[1]

Although I join my colleagues in full, I write separately to express my view that this decision is an unfortunate and unintended consequence of high-stakes, time-sensitive legislative drafting.[2] It is indisputable that the services ANCs provide to Alaska Native communities—including healthcare, elder care, educational support and housing assistance—have been made only more vital due to the pandemic. I can think of no reason that the Congress would exclude ANCs (and thus

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[1] Press Release, Centers for Disease Control and Prevention, CDC data show disproportionate COVID-19 impact in American Indian/Alaska Native populations (Aug. 19, 2020), https://www.cdc.gov/media/releases/2020/p0819-covid-19-impact-american-indian-alaska-native.html.

[2] The CARES Act was drafted and required to be implemented on an extraordinarily short timeline. Only eight days elapsed between the CARES Act's introduction in the Senate on March 19 and the President's signature on March 27. *See* H.R. 784, 116th Cong. (2020) (enacted); S. 3548, 116th Cong. (2020). The CARES Act funds at issue were to be distributed no later than 30 days after enactment and any undistributed funds are scheduled to lapse on September 30. 42 U.S.C. § 801(a)(1), (b)(1).

exclude many remote and vulnerable Alaska Natives) from receiving and expending much-needed Title V funds.

Indian law, however, does not have a simple history or statutory scheme and "no amount of wishing will give it a simple future." *Lummi Indian Tribe v. Whatcom Cty.*, 5 F.3d 1355, 1360 (9th Cir.) (Beezer, J., dissenting), *as amended on denial of reh'g* (Dec. 23, 1993); s*ee also United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) ("Federal Indian policy is, to say the least, schizophrenic."). Indian law's complexity and the pressure to provide swift relief may have proved too much in this case. ISDA is only one of the many statutes which define "Indian tribe" in less than clear—and even conflicting—terms.[3] I believe the Congress must have had reason to believe its definition would include ANCs but, by incorporating by reference ISDA's counter-intuitive definition, it did not, in fact, do so. As a result, many of our fellow citizens who depend on ANCs will not receive Title V aid. Nonetheless it is not this court's job to "soften . . . Congress' chosen words whenever [we] believe[] those words lead to a harsh result." *United States v. Locke*, 471 U.S. 84, 95 (1985). And a harsh result it is.

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[3] For example, the Native American Housing Assistance and Self-Determination Act defines "Indian tribe" as a "federally recognized tribe" and defines "federally recognized tribe" as those tribes, Alaska Native villages or ANCs "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians *pursuant to [ISDA]*." 25 U.S.C. §4103(13)(B) (emphasis added).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 20-cv-01002 (APM)

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL., PLAINTIFFS

v.

STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, DEFENDANT

Case No. 20-cv-01059 (APM)

CHEYENNE RIVER SIOUX TRIBE, ET AL., PLAINTIFFS

v.

STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, DEFENDANT

Case No. 20-cv-01070 (APM)

UTE TRIBE OF THE UINTAH AND OURAY RESERVATION, PLAINTIFF

v.

STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, DEFENDANT

Filed: June 26, 2020

MEMORANDUM OPINION

Under Title V of the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, Congress appropriated $8 billion for "Tribal governments" to combat the COVID-19 pandemic. This consolidated case concerns who qualifies as a "Tribal government" under the CARES Act. Plaintiffs are a group of federally recognized tribes from the lower 48 states and Alaska; they ask this court to permanently enjoin the Secretary of the Treasury from making Title V payments to Alaska Native regional and village corporations, or ANCs. ANCs are not federally recognized tribes; rather, they are for-profit corporations established by Congress in 1971 under the Alaska Native Claims Settlement Act and recognized under Alaska law.

The CARES Act defines "Tribal governments" to mean "the recognized governing body of an Indian Tribe." The Act in turn defines "Indian Tribe" by cross-referencing the definition of that term in another statute: the Indian Self-Determination and Education Assistance Act. In Plaintiffs' view, ANCs do not meet the statutory definition of either "Indian Tribe" or "Tribal government." The Secretary of the Treasury, whom Congress vested with authority to allocate Title V funds, on the other hand, reads the CARES Act to allow payment of Title V funds to ANCs. The court previously agreed with Plaintiffs, at least tentatively, and preliminarily enjoined the Secretary from distributing CARES Act funds to ANCs. *See Confederated Tribes of the Chehalis Reservation v. Mnuchin*, Case No. 20-cv-1002 (APM), 2020 WL 1984297 (D.D.C. April 27, 2020) ("*Confederated Tribes*"). In that decision, the court found

that Plaintiffs would be irreparably harmed absent emergency relief, and that they had established a substantial likelihood of success on the merits.

The matter is before the court on cross-motions for summary judgment. Although the court initially determined that Plaintiffs were likely to succeed on the merits of their claim, after reviewing the parties' arguments on summary judgment, the court now holds that ANCs are "Indian Tribes," and that their boards of directors are "Tribal governments," for purposes of the CARES Act. Accordingly, ANCs are eligible to receive Title V funds. As a result, the court dissolves the preliminary injunction and enters judgment in favor of Defendants.

I.

A. Background

The court begins with a brief overview of the relevant statutes and the history of this case.[1]

1. Statutory Background

Congress enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020), to respond to the devastating impacts of the COVID-19 pandemic. Title V of the CARES Act, the title relevant here, appropriates $150 billion for fiscal year 2020 for "payments to States, Tribal governments, and units of local government."

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[1] For a more detailed factual and procedural background, the court directs the reader to its Memorandum Opinion granting preliminary injunctive relief. *See Confederated Tribes*, 2020 WL 1984297.

42 U.S.C. § 801(a)(1). Of that sum, $8 billion is "reserve[d] . . . for making payments to Tribal governments." *Id.* § 801(a)(2)(B). Congress directed the Secretary of the Treasury ("Secretary") to disburse those monies to "Tribal governments" within 30 day of the law's enactment, or by April 26, 2020. § 801(b)(1).

The CARES Act defines "Tribal government" as "the recognized governing body of an Indian tribe." *Id.* § 801(g)(5). The Act further provides that "[t]he term 'Indian Tribe' has the meaning given that term" in section 4(e) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5304(e)). *Id.* § 801(g)(1). The Indian Self-Determination and Education Assistance Act, or 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.* ("ANCSA")], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5304(e). The court refers to "Alaska Native . . . regional or village corporation[s]" in this opinion as ANCs.

Congress enacted ISDEAA in 1975 "to help Indian tribes assume responsibility for aid programs that benefit their members." *Menominee Indian Tribes of Wis. v. United States*, 136 S. Ct. 750, 753 (2016). Under ISDEAA, federally recognized Indian tribes, tribal organizations, and tribal consortiums can choose to have the Bureau of Indian Affairs (BIA) provide direct services, or they can operate the programs themselves by

entering into "self-determination contracts" with these federal agencies to provide services that otherwise would have been provided by the federal government, such as education, law enforcement, and health care. 25 U.S.C. § 5321(a)(1); *see also Menominee Indian Tribes of Wis.*, 136 S. Ct. at 753. A contracting tribal organization is eligible to receive the amount of money that the federal government would have otherwise spent on the program, *see* 25 U.S.C. § 5325(a)(1), as well as reimbursement for reasonable "contract support costs," which include administrative and overhead costs associated with carrying out the contracted programs, *id.* § 5325(a)(2), (3)(A). ISDEAA was amended in 1988, 1994, and 2000, and now includes health care programs administered by the Indian Health Service. *See* Pub. L. 100-472 (Oct. 5, 1988); Pub. L. 103-413 (Oct. 25, 1994); Pub. L. 106-260 (Aug. 18, 2000).

2. Factual and Procedural Background

Congress instructed the Secretary to distribute Title V funding quickly—within 30 days of the law's enactment. So, on April 13, 2020, shortly after the CARES Act became law, the Secretary published on the Treasury Department's website a form titled "Certification for Requested Tribal Data," which sought certain data to effectuate disbursement of CARES Act funds. *See* Confederated Tribes of the Chehalis Pls.' Mot. for TRO & Prelim. Inj., ECF No. 3, Decl. of Riyaz Kanji, Ex. 2, ECF No. 3-8 [hereinafter Certification], at 15-16. The Certification identified metrics specific to ANCs. ANCs are not federally recognized Indian tribes but are for-profit corporations established by Congress under the Alaska Native Claims Settlement Act. *See* 43 U.S.C. §§ 1606, 1607. The metrics specific to ANCs

identified by the Secretary included "shareholders" as of January 1, 2020, and total land base, which expressly included lands "selected pursuant to the Alaska Native Claims Settlement Act." Certification.

The Certification's posting prompted three groups of Tribes to bring suit against the Secretary under the Administrative Procedure Act ("APA"), challenging the Secretary's anticipated treatment of ANCs as eligible for Title V funding. *Id.* On April 17, 2020, the Confederated Tribes of the Chehalis Reservation, the Tulalip Tribes, the Houlton Band of Maliseet Indians, the Akiak Native Community, the Asa'carsarmiut Tribe, and the Aleut Community of St. Paul Island (collectively, "Confederated Tribes Plaintiffs") filed an action against the Secretary. Confederated Tribes Compl., ECF No. 1.[2] Shortly afterward, Plaintiffs Cheyenne River Sioux Tribe, Oglala Sioux Tribe, and Rosebud Sioux Tribe filed their suit, *see* Cheyenne River Sioux Compl., ECF No. 1, and Plaintiff Ute Indian Tribe of the Uintah and Ouray Reservation filed a third lawsuit the next day, *see* Ute Compl., ECF No. 1. The court consolidated all three cases. *See* Docket 20-cv-1070, Minute Order, April 24, 2020; Docket 20-cv-1059, Minute Order, April 23, 2020.

On April 23, 2020, the Treasury Department formally announced its position that it intended to distribute Title

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[2] The Confederated Tribes Plaintiffs filed an amended complaint, which added the Navajo Nation; Quinault Indian Tribe; Pueblo of Picuris; Elk Valley Rancheria, California; and San Carlos Apache Tribe as plaintiffs. *See* Am. Confederated Tribes Compl., ECF No. 7. Plaintiffs again brought the same single count for violations of the APA. *Id.* ¶¶ 117-23.

V funds to ANCs: "After consultation with the Department of the Interior, Treasury has concluded that Alaska Native regional and village corporations as defined in or established pursuant to the Alaska Native Claims Settlement Act are eligible to receive payments from the Fund in the amounts to be determined by the Secretary of the Treasury." U.S. TREASURY DEP'T, Coronavirus Relief Fund Payments to Tribal Governments (April 23, 2020) (footnote omitted).[3]

All Plaintiffs moved for preliminary injunctive relief, which this court granted on April 27, 2020. *See Confederated Tribes*, 2020 WL 1984297. In granting that relief, the court rejected the Secretary's threshold contention that the Treasury Department's legal determination that ANCs are eligible for Title V funds is a presumptively unreviewable discretionary action under the APA. *See id.* at *5-6. The court concluded that, "while the Secretary's decisions as to *how* much to disburse might not be reviewable, his decisions *to whom* to disburse those funds most certainly is." *Id.* at *5 (footnote omitted). As for the injunction factors, the court evaluated them on a sliding scale and found that they weighed in favor of granting relief. *See id.* at *7-15. In particular, on the merits of the APA claim, the court

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[3] Available at https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Payments-to-Tribal-Governments.pdf. The Confederated Tribes and the Cheyenne River Sioux Plaintiffs both amended their complaints a second time following summary judgment briefing to include an additional allegation regarding the Secretary's April 23, 2020 statement, which was not issued until after the date of the Confederated Tribes Plaintiffs' first amended complaint. *See* Confederated Tribes Second Am. Compl., ECF No. 93; Cheyenne River Sioux Second Am. Compl., ECF No. 96.

preliminarily agreed with Plaintiffs that no ANC satisfied the CARES Act's definition of "Tribal government" and therefore no ANC was eligible for Title V funds. *Id.* at *10. The court declined, however, to grant the full relief that Plaintiffs sought. Instead of compelling the Secretary to distribute all $8 billion in Title V funds only to federally recognized Indian tribes, the court entered a "more limited remedy," *id.* at *16, which enjoined the Secretary from disbursing Title V funds to any ANC pending entry of a final judgment in the case, *see* Order, ECF No. 37.

On May 5, 2020, the Treasury Department began distributing 60 percent, or $4.8 billion, of the $8 billion in Title V funds designated for Tribal governments. The Secretary allocated that sum based not on any information collected through the Certification, but rather on pre-existing tribal population data maintained by the U.S. Department of Housing and Urban Development ("HUD"). *See* U.S. DEP'T OF TREASURY, Coronavirus Relief Fund Allocations to Tribal Governments (May 5, 2020), at 2.[4] Based on the HUD data, the Secretary determined that ANCs would receive $162.3 million in Title V funds but withheld that amount to comply with the preliminary injunction. *See Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-cv-01136 (APM) [hereinafter *Agua Caliente Band*], 5/8/2020 Hr'g Tr., ECF No. 30, at 18.

The Secretary began disbursing the balance of the Title V funds on June 17, 2020. *See* Notice, *Agua Caliente Band*, ECF No. 43 [hereinafter Notice]. This

[4] Available at https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf.

second tranche of emergency relief was distributed based on employment and expenditure data submitted by Tribal governments, including ANCs. *See* Def.'s Status Report, *Agua Caliente Band*, ECF No. 39. The Secretary once again allocated Title V funds to ANCs but withheld making payments per the court's order, *see* Notice, and he has not publicly announced the exact amount withheld for ANCs in this second tranche of funding.

Meanwhile, a number of ANCs and ANC associations filed motions to intervene as defendants in this case,[5] which the court granted. *See* Minute Order, May 13, 2020; Order, ECF No. 70. Summary judgment briefing concluded on June 9, 2020, and the court heard argument on the parties' cross-motions on June 12, 2020. *See* Minute Entry, June 12, 2020.

II.

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate when the moving party demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). However, in cases such as this one involving review of a final agency action, the standard set forth in Rule 56 does not apply. *See AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 81 (D.D.C. 2007). The court's role in an APA action "is to determine whether or not as a matter of law the evidence in the

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[5] *See* Mot. of Ahtna, Inc. to Intervene as Defendant & Incorporated Mem. of Law, ECF No. 43; Mot. of Alaska Native Village Corp. Ass'n, Inc. & Ass'n of ANCSA Regional Corp. Presidents/CEO's, Inc. to Intervene and Mem. of P. & A., ECF No. 45; Mot. to Intervene as Defendants & Supp. Mem. of Law, ECF No. 46.

administrative record permitted the agency to make the decision it did." *Charter Operators of Ala. v. Blank*, 844 F. Supp. 2d 122, 127 (D.D.C. 2012) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985)). Summary judgment "serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Id.*

III.

The Secretary renews the jurisdictional argument that the court rejected at the preliminary injunction stage, which is that "Congress did not intend for emergency relief payments to be subject to judicial review." Def.'s Mot for Summ. J., ECF No. 79, Def.'s Mem of Law in Supp. of its Mot. for Summ. J., ECF No. 79-1 [hereinafter Def.'s Mot.], at 11. The Secretary points to two features of the CARES Act that he contends evince such congressional intent. First, he points to the short statutory, 30-day timeline to distribute funds. *Id.* at 11-12. Second, he argues that the statutory scheme, which does not require Treasury to publish to "whom it will be paying, its methodology or the payment amounts" prior to disbursing the funds, makes clear Congress's intent that the Secretary's decisions be insulated from review. *Id.* at 12. These arguments are refinements of the Secretary's prior assertion of judicial non-reviewability, but they fare no better.

There is a "strong presumption that Congress intends judicial review of administrative action." *Council for Urological Interests v. Sebelius*, 668 F.3d 704, 708 (D.C. Cir. 2011) (quoting *Bowen v. Mich. Acad. of Fam-*

ily Physicians, 476 U.S. 667, 670 (1986)). That presumption can be overcome if "congressional intent to preclude judicial review is fairly discernible from the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 390 (1984). But such a showing entails a "heavy burden," which must be carried by "clear and convincing evidence." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (citation omitted), *overruled on other grounds by Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley*, 467 U.S. 526 (1984).

A tight statutory deadline by itself is not sufficient to overcome the strong presumption in favor of judicial review. *See id.* at 562 n.2 & 567 (holding that a decision by the Secretary of Labor subject to a 60-day deadline is reviewable); *In re FTC Corp. Patterns Report Litig.*, 432 F. Supp. 274, 289-90 (D.D.C. 1977) (rejecting argument that 45-day timeline for agency action evinced Congress'[s] intent to preclude judicial review, and reasoning that "[a]t best, a court could indirectly imply from Congress's obvious desire to prevent undue delays an intent to protect the [Secretary's] actions from judicial scrutiny. This tenuous link, however, does not constitute clear and convincing evidence of Congressional intent to preclude judicial review."). The cases Defendant cites to the contrary are easily distinguishable. In *Morris v. Gressette*, 432 U.S. 491 (1977), for example, the Court pointed to numerous features of the statute, including "the potential severity of the . . . remedy, the statutory language, and the legislative history," from which "nonreviewability [could] fairly be inferred." *Id.* at 501, 504 (citation omitted). No such additional indicia are present here. *Dalton v. Specter* also is inapposite. There, four concurring Justices found that a

series of "tight and rigid deadlines" prescribed in a statutory scheme for military base closings was an indication that Congress did not intend for judicial review of an individual closing determination. 511 U.S. 462, 479 (1994) (Souter, J., concurring, joined by Blackmun, Stevens, Ginsburg, JJ.). But there was also more at play in *Dalton*: the Justices observed that "the Act's text and intricate structure . . . plainly express congressional intent that action on a base-closing package be quick and final, or no action be taken at all." *Id.* That included not only a series of "unbending" time deadlines, but also the speed with which the base closures were to occur if approved and the disbanding of the base-closing Commission at the end of each decision round, and its eventual automatic termination. *See id.* at 480-81. Here, in sharp contrast, Congress did not tie the 30-day distribution period to any other deadline for congressional or agency action; and there is no impending automatic expiration of authority to distribute the funds.[6] Nor can it be said that the deadline is "unbending," as the Secretary—independent of any litigation—did not begin distributing the second tranche of funds until June 12, 2020, 47 days past the 30-day deadline, *see* Def.'s Status Report, *Agua Caliente Band*, ECF No. 39; 42 U.S.C. § 801(b)(1). A stand-alone deadline, even one of a mere 30 days, cannot without more overcome the strong presumption in favor of agency review.

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[6] At most, Title V mandates payment of funds for "fiscal year 2020," which expires September 30, 2020. 42 U.S.C. § 801(b). That leaves sufficient time to litigate this matter to its conclusion, including possible expedited appellate review.

Nor does the fact that Congress did not require the Secretary to identify aid recipients before making payments indicate an intent to foreclose judicial review. The Secretary points to no evidence that Congress even considered such a pre-publication requirement, let alone consciously elected not to adopt one. The court cannot draw any inference of non-reviewability from Congress's failure to enact a provision that it did not even consider. The presumption of reviewability therefore applies, and the Secretary has failed to defeat it.

IV.

The court turns now to the merits. Recall, the CARES Act grants $8 billion in emergency aid to "Tribal governments," which the Act defines as "the recognized governing body of an Indian Tribe." 42 U.S.C. § 801(g)(5). "Indian Tribe," in turn, "has the meaning given that term" under ISDEAA. *Id.* § 801(g)(1). ISDEAA defines "Indian tribe" as:

> [A]ny Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

25 U.S.C. § 5304(e). Plaintiffs argue that ANCs do not qualify for Title V funds for two reasons: (1) ANCs do not meet ISDEAA's definition of "Indian Tribe," and (2) ANCs are not a "recognized governing body" of an Indian tribe, nor do they have such a body. Though these

arguments seem straightforward at first blush, the parties have staked out varied approaches in addressing them.

Whether ANCs are "Indian Tribes" under ISDEAA turns on how one reads the dependent clause that appears at the end of the ISDEAA definition—"which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The court refers to this as the "eligibility clause." According to the Confederated Tribes Plaintiffs, the eligibility clause applies to each listed entity that comes before it, including most critically "Alaska Native . . . regional or village corporations" —ANCs. *See* Confederated Tribes Mot. for Summ. J. and Mem. of P. & A., ECF No. 77 [hereinafter Confederated Tribes Mot.], at 13 (citing 25 U.S.C. § 5304(e)). Because no ANC presently satisfies the eligibility clause, those Plaintiffs say, none qualifies for CARES Act funds. *Id.* at 13-14.

The Confederated Tribes Plaintiffs, however, are the only Plaintiffs that press this interpretation. The Cheyenne River Sioux and Ute Plaintiffs (collectively, "Cheyenne River Sioux Plaintiffs") acknowledge that "ANCs can be treated as 'Indian tribe[s]' for limited purposes" under ISDEAA. *See* Pls. Cheyenne River Sioux Tribe's, Rosebud Sioux Tribe's, Oglala Sioux Tribe's, Nondalton Tribal Council's Arctic Village Council's Native Village of Venetie Tribal Government's, Navajo Nation's, & Ute Indian of the Uintah & Ouray Indian Reservation's Mem. in Supp. of Jt. Mot. for Summ. J., ECF No. 76-2 [hereinafter Cheyenne River Sioux Mot.], at 4. Thus, there is a split among Plaintiffs as to whether

ANCs qualify as "Indian Tribes" for purposes of the CARES Act.

Ironically, the Secretary agrees with the Confederated Tribe Plaintiffs that ANCs do not satisfy, and never have satisfied, the eligibility clause; and yet he contends that ANCs qualify for CARES Act funding as "Indian Tribes" under ISDEAA. Def.'s Mot. at 1. The Secretary asserts that the ISDEAA definition must be read to, in effect, exempt ANCs from satisfying the eligibility clause. That interpretation, the Secretary claims, is faithful to congressional design, because the Confederated Tribes' alternative reading, if accepted, would render the listing of ANCs in the ISDEAA definition surplusage and defeat Congress's intent to make ANCs eligible for ISDEAA self-determination contracts. The ANC-Intervenors, by contrast, take a "heads-I-win, tails-I-win" approach to reading the ISDEAA definition. They say that ANCs *do* satisfy the ordinary meaning of the eligibility clause, because they are "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Mem. of P. & A. in Supp. of Intervenor-Defs.' Mot. for Summ. J., ECF No. 78-1 [hereinafter Intervenors' Mot.], at 47; Intervenor-Defs.' Resp. in Opp'n to Pls.' Cross-Mots. for Summ. J., ECF No. 86 [hereinafter Intervenors' Opp'n], at 5. The Secretary expressly rejects this reading, contending that the eligibility clause conveys the principle of federal recognition of Indian tribes, which ANCs as corporations cannot satisfy (the Confederated Tribe Plaintiffs agree). *See* Def.'s Combined Opp'n & Reply in Supp. of Mot. for Summ. J., ECF No. 88 [hereinafter Def.'s Opp'n], at 4 n.3; Confederated Tribes Mot. at 14; Confederated Tribes Pls.' Reply in Supp. of its Mot. for Summ. J. & Resp. in Opp'n to Defs.'

Mots. for Summ. J., ECF No. 87 [hereinafter Confederated Tribes Opp'n], at 7-8. No matter, say the ANC-Intervenors. If their primary reading is incorrect, they then embrace the Secretary's reading, which exempts ANCs from the eligibility clause. *See* 6/12/2020 Hr'g Tr., ECF No. 94, at 88-89. Either way, according to the ANC-Intervenors, they qualify as "Indian Tribes" under ISDEAA and therefore are eligible for Title V funds. *Id.*

There is greater alignment among the parties on the second question: whether an ANC qualifies as a "Tribal government" for the purposes of the CARES Act. The Cheyenne River Sioux Plaintiffs urge the court not to get bogged down in the morass of whether ANCs qualify as "Indian Tribes" because, in their view, "ANCs are not Tribal governments under any measure." Cheyenne River Sioux Mot. at 2. The Confederated Tribes Plaintiffs agree, though this is their secondary position. Confederated Tribes Mot. at 12-13. The Secretary and the ANC-Intervenors see eye-to-eye on this question, too. They agree that an ANC's board of directors qualifies as a "recognized governing body of an Indian tribe" for purposes of the CARES Act. Def.'s Mot. at 34; Intervenors' Mot. at 38-39. Their argument, as will be seen below, relies on a similar definitional phrase contained in ISDEAA, "tribal organization," that appears nearly verbatim as the CARES Act's definition of "Tribal government," *compare* 25 U.S.C. § 5304(l) (defining "tribal organization" to mean in part "the recognized governing body of any Indian tribe") *with* 42 U.S.C. § 801(g)(5) (defining "Tribal government" to mean "the recognized governing body of an Indian Tribe"), which they assert encompasses an ANC's board of directors for ISDEAA

contracting purposes. Def.'s Mot. at 30-31, 33; Intervenors' Mot. at 38-39.

As the above summation shows, this case does not present easy, straightforward questions of statutory interpretation. The court has wrestled with them. Each side has marshaled an impressive array of textual, historical, and practical evidence, all of which must be viewed against the unique treatment of Native Alaskans by Congress and Executive Branch agencies. Though the court ruled at the preliminary injunction stage that ANCs likely did not qualify for CARES Act funds, as explained below, the court now concludes otherwise: ANCs qualify as "Indian Tribes," and their boards of directors are "recognized governing bod[ies]," for purposes of the CARES Act. Accordingly, the court holds that ANCs are eligible for Title V funding.

A. "Indian Tribe" under ISDEAA

The parties agree that, as a matter of pure grammar, the eligibility clause contained in the definition of "Indian Tribe" in ISDEAA and the CARES Act applies to ANCs. *See* Hr'g Tr. at 54-55; Intervenors' Opp'n at 4-5; Confederated Tribes Mot. at 13-14. The eligibility clause plainly modifies each of the nouns that precedes it, including ANCs. The parties diverge, however, on whether that grammatical structure both begins and ends the statutory interpretation debate.

Each side comes armed with its own preferred canon of statutory construction. The Confederated Tribes Plaintiffs contend that the series-qualifier canon of statutory interpretation settles this case. *See* Confederated Tribes Mot. at 13-14. Under that canon, "'[w]hen

there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier at the end of the list 'normally applies to the entire series,'" *Lockhart v. United States*, 136 S. Ct. 958, 970 (2016) (Kagan, J., dissenting) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012) (SCALIA & GARNER)). Relatedly, under the last antecedent rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Applying either of these canons dictates that "any Alaska Native village or regional or village corporation" qualifies as an "Indian tribe" *only* if it 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); *see also* Confederated Tribes Mot. at 13 n.8. Because no ANC is so recognized as eligible for the special programs and services provided by the United States, the argument goes, no ANC is an "Indian tribe" under ISDEAA.

The Secretary, on the other hand, urges the court to look beyond the statute's grammatical structure. He argues that a blind application of the series-qualifier canon would violate the "'cardinal principle' of statutory interpretation"—that is, "to adopt a reading that gives effect to every term in the statute." Def.'s Opp'n at 7 (quoting *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019)). Here, according to the Secretary, Congress expressly inserted ANCs into the statutory text, despite knowing that ANCs could not satisfy the eligibility clause because of their status as for-profit corporations. Subjecting ANCs to the eligi-

bility clause therefore would negate their addition, rendering the inclusion of "Alaska Native [ ] regional or village corporation" surplusage.

Although a close question, the court is now convinced that, in 2020 when Congress passed the CARES Act, it could not have intended the eligibility clause to apply ANCs. Several considerations lead the court to this result. First, while the Confederated Tribes Plaintiffs emphasize the importance of the series-qualifier canon, the court's proper role is not to apply a single canon of statutory construction—"canons of construction are no more than rules of thumb that help courts determine the meaning of legislation," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). The court must interpret the statute as whole to give effect to congressional intent. *Parker Drilling*, 139 S. Ct. at 1890. Consequently, the court cannot simply disregard the inclusion of ANCs in the definition that Congress chose for purposes of the CARES Act. Second, the court's interpretation is consistent with ISDEAA's legislative history, which reveals that Congress took pains to include ANCs in the ISDEAA definition. Third, to the extent the competing canons of construction give rise to ambiguity, *Skidmore* deference to the BIA's interpretation of ISDEAA is warranted, given the reasonableness of the agency's approach and its longstanding adherence to it. The court discusses each of these reasons below. Because the court reads the eligibility clause as inapplicable to ANCs, the court does not address the ANC's alternative argument that they satisfy the ordinary meaning of the eligibility clause.

1.

Applying the series-qualifier canon in this case does not resolve the statutory interpretation debate. "[A]s with any canon of statutory interpretation," the series-qualifier canon "'is not an absolute and can assuredly be overcome by other indicia of meaning.'" *Lockhart*, 136 S. Ct. at 963, 965 (quoting *Barnhart*, 540 U.S. at 26). Indeed, as the Tenth Circuit has observed, the series-qualifier canon, "perhaps more than most canons, is subject to defeasance by other canons—that is, it is perhaps more prone than most to have its effect nullified by other canons." *Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 745 (10th Cir. 2020) (cleaned up); *see also* SCALIA & GARNER at 150 ("Perhaps more than most of the other canons, [the series-qualifier canon] is highly sensitive to context.").

Such is the case here, where the series-qualifier canon runs headlong into another canon of interpretation: the rule against superfluity. It is "the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Parker Drilling*, 139 S. Ct. at 1890 (quoting *Loughrin v. United States*, 573 U.S. 351, 358 (2014)). As a result, courts are "reluctant to treat statutory terms as surplusage in any setting." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (cleaned up). Such reluctance is particularly apt here, where adopting Plaintiffs' construction would render Congress's purposeful inclusion of ANCs in the ISDEAA definition "wholly superfluous." *Id.* at 174. ANCs would become "wholly superfluous" under the Confederated Tribes' preferred reading, because all agree (except the ANCs themselves) that ANCs never

have, and almost certainly never will, satisfy the eligibility clause. ANCs cannot be 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). ANCs, after all, are for-profit corporations established by Congress and recognized under Alaska law, and thus do not enjoy "status as Indians." Indeed, under the Alaska Native Claims Settlement Act, the statute that established ANCs by extinguishing all aboriginal claims to Alaska land, the transfer of land to the new, state-chartered private business corporations "was without any restraints on alienation or significant use restrictions" precisely because Congress intended to avoid "'any permanent racially defined institutions, rights, privileges, or obligations.'" *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532-33 (1998) (quoting 43 U.S.C. § 1601(b)). Thus, while the first ANC shareholders were required to be Alaska Natives, the corporations could immediately convey former reservation lands and ANC stock to non-Natives. *Id.* at 533; 43 U.S.C. § 1606(h). It cannot be said, then, that ANCs enjoy "status as Indians."

Moreover, both the Secretary and the Confederated Tribes read the eligibility clause as conveying the principle of federal recognition, which confers upon tribes a distinct political and legal status in relation to the United States. *See* 6/12/2020 Hr'g Tr. at 60; Confederated Tribes Mot. at 14-15. The Confederated Tribes contend that ISDEAA's eligibility clause must be read *in pari materia* with the nearly identical language in the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, or List Act, which directs the Secretary of Interior to publish a "list of all Indian tribes that the Secretary recognizes to be eligible

for the special programs and services provided by the United States to Indians because of their status as Indians" (quoting 25 U.S.C. § 5131(a))). No ANC has ever been federally recognized by the United States as an Indian tribe under the List Act because no ANC is "recognize[d] to be eligible for the special programs and services provided by the United States to Indians because of [its] status as Indians." The court agrees that the nearly identically worded eligibility clauses in both statutes are terms of art that convey the principle of federal recognition, and thus reading the eligibility clause to apply to ANCs would render as surplusage their listing in the ISDEAA definition of "Indian tribe."

The Confederated Tribes Plaintiffs attempt to sidestep this superfluity problem by asserting there is no such problem to begin with. They contend that the disjunctive nature of the clause in which ANCs appear—which they refer to as the "Alaska clause"—"means that the clause has effect as long as 'any Alaska Native village *or* regional *or* village corporation' satisfies the terms of the eligibility clause, and according to the Secretary of the Interior's own listing there are 229 Native villages[7] that do." Confederated Tribes Opp'n at 8. The court expressed a similar logic in its preliminary injunction opinion, writing that "[t]he possibility that ANCs might not qualify under the eligibility clause is hardly fatal to carrying out Congress's purpose under

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[7] Alaska Native villages are not corporations. They are sovereign, political entities exercising governmental authority, much like "'Indian tribes,' as that term is commonly used to refer to Indian entities in the contiguous 48 states." *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,365 1993 WL 420646 (October 21, 1993).

ISDEAA . . . [because] [Alaska Native villages] are also in the statute [and] [t]hey can and do satisfy the eligibility clause." *Confederated Tribes*, 2020 WL 1984297 at *11. The court is no longer convinced of this rationale. ISDEAA says that "'Indian tribe' means *any* . . . organized group or community, including *any* Alaska Native [1] village or [2] regional [corporation] or [3] village corporation as defined in or established pursuant to [ANCSA]." 25 U.S.C. § 5304(e) (emphasis added). Congress thus intended for *any* of the nouns in the Alaska clause to satisfy the definition, and subjecting any of those nouns to a requirement that it cannot meet—as Plaintiffs seek to do—would still turn that noun into surplusage. The series-qualifier canon therefore must give way in this case to the rule against superfluity.[8]

Plaintiffs' cited authorities are not to the contrary. Plaintiffs rely on *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), and *King v. Burwell*, 135 S. Ct. 2480 (2015), for the proposition that "the canon against surplusage should [not] be elevated to Holy Grail status and operate to subvert the plain meaning of the statutory text." Confederated Tribes Opp'n at 10. But these cases are readily distinguishable. *Chickasaw Nation* concerned a provision of the Indian Gaming Regulatory Act that, like ISDEAA, featured an "including" clause (akin to the Alaska clause) followed by a limiting clause

[8] The Confederated Tribes Plaintiffs also suggest that applying the eligibility clause to ANCs does not render them superfluous under ISDEAA, because in 1975, when Congress passed the statute, it was an open question whether ANCs could satisfy the eligibility clause. Confederated Tribes Mot. at 31. The court addresses this argument in the following section.

(akin to the eligibility clause). 534 U.S. at 86-87. The Court there rejected the plaintiffs' reliance on the canon against surplusage and instead found that the limiting clause applied to the words before it—to find otherwise would "seriously rewrit[e] the language of the rest of the statute." *Id.* at 89. But critical to that conclusion was the Court's reasoning that the troublesome language in the statute—a cross-reference to another chapter of the Internal Revenue Code—was "simply a drafting mistake, a failure to delete an inappropriate cross-reference in the bill that Congress later enacted into law." *Id.* at 91.

The Court struck a similar chord in *King v. Burwell*. That case involved the Affordable Care Act, which the Court observed "contains more than a few examples of inartful drafting" and, by virtue of how the legislation was enacted, "does not reflect the type of care and deliberation that one might expect of such significant legislation." 135 S. Ct. at 2492. In light of these shortcomings, the Court found "specifically with respect to this Act, rigorous application of the [surplusage] canon does not seem a particularly useful guide to a fair construction of the statute." *Id.*

The reasons for discounting the surplusage canon that were present in *Chicksaw Nation* and *King v. Burwell* simply are not present here. There is nothing to suggest that Congress's inclusion of ANCs in the ISDEAA definition of "Indian tribe" was a drafting error; nor is there any reason to question the Legislative Branch's diligence in drafting the definition. To the contrary, as discussed4 further below, the definition's legislative history reflects a conscious decision on the part of Congress to make ANCs eligible to contract with

the United States to deliver public services to Alaska Native populations. Thus, while the "preference for avoiding surplusage constructions is not absolute," *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004), there is no good reason to abandon it here.

Admittedly, reading the ISDEAA definition as the Secretary posits gives rise to an odd grammatical result. No one disputes that an "Alaska Native village"—the first entity listed in the Alaska clause—must satisfy the eligibility clause to qualify as an "Indian tribe" under ISDEAA. *See Confederated Tribes*, 2020 WL 1984297 at *11. An Alaska Native village that is not "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" cannot contract with a federal agency under ISDEAA. That reading, however, creates the strange result that the eligibility clause modifies the first in the series of three nouns that comprises the Alaska clause, but not the last two. That is an unnatural reading, to be sure. The court's primary goal, however, is to discern the "intent embodied in the statute Congress wrote." *Chicksaw Nation*, 534 U.S. at 94. Treating ANCs as not subject to the eligibility clause achieves that purpose. Congress expressly included ANCs in the definition of "Indian tribe" under ISDEAA to make them eligible to enter into self-determination contracts with federal agencies. By incorporating wholesale ISDEAA's definition of "Indian Tribes" into the CARES Act, Congress declared ANCs to be eligible for Title V emergency relief funds.

2.

ISDEAA's drafting history lends support to this conclusion. Neither the Senate's nor the House of Representative's initial versions of the ISDEAA definition of "Indian tribe" included ANCs, though each included the eligibility clause. *See* H.R. 6372, § 450b(b), 93rd Cong., 1st Sess. (1973); S. 1017, 93d Cong., 2d Sess. (1974), 120 Cong. Rec. 2813-19; *see also Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1474-75 (9th Cir. 1987) (discussing ISDEAA's legislative history). The House Committee on Interior and Insular Affairs, to whom the Senate bill was referred, "amended the definition of 'Indian tribe' to include regional and village corporations established by the Alaska Native Claims Settlement Act." H.R. Rep. 93-1600; 120 Cong. Rec. 40252 (Dec. 16, 1974). The amended definition that became law, and remains the same today, thus reads, "including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act." *See* Pub. L. 93-638 § 4(b), 88 Stat. 2203, 2204 (1975) (codified at 25 U.S.C. § 5304(e)). Importantly, not only did the amended definition expressly include ANCs, the latter portion of the clause—"established pursuant to [ANCSA]"—applies *only* to ANCs. As the Secretary points out, while "native villages" are *defined* in ANCSA, only Alaska regional and village corporations are "established" by it. *See* Def.'s Opp'n at 5 & n.5 (citing H.R. Rep. 93-1600; 120 Cong. Rec. 40252 (Dec. 16, 1974)). That Congress went out of its way to add ANCs to the statutory definition of "Indian tribe" is compelling evidence that Congress intended ANCs to meet that definition. It would be an odd result indeed for Congress to include ANCs in one

breath only to negate their inclusion in the very next breath through the eligibility clause.

The Confederated Tribes Plaintiffs endeavor to explain this ostensible statutory contradiction by positing that Congress "left the door open" for ANCs to satisfy the eligibility clause in ISDEAA, and only "over time" has the Secretary of the Interior declared that ANCs are not eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Confederated Tribes Mot. at 31. In support, Plaintiffs point to two comments submitted in 1977—two years after Congress passed ISDEAA—to proposed BIA regulations regarding the development of uniform procedures for the recognition of Indian tribes. Confederated Tribes Opp'n at 20-21. These comments, submitted by two Alaska Native corporations, suggest some uncertainty as to whether ANCs could satisfy the eligibility clause. *See id.* But these isolated comments, from private enterprises, have little to no probative value in determining whether *Congress* in fact "left the door open" for ANCs to satisfy the eligibility clause when it passed ISDEAA. There is simply no legislative history before the court to support the notion that Congress in 1975 believed ANCs could ever meet the eligibility clause.

Moreover, whether ANC eligibility remained an unsettled question in 1975 is ultimately a distraction. The issue before the court is whether Congress meant for ANCs to be eligible for CARES Act relief *in 2020*. The Confederated Tribes Plaintiffs concede that by 1978, when the BIA proposed revised regulations regarding the recognition of Indian tribes that expressly excluded ANCs, "the door was closed on [the] possibility" that

ANCs could meet the eligibility clause. Confederated Tribes Opp'n at 21-22; 6/12/2020 Hr'g Tr. at 21. And certainly by 2020, Congress understood that no ANC could satisfy the eligibility clause, as none had done so since ISDEAA's inception. 6/12/20202 Hr'g Tr. at 59-60. Thus, by incorporating the ISDEAA definition into the CARES Act, Congress must have known that it had selected a definition of "Indian Tribe" that expressly encompasses ANCs, notwithstanding their falling outside the definition's eligibility clause.[9] Congress therefore intended to make Title V funds available to ANCs.

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[9] The parties tussle over what inference can be drawn, if any, from Congress's selection of the ISDEAA definition of "Indian tribe," as opposed to some other statutory definition of "Indian tribe" appearing in the U.S. Code. *See* Intervenors' Mot. at 28; Confederated Tribes' Opp'n 12. The answer is none. As the parties point out, the U.S. Code contains multiple different definitions of "Indian tribe." Some of those definitions expressly include ANCs. *See, e.g.*, 20 U.S.C. § 1401(13) (defining "Indian tribe" as "any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act. . . .)"). Some do not. *See, e.g.*, 25 U.S.C. § 5130(2) ("The term 'Indian Tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe."). Some expressly *exclude* ANCs. *See, e.g.*, 25 U.S.C. § 3501(4)(B) ("For the purpose of paragraph (12) and sections 3503(b)(1)(C) and 3504 of this title, the term 'Indian Tribe' does not include any Native Corporation."). Some expressly *include* them. Of those definitions that expressly include ANCs, some incorporate a similarly worded eligibility clause. *See, e.g.*, 25 U.S.C. § 4103(13)(B) (defining "federally recognized tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, that is recognized

3.

The court also concludes that, to the extent there is ambiguity in the definition of "Indian tribe," the Secretary's position is entitled to *Skidmore* deference. Under *Skidmore v. Swift & Co.*, the weight a court affords to an agency interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. 134, 140 (1944). Ultimately, a court upholds an agency determination under *Skidmore* to the extent is has "power to persuade." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (internal quotation marks and citation omitted); *see also Davis v. United States*, 495 U.S. 472,

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as eligible for the special programs and services provided by the United States to Indians because of their status as Indians pursuant to the Indian Self-Determination and Education Assistance Act"). Others do not. *See, e.g.*, 16 U.S.C. § 470bb(5) (defining "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. §§ 1601-1629h]").

All this proves is that Congress, when it passed the CARES Act, had other statutory definitions available to it that could have provided greater clarity about the eligibility of ANCs. Unfortunately, this availability sheds no useful light on the dispute at hand. The Alaska Federation of Natives amicus suggest a neat dichotomy among the various statutory definitions: Congress includes ANCs within the definition of "Indian tribe" when the statute concerns economic legislation, but not when it concerns tribal self-governance, and the CARES Act falls into the former category. Amicus Br. of the Alaska Federation of Natives, ECF No. 81, at 13-14. The court need not pass on the merits of these proposed groupings, as the ordinary tools of statutory construction suffice to reach an answer.

484 (1990) ("[W]e give an agency's interpretations . . . considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use.").

The position that the Secretary advances in this case is neither new nor cut from whole cloth. The Department of Interior, which administers the federal government's affairs with Indian tribes, has long taken the position that ANCs qualify as "Indian Tribes" for purposes of ISDEAA and therefore are permitted to contract with federal agencies. In 1976, the year after ISDEAA was enacted, the Assistant Solicitor for Indian Affairs, Charles M. Soller, issued a memorandum to the Commissioner of Indian Affairs that evaluated whether ANCs meet the ISDEAA definition of "Indian tribe." J.A., ECF No. 90-1, at 610-13 [hereinafter Soller Mem.] at 611. The Commissioner had asked Soller to address "whether [Alaska Native] village and regional corporations are within the scope of" ISDEAA. *Id.* at 610. The question arose due to the "qualifying language" in the statute's definition of "Indian tribe," i.e., the eligibility clause. *Id.* at 611. Soller concluded that, "[s]ince both regional and village corporations find express mention in the definition, customary rules of statutory construction would indicate that they should be regarded as Indian tribes for purposes of application of this Act." *Id.* at 610. Soller acknowledged that the eligibility clause added "qualifying language," and he observed that "profit-making regional and village corporations have not heretofore been recognized as eligible for [Bureau of Indian Affairs] programs and services which are not provided for by the terms of the Settlement Act." *Id.* at 611. But, Soller concluded,

> if the quoted language operates to disqualify [ANCs] from the benefits of [ISDEAA], then their very mention in section 4(b) is superfluous. Therefore, we think the better view is that Congress intended the qualifying language not to apply to regional and village corporations but to pertain only to that part of the paragraph which comes before the word "including." Accordingly, regional and village corporations are within the scope of the Act.

Id.[10]

Thus, the argument against surplusage that the Secretary advances in this litigation has a long historical antecedent. It has been the position of the agency in charge of Indian affairs for nearly 45 years. Although the analysis is brief, Soller recognized the interpretive challenge presented by Congress's drafting of the ISDEAA definition, identified the competing canons of statutory construction, and evaluated those canons in light of contemporaneous understandings of the statutory terms used and Congress's intent. The Soller Memorandum therefore has the "power to persuade." *Christensen*, 529 U.S. at 587 (citation omitted).

The Confederated Tribes Plaintiffs seek to undermine the force of the Soller Memorandum by faulting its failure to consider the disjunctive nature of the Alaska clause. *See* Confederated Tribes Opp'n at 18. But, as

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[10] Soller appears to have misspoken in one respect. To apply the eligibility clause only to those words that appear "before the word 'including'" would mean that the eligibility clause does not apply to "Alaska Native village[s]." But no one then, or now, takes the position that an Alaska Native village can contract under ISDEAA unless it satisfies the eligibility clause. *See Confederated Tribes*, 2020 WL 1984297 at *11.

explained, the use of the disjunctive does nothing to save the clause from superfluity. Soller's ultimate reading of the statute is reasonable. This was the conclusion of the only appellate court to have considered whether ANCs qualify as "Indian Tribes" for purposes of ISDEAA. *See Bowen*, 810 F.2d at 1471. Although a single appellate decision cannot amount to a judicial consensus that the court can presume Congress knew of and endorsed when it incorporated the ISDEAA definition into the CARES Act, *see Confederated Tribes*, 2020 WL 1984297, at *12, *Bowen* lends additional persuasive force to the agency's longstanding view that ANCs are "Indian tribes" under ISDEAA. Thus, to the extent that the ISDEAA definition of "Indian tribe" contains any ambiguity, *Skidmore* counsels affording deference to the agency's interpretation.

The Confederated Tribes Plaintiffs go to great lengths to cast the Department of Interior's position on ANCs under ISDEAA as inconsistent and lacking clarity. *See* Confederated Tribes Opp'n at 19-25. The court need not take on this complex history. For present purposes, it suffices to say that the Confederated Tribes have identified no point in time in last four decades in which the Department of Interior has not treated ANCs as "Indian Tribes" for purposes of ISDEAA.[11]

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[11] The most interesting evidence of different agency treatment of ANCs is that, for a short period of time, from 1988 to 1994, the Department of Interior actually identified ANCs alongside federally recognized tribes on its list of "Indian Entities Recognized and Eligible to Receive Services from [BIA]." Confederated Tribes Mot. at 39 (citing 53 Fed. Reg. 52,829-02, 52,832-33 (Dec. 29, 1988)). The BIA removed ANCs from the 1994 version of the list but in so doing reaffirmed ANCs' status as "Indian tribes" for purposes of ISDEAA.

The BIA observed that "a number of non-tribal Native entities in Alaska that currently contract with or receive services from the Bureau of Indian Affairs pursuant to specific statutory authority, including ANCSA village and regional corporations and various tribal organizations," were no longer on the list, but that their non-inclusion on the list "does not affect the continued *eligibility* of the entities for contracts and services." Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 FR 54,364, 54,366, 1993 WL 420646 (October 21, 1993) (emphasis added). ANC's on-and-off-again status on the BIA's list, then, only indicates that the BIA struggled with how to properly characterize Alaska entities, but has always acknowledged their continued eligibility for certain contracts, including under ISDEAA.

This understanding comports with the 1977 Report submitted to Congress by the American Indian Policy Review Commission. The 1977 Report made clear that while Alaska Native village and regional corporations are not "repositories of tribal sovereignty," they should not "be excluded from the benefits of existing and future legislation and programs designed to promote the development of Native peoples." Def.'s Mot., Ex. 1, ECF No. 79-2, at 495. While the Confederated Tribes Plaintiffs discount the 1977 Report as simply one report submitted to Congress, with "no indication that Congress ever agreed with these cursory and erroneous conclusions or has taken any action in reliance on them," Confederated Tribes Opp'n at 20, the court notes that the Report's author, the American Indian Policy Review Commission, was established through Congressional resolution and was composed of three senators, three members of the House of Representatives, and five Indian leaders. American Indian Policy Review Commission, Final Report (May 17, 1977) (Appendix A ("How the Commission Did Its Work") at 3, available at https://catalog.hathitrust.org/Record/011340209. Further, the investigations that contributed to the Report were conducted by eleven task forces "each composed of three members selected from among the leading authorities in their respective fields of expertise in Indian affairs." *Id.* The Commission's Report, "a product of Indian participation, represent[s] 'a compendium of information on a scale heretofore unavailable to the Federal Government'" and "represent[s] the most comprehensive review of Indian policies and programs ever conducted." *Id.* at 4. *See also* Cheyenne River Sioux

As noted at the outset of this discussion, the Cheyenne River Sioux Plaintiffs do not dispute that ANCs qualify as "Indian tribes" under ISDEAA. But they do seek to diminish their role and status, explaining that ANCs have "limited tribal status" under certain narrow circumstances. *See* Cheyenne River Sioux Mot. at 14-17. Relying on agency contracting priority policies, they contend that "ANCs may qualify under ISDEAA's definition of 'Indian tribe' only as a stop-gap to ensure critical services are provided to Alaska Natives in regions where there are no actual federally recognized Tribal governments, or where Tribal governments choose to compact with ANCs to provide services under ISDEAA." *Id*. at 14. The court has no reason to doubt the accuracy of that characterization. But ANCs' status as a contracting partner of "last resort" only underscores that ANCs are nevertheless *eligible* for ISDEAA contracts. For *definitional* purposes, ANCs are not considered "Indian tribes" only as a last resort under ISDEAA; they are always "Indian tribes." The same thus holds true under the CARES Act.

4.

Before moving on, the court must address some of the reasons it set forth in its preliminary injunction opinion when ruling that Plaintiffs were likely to succeed on the merits. Of course, the "findings of fact and conclusions of law made by a court granting a preliminary injunction

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Mot. at 16 n.14 (explaining that the Department of the Interior "still relies [on] this [1977] Report"). Thus, the court has no reason to doubt the accuracy of the 1977 Report generally and considers the Report as providing some evidence that, close to the time of IDEAA's enactment, Congress understood ISDEAA to treat ANCs as "eligible" Indian tribes.

are not binding at trial on the merits," *see Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), and the additional briefing in this case has convinced the court to change its mind.

First, the court described the Secretary's reading of ISDEAA as "counter-textual." *Confederated Tribes*, 2020 WL 1984297, at *11. The court no longer ascribes to that view for the reasons already discussed. Second, the court deemed inconsistent and unexplained the government's position taken in other cases, but not here, that "the definition of 'Indian tribe' in various federal statutes must be read in conjunction with the List Act. In other words, unless the entity or group appears on the Interior Secretary's List, it does not qualify as an 'Indian tribe.'" *Id.* at *12-13 (citing *Wyandot Nation of Kan. v. United States*, 858 F.3d 1392, 1396, 1397-98 (Fed. Cir. 2017); *Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178, 1202 (D. Or. 2010)). As the Secretary now points out, *Wyandot* and *Slockish* were cases that did not involve ANCs but entities claiming tribal status even though not federally recognized. Def.'s Mot. at 19-20. It was therefore appropriate in those cases for the government to insist on identification on the Interior Department's List, whereas the same insistence is not necessary here, because ANCs are already treated as "Indian tribes" for purposes of ISDEAA. Finally, the court reasoned that "Congress's adoption of the ISDEAA definition cannot be divorced from actual agency practice under ISDEAA, which seemingly is to contract with ANCs only, if at all, with tribal consent or as a last resort." *Id.* at *13. The flaw in that logic is now apparent. Even if actual agency practice is to rarely contract with ANCs to deliver services under ISDEAA, the fact remains that ANCs are "Indian tribes"

for purposes of ISDEAA contracting *eligibility*. By importing ISDEAA's definition into the CARES Act, Congress carried forward that same treatment.[12]

* * *

Accordingly, the court holds that Alaska Native village and regional corporations meet ISDEAA's definition of "Indian tribe," and therefore ANCs qualify as "Indian tribes" for the purposes of CARES Act funding.

B. "Recognized Governing Bodies" under ISDEAA

Having concluded that ANCs qualify as "Indian tribes" under ISDEAA, the court now turns to the second question: Are ANCs "recognized governing bod[ies]," or do they have such bodies? Remember, Title V provides that the Secretary shall make payments only to "the recognized governing bod[ies]" of Indian Tribes. *See* 42 U.S.C. § 801(g)(5). The parties dispute whether "recognized" is a legal term of art meaning "federally recognized"—in which case, only federally recognized tribes, and not ANCs, meet the definition—or whether it carries an ordinary meaning. Confederated Tribes Mot. at 19; Cheyenne River Sioux Opp'n at 7-8; Def.'s Opp'n at 31-32; Intervenors' Opp'n. at 16-17. They also dispute whether "governing body" refers to "government status or attributes of sovereignty," *see* Cheyenne

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[12] The decision whether to award ANCs Title V funds in proportion to their status as a service provider of "last resort" is an allocation determination that rests squarely within the broad discretion that Congress vested in the Secretary. *See generally Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-cv-1491 (APM), 2020 WL 3402298, at *1-2 (D.D.C. June 11, 2020) (holding that the Secretary's selected allocation method under Title V of the CARES Act is an unreviewable discretionary agency action under the APA).

River Sioux Mot. at 4, or whether it "simply references the entity or individuals authorized to govern the organization in its charter or other organizing documents," Intervenors' Opp'n at 15.

In evaluating the parties' arguments, ISDEAA once more serves as the starting point. ISDEAA authorizes the federal government to contract not with an Indian tribe, but with a tribal *organization*, to deliver public services. 25 U.S.C. § 5321. ISDEAA defines "tribal organization" in two ways: (1) "the recognized governing body of any Indian tribe"; and

> (2) any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant.

25 U.S.C. § 5304(l). The first definition of "tribal organization" should ring familiar as Congress used almost the same exact words to define "Tribal government" for purposes of the CARES Act. *Compare id.* with 42 U.S.C. § 801(g)(5) ("The term 'Tribal government' means the recognized governing body of an Indian Tribe."). The ISDEAA definition of "tribal organization" is therefore instructive in understanding the term "Tribal government" under the CARES Act. *See Branch v. Smith*, 538 U.S. 254, 281 (2003) (explaining that "courts

do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part").

All parties, even the Confederated Tribe Plaintiffs, concede that ANCs may enter into ISDEAA contracts. *See* Confederated Tribes Mot. at 36 (describing ANC contracting under ISDEAA as occurring in "exceptional" or "narrow" circumstances). Thus, to enjoy such status, ANCs, or some constituent part of them, necessarily must meet at least one of ISDEAA's two definitions of "Tribal organization," because only a "tribal organization" may enter into an ISDEAA contract, *see* 25 U.S.C. § 5321(a)(1). The Plaintiffs part ways on which of the two definitions apply. The Cheyenne River Sioux Plaintiffs say that ANCs satisfy the first definition of "tribal organization"—"the recognized governing body of any Indian tribe"; yet they resist the logical next step that ANCs also are, or have, a "recognized governing body" for purposes of the CARES Act, even though the two statutes use the exact same terms. The Confederated Tribes Plaintiffs attempt to dodge this trap. They argue that ANCs fall into the second, longer definition of "tribal organization," which Congress did not incorporate into the CARES Act. *See id.* at 35. In their view, ANCs qualify as "tribal organization[s]" only because they are a "legally established organizations of Indians . . . sanctioned by" the governing body of an Indian tribe, in this case, "a Native village." 6/12/2020 Hr'g Tr. at 14. This reading, in their view, harmonizes how ANCs are not, or do not have, a "recognized governing body," but still can enter into ISDEAA contracts as a "tribal organization." *Id.* The court takes Plaintiffs' arguments in reverse order.

The Confederated Tribes' reading cannot be squared with ISDEAA's text. ANCs are not "controlled, sanctioned, or chartered" by the governing body of an Indian Tribe.[13] ANCs are corporate entities established by Congress and chartered under Alaska state law. *See generally* 43 U.S.C. § 1601 *et seq*. Though the ISDEAA definition of "tribal organization" uses the word "sanctioned," it does not use that term in the sense of tribal approval of ISDEAA contracts. The term "sanction" in the definition of "tribal organization" is entirely disconnected from contract approval. It is true, as the Confederated Tribes Plaintiffs point out, that ANCs ordinarily obtain the approval of governing bodies of Native Villages as a condition of ISDEAA contracts. But that requirement stems not from the word "sanctioned," but rather from the "Provided" clause found later in the definition: "in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, *the approval of each such Indian tribe shall be a prerequisite* to the letting or making of such contract or grant." 25 U.S.C. § 5304(l) (emphasis added). Thus, if an ANC seeks to enter into a contract that benefits a Native Village, it must logically obtain the approval of that Native Village's governing body as a condition of doing so.[14]

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[13] Nor do they satisfy the second half of the second "tribal organization" definition: ANCs are not "democratically elected by the adult members of the Indian community to be served by such organization." 25 U.S.C. § 5304(l).

[14] Plaintiffs make the point that, absent specific approval from a Tribal government, an ANC can receive an ISDEAA contract "[o]nly if a Tribal government does not exist for a specific area." Cheyenne River Sioux Mot. at 17; 6/12/2020 Hr'g Tr. at 40; *see also* Confederated Tribes Mot. at 36. This fact only underscores that

This interpretation of ISDEAA is consistent with the longstanding view of the Department of Interior. As the Soller Memorandum explains, ANCs as "Indian tribes" under ISDEAA can seek self-determination contracts on their own behalf, and their boards of directors qualify as the "governing body" for such purposes. *See* Soller Mem. at 611 (stating that "regional and village corporations may request to contract for the provision of BIA services under section 102 of the Act"). The Memorandum further recognizes that, as a practical matter, ANCs almost always must obtain tribal consent because such self-determination contracts are likely in some way to be for the benefit of one or more Native Villages, rather than the corporation itself. *Id.* at 612 ("[T]he language of the Act is unambiguous. If a contract or grant benefits more than one village or village corporation, the approval of each must be obtained."); *id.* ("Indeed, it is not clear to us what it means for a contract to 'benefit' a village corporation, as opposed to the Native village. . . . However, it does seem clear that if a contract is let to a regional tribal organization for the purpose of providing services in a given village, some governing body in that village must approve that contract.").[15] Thus, under a straightforward reading of

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ANCs must fit under the first category of "tribal organization," because in these circumstances—limited though they may be—there is no Tribe to "sanction" the ISDEAA contract. That such ISDEAA contracts arise only as a "last resort" or in "exceptional circumstances" is of no moment. Nothing in the text of the statute limits ANCs' functioning as, or having, "recognized governing bodies" only to these "last resort" circumstances.

[15] The sole case that the Confederated Tribes Plaintiffs cite, *Ukpeagvik Inupiat Corp.* ("UIC") *v. U.S. Dep't of Health and Human Svcs*, No. 3:13-cv-00073-TMB, 2013 WL 12119576 (D. Alaska

"tribal organization," ANCs must be eligible for contracting under the first definition of "tribal organization"—"the recognized governing body of any Indian tribe." 25 U.S.C. § 5304(l).[16] And by the terms of that definition, they must have a "recognized governing body" for purposes of ISDEAA. If ANCs have a "recognized governing body" for purposes of ISDEAA, it stands to reason that Congress brought that same meaning forward in the CARES Act, as the first definition of "tribal organization" in ISDEAA and the definition of "Tribal government" in the CARES Act are essentially identical. *See Branch*, 538 U.S. at 281.

Plaintiffs resist this logic. They contend that Congress's use of the word "recognized" was intended as a

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May 20, 2013), at *2–3), does not help them. There, an ANC obtained a contract to provide services at a hospital. Of the approvals it obtained, two were from other ANCs and one was from the contracting ANC itself. 2013 WL 12119576 at *1 & n.5 (listing, in addition to UIC (the contracting ANC), Atqasuk Village Corporation and Kuukpik Village Corporation). This case thus supports the understanding that ANCs are "Indian Tribes." Otherwise, the ANCs' "approvals" would not have been required under the proviso in ISDEAA's definition of "tribal organization." *See* 25 U.S.C. § 5304(l) ("[I]n any case where a contract is let or grant made to an organization to perform services benefitting more than one *Indian tribe*, the approval of *each such Indian tribe* shall be a prerequisite.") (emphasis added).

[16] ANCs plainly fall under the first definition for another reason. If, as the Confederated Tribes Plaintiffs contend, they fall under the second definition of "Tribal organization," there would have been no need to expressly include them in the definition of "Indian Tribe," *see* 25 U.S.C. § 5304(e), because ANCs could simply contract under the second definition, *see id.* § 5304(l). Accepting the Confederated Tribes Plaintiffs' position would thus render ANCs' inclusion in the "Indian Tribe" definition surplusage twice over.

term of art, meant to convey the unique political and legal status afforded to federally recognized tribes. *See* Confederated Tribes Mot. at 21-23; Cheyenne River Sioux Opp'n at 6-8. The Confederated Tribes Plaintiffs, for example, point to a federal regulation that defines "[r]ecognized governing body" as "the tribe's governing body recognized by the Bureau [of Indian Affairs] for the purposes of government-to-government relations." Confederated Tribes Mot. at 21 (quoting 25 C.F.R. § 81.4). But that regulation by its own terms "applies only to federally recognized tribes," *id.* § 81.2, because the regulation concerns election procedures to "adopt, amend, or revoke tribal governing documents" and charters, *id.* § 81.1. It is unsurprising, then, that ANCs would not be included in such a regulation. Likewise, the Cheyenne River Sioux Plaintiffs point to a slew of cases holding that ANCs are not "governing bodies" or "tribal governments." *See* Cheyenne River Sioux Mot. at 11-12 (collecting cases); Cheyenne River Sioux Opp'n at 6-8; *see also* Confederated Tribes Mot. at 22-23 (same). Not only are these cases from non-ISDEAA contexts, they concern a proposition that is simply not at issue here; no one disputes that ANCs are not Tribal governments in the traditional sense. This case concerns the entirely separate question whether ANCs have "recognized governing bodies" for purposes of the CARES Act. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 455 (2012) ("Congress remains free, as always, to give [a] word a broader or different meaning" than the one suggested by the word's plain meaning.).

On this question, while the court agreed with Plaintiffs' argument at the preliminary injunction stage, *see*

Confederated Tribes, 2020 WL 1984297, at *10, upon further reflection the court now concludes the opposite—"recognized" standing alone, as it is used in the CARES Act's definition of "Tribal government," does not convey federal recognition of an Indian tribe. The best evidence of this reading is that Congress used nearly the exact same words, "recognized governing body of any Indian tribe," found in the first definition of "tribal organization" in ISDEAA, 25 U.S.C. § 5304(l). While the Cheyenne River Sioux Plaintiffs point out that the CARES Act incorporated only ISDEAA's definition of "Indian Tribe" and did not import ISDEAA "whole cloth," 6/12/2020 Hr'g Tr. at 120, ISDEAA nevertheless demonstrates that when Congress uses the word "recognized," or even "recognized governing body," it does not a fortiori mean "federally recognized." "Recognition" is not used as a term of art in the IDEAA definition of "tribal organization";[17] it follows that the same is true under the CARES Act.

Another interpretive clue leads to this conclusion. The Cheyenne River Sioux's reading, if accepted, would produce the result that Congress expressly granted eligibility in one definition under the CARES Act—by incorporating the ISDEAA definition of "Indian tribe"—but silently took it away in another—by excluding ANCs from

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[17] Relevant agencies have long understood this. Under the 1981 guidelines promulgated by Interior and HHS, for example, ANCs can be "recognize[d] as the village governing body" for "the purposes of contracting under Pub. L. 93-628 [ISDEAA]." 46 Fed. Reg. 27,178-02, 27,179 (May 18, 1981). And the 1988 list of Tribes published by Interior described ANCs as "Alaska entities which are *recognized* and eligible to receive funding and services from the Bureau of Indian Affairs." 53 Fed. Reg. at 52,832 (emphasis added).

the definition of "Tribal government." It would be passing strange to exclude ANCs so obliquely, and the court cannot presume that Congress intended such a result.

Finally, and contrary to what the court previously concluded, *see Confederated Tribes*, 2020 WL 1984297, at *10, Plaintiffs' appeal to statutory context is ultimately not convincing. Specifically, they contend that the statute's "definition of 'Tribal government' must be read in th[e] context" of Title V of the CARES Act, which they argue is "directed to sovereign governments and their political subdivisions." Confederated Tribes Mot. at 24; *see also* Cheyenne River Sioux Mot. at 2 (emphasizing that the CARES Act uses the term "Tribal governments" "15 times in just over three pages"). But there is nothing inconsistent with treating ANCs alongside tribal governments for these limited purposes. ISDEAA is aimed at providing government services—including health care—to Indians by partnering with Tribal organizations, including, at times, ANCs. It stands to reason that Congress, in its effort to distribute emergency funds quickly to Indians under the CARES Act, intended to get those dollars in the hands of the same entities that deliver public services to Indians. In the lower 48 states, those entities are largely Tribal governments in the traditional sense, but in Alaska, those entities include Alaska Native village and regional corporations. *See* Intervenors' Mot. at 14-18. ANCs' inclusion in Title V alongside other types of traditional governments is therefore not incongruous with Congress's purpose of appropriating emergency funds for "governments" to deliver public services to address and manage a national health emergency. In the end, the question before the court is whether ANCs are "Tribal govern-

ments" for the limited purpose of delivering public services to combat the COVID-19 pandemic. For all the foregoing reasons, they are.

* * *

Before concluding, the court addresses Plaintiffs' concern that deeming ANCs eligible for Title V funding will enact a sea-change in Tribal law. *See, e.g.*, 6/12/2020 Hr'g Tr. at 42-43. Not so. The court does no more than opine on the status of ANCs under ISDEAA and the CARES Act, and it reaches a holding that is consistent with longstanding treatment of ANCs under ISDEAA by the federal government. The court's ruling in no way elevates ANCs to "super-tribal status" as the Confederated Tribes Plaintiffs maintain, Confederated Tribes Opp'n at 10; nor does it allow ANCs to "compete" with federally recognized tribes in any other context as the Cheyenne River Sioux Plaintiffs fear, Cheyenne River Sioux Mot. at 12. The court's decision simply recognizes that ANCs are eligible for CARES Act funds, as Congress intended—no more, no less.

IV.

For the foregoing reasons, the court grants the Secretary's and Defendant-Intervenors' Motions for Summary Judgment, ECF Nos. 78 and 79, and denies Plaintiffs' Motions for Summary Judgment, ECF Nos. 76 and 77. A final, appealable Order accompanies this Memorandum Opinion.

Dated: June 26, 2020

/s/ AMIT P. MEHTA
AMIT P. MEHTA
United States District Court Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5204
Consolidated with 20-5205 and 20-5209

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL., APPELLEES

UTE TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, APPELLANT

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF U.S. DEPARTMENT OF THE TREASURY, ET AL., APPELLEES

Filed: Sept. 30, 2020
September Term, 2020
No. 1:20-cv-01002-APM
No. 1:20-cv-01059-APM
No. 1:20-cv-01070-APM

ORDER

BEFORE: HENDERSON[*], MILLETT, and KATSAS, Circuit Judges

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[*] Circuit Judge Henderson would deny the motion.

Upon consideration of the emergency motion to suspend statutory lapse of appropriation and extend budget authority, the responses thereto, and the replies, it is

ORDERED that to ensure an opportunity for orderly review of this Court's September 25, 2020 decision, as well as the government's ability to disburse the disputed funds upon completion of the litigation, any expiration of the appropriation for Tribal governments set forth in 42 U.S.C. 801(a)(2)(B) is hereby suspended. *See Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 588 (D.C. Cir. 1977). It is

FURTHER ORDERED that this order will expire at 5:00 p.m. on October 30, 2020, unless the federal government or the intervenor-appellees has by then filed either a petition for rehearing en banc or for a writ of certiorari seeking review of this Court's decision, in which case this order will remain effective until seven days after final action by this Court or the Supreme Court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Amanda Himes
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5204
Consolidated with 20-5205 and 20-5209

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL., APPELLEES

UTE TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, APPELLANT

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF U.S. DEPARTMENT OF THE TREASURY, ET AL., APPELLEES

Filed: Sept. 14, 2020
September Term, 2020
No. 1:20-cv-01002-APM
No. 1:20-cv-01059-APM
No. 1:20-cv-01070-APM

ORDER

BEFORE: HENDERSON, MILLETT, and KATSAS, Circuit Judges

On July 7, 2020, the district court issued a memorandum opinion staying its June 26, 2020 order until the earlier of September 15, 2020, or resolution of this matter by this court. Upon consideration of the foregoing, it is

ORDERED, on the court's own motion, that the Secretary of the Treasury be enjoined from disbursing or otherwise paying Title V funds to any Alaska Native regional or village corporations pending resolution of these consolidated appeals.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 20-cv-01002 (APM)

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL., PLAINTIFFS

v.

STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, DEFENDANT

Case No. 20-cv-01059 (APM)

CHEYENNE RIVER SIOUX TRIBE, ET AL., PLAINTIFFS

v.

STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, DEFENDANT

Case No. 20-cv-01070 (APM)

UTE TRIBE OF THE UINTAH AND OURAY RESERVATION, PLAINTIFF

v.

STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, DEFENDANT

Filed: July 7, 2020

MEMORANDUM OPINION AND ORDER

I.

On June 26, 2020, the court ruled that Alaska Native regional and village corporations ("ANCs") are eligible to receive emergency relief funds appropriated by Congress under Title V of the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act. *See Confederated Tribes of Chehalis Reservation v. Mnuchin*, No. 20-cv-01002 (APM), 2020 WL 3489479 (D.D.C. June 26, 2020). The court accordingly entered judgment in favor of Defendant Secretary of the U.S. Department of the Treasury and the ANC Defendant-Intervenors, and dissolved the preliminary injunction that, until then, had prevented the Secretary from disbursing Title V funds to ANCs. *See* Order, ECF No. 98. The Confederated Tribes of the Chehalis Reservation Plaintiffs now ask the court to stay its judgment pending appeal. Pls.' Mot. for Injunction Pending Appeal and Mem. of P. & A., ECF No. 99 [hereinafter Pls.' Mot.].[1] Specifically, they seek an injunction that prohibits the Secretary from "disbursing or otherwise paying Title V funds to any [ANC], until further order of this Court or by order of the Court of Appeals for the District of Columbia Circuit." Proposed Order, ECF No. 99-1, at 2. For the reasons that follow, the requested injunctive relief is

[1] Plaintiff Ute Indian Tribe of the Uintah and Ouray Reservation join in the Confederated Tribes Plaintiffs' motion. *See* Ute Indian Tribe's Joinder in "Mot. for Leave to File Injunction Pending Appeal," ECF No. 100.

granted, subject to the condition that Plaintiffs file a notice of appeal and a motion for expedited review by July 14, 2020.

II.

This court set forth the standard governing a motion for injunction pending appeal in *Cigar Association of America v. FDA*, 317 F. Supp. 3d 555, 560-61 (D.D.C. 2018). The court need not repeat that discussion here but incorporates it by reference, and proceeds directly to the four injunction factors it must consider on a sliding scale.

First, Plaintiffs have presented "serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation and thus for more deliberative investigation." *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). Although the court ultimately ruled in Defendants' favor, it observed that "this case does not present easy, straightforward questions of statutory interpretation," and it "wrestled" with the decision it made. *Confederated Tribes*, 2020 WL 3489479, at *6. The proper application of the competing canons of interpretation to Title V's relevant statutory terms alone warrants additional scrutiny, and the "impressive array of textual, historical, and practical evidence" amassed by the parties, "all of which must be viewed against the unique treatment of Native Alaskans by Congress and Executive Branch agencies," only counsels in favor of further review. *Id.* Because the question of statutory interpretation presented in this case is as complicated as it is

consequential, it deserves an audience before a higher court while maintaining the status quo.[2]

Second, Plaintiffs would suffer irreparable harm if the court denied injunctive relief and the Secretary then distributed the withheld Title V funds to ANCs. Such payments could result in this case becoming moot before receiving a full hearing before the D.C. Circuit. *See City of Houston. v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1424 (D.C. Cir. 1994) ("It is a well-settled matter of constitutional law that when an appropriation has lapsed or has been fully obligated, federal courts cannot order the expenditure of funds that were covered by that appropriation."); *Ambach v. Bell*, 686 F.2d 974, 986 (D.C. Cir. 1982) (holding that "interim relief" was proper where plaintiff States challenged the agency's formula for distributing education funding, because, "[o]nce the . . . funds are distributed to the States and obligated, they cannot be recouped"). Given the complexity and significance of the questions presented, this court should not have the last say on this matter. Defendants respond that the harm Plaintiffs faced at the preliminary injunction stage is now greatly diminished because they have received approximately 90% of the CARES Act funding to which they are entitled. Opp'n to Pls.' Mot. for Inj. Pending Appeal of Intervenor-Defendants Alaska Native Village Corp. Assoc., Inc., and Assoc. of ANCSA Regional Corp. Presidents/CEO's,

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[2] To varying degrees, the parties have sought to revisit the merits of the court's decision. *See, e.g.*, Pls.' Mot. at 6-12; Def,'s Opp'n to Pls.' Mot. for Inj. Pending Appeal, ECF No. 103, at 5-13. Wading into those thorny issues once more is neither desirable nor necessary. It suffices to say that the questions Plaintiffs have raised are sufficiently "substantial" to warrant an injunction pending appeal.

Inc., ECF No. 104, at 8. Yet, there remains hundreds of millions of dollars in dispute. And, although not all of those funds would go to these Plaintiffs if they were to prevail, the lesser amount at stake would not make the lost chance at appellate review sting any less.

Third, the final two factors taken together—the balance of equities and the public interest—cannot overcome the reasons favoring injunctive relief. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) ("The first two factors of the traditional standard are the most critical."); *id.* at 435 (observing that the third and fourth factors "merge" when the government is the opposing party). To be sure, the ANCs and, more importantly, the constituencies they serve will suffer some injury from additional delay in receiving Title V funds. However, the public interest also rests in carrying out Congress's will, and that interest is not served if ANCs receive and spend tens of millions of dollars of emergency relief to which they are not entitled. *See League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (stating that "there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations" (internal quotation marks and citation omitted)). Although this court has concluded that ANCs are eligible for those funds, the public interest rests with the D.C. Circuit deciding whether this court got it right.

In summary, the injunction factors, applied on a sliding scale, favor granting Plaintiffs' request for an injunction pending appeal.

III.

The Calista ANC-Intervenor Defendants urge the court, in effect, to punt Plaintiffs' request for injunctive relief to the D.C. Circuit. *See* Opp'n to Pls.' Mot. to Stay Judgment Pending Appeal, ECF No. 102 [hereinafter Calista Mot.] at 2 ("In all events, this Court is the wrong court to grant the relief that plaintiffs seek."). The court declines to do so. This court has an independent obligation to consider Plaintiffs' motion, *see* Fed. R. Civ. P. 62(d); Fed. R. App. P. 8(a)(1), and it must discharge that responsibility. That said, the Calista ANC-Intervenor Defendants are right to be concerned that a delayed appeal would defeat the very purposes for which Congress appropriated CARES Act funds on an emergency basis. *See* Calista Mot. at 2-3. The Confederated Tribes Plaintiffs have not suggested that they intend to delay prosecuting an appeal; to the contrary, they have said they will pursue expedited review. *See* Pls.' Mot. at 2 n.1. Nevertheless, to ensure prompt appellate consideration, the court will condition the requested stay on Plaintiffs' filing both a notice of appeal and a motion for expedited review before the D.C. Circuit by no later than July 14, 2020. *See Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, 240 F. Supp. 2d 21, 23 & n.1 (D.D.C. 2003) (granting injunction pending appeal conditioned on seeking expedited review); *accord Charles v. Office of the Armed Forces Medical Examiner*, Civil Action No. 1:09-cv-0199 (KBJ), 2013 WL 12332949, at *2 (D.D.C. May 9, 2013). If Plaintiffs fail to move on an expedited basis, the stay will expire.

IV.

For the foregoing reasons, the Confederated Tribes Plaintiffs' Motion for Injunction Pending Appeal, ECF No. 99, is hereby granted, subject to one condition.

The court's Order of June 26, 2020, ECF No. 98, is hereby stayed until the earlier of September 15, 2020, or resolution of this matter by a three-judge panel of the D.C. Circuit, so long as Plaintiffs file a notice of appeal and seek expedited review by July 14, 2020. If Plaintiffs do not timely satisfy this condition, the injunction pending appeal shall expire on July 15, 2020. If the D.C. Circuit has not resolved this case by September 15, 2020, this order may be extended upon motion by a party or by the D.C. Circuit. Any motion filed before this court shall address whether Title V funds will expire if the D.C. Circuit does not issue a decision by September 30, 2020.

Dated: July 7, 2020

/s/ AMIT P. MEHTA
AMIT P. MEHTA
United States District Court Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 20-cv-01002 (APM)

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL., PLAINTIFFS

v.

STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, DEFENDANT

Case No. 20-cv-01059 (APM)

CHEYENNE RIVER SIOUX TRIBE, ET AL., PLAINTIFFS

v.

STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, DEFENDANT

Case No. 20-cv-01070 (APM)

UTE TRIBE OF THE UINTAH AND OURAY RESERVATION, PLAINTIFF

v.

STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, DEFENDANT

Filed: Apr. 27, 2020

MEMORANDUM OPINION

Under Title V of the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, Congress set aside $8 billion in emergency aid for "Tribal governments" to combat the coronavirus pandemic. This case concerns what it means to be a "Tribal government" for the purpose of receiving Title V funds.

Plaintiffs are a group of federally recognized tribes from the lower 48 states and Alaska. They unquestionably qualify to receive some portion of the emergency relief set aside under Title V of the CARES Act. What Plaintiffs fear, however, is that the Secretary of the Treasury, who Congress authorized to disburse the monies, is about to give away a significant percentage of the $8 billion to what are known as Alaska Native regional and village corporations, or ANCs. ANCs are for-profit corporations recognized under Alaska law that were established by Congress as part of the Alaska Native Claims Settlement Act. The Secretary of Treasury has announced that ANCs are eligible to receive Title V funds, although he has yet to identify which ANCs will receive funds or how much. The Secretary intends to disburse the funds tomorrow—April 28, 2020.

Plaintiffs ask this court to enjoin the Secretary from making Title V payments to ANCs. Their position is straightforward. Title V grants $8 billion in relief funds for "Tribal governments," which the CARES Act defines as "the recognized governing body of an Indian Tribe." In Plaintiffs' view, ANCs do not meet the statutory definition of either "Indian Tribe" or "Tribal government." ANCs therefore are not eligible for Title V funds. Whether Plaintiffs' or the Secretary's reading

of Title V is the correct one is at the heart of the parties' dispute.

Before the court are Plaintiffs' motions for a temporary restraining order and preliminary injunction. Because the court finds that Plaintiffs have made a clear showing that they are likely to suffer irreparable harm in the absence of preliminary relief, that they are likely to succeed on the merits, and the balance of the equities and the public interest favor an injunction, the court grants Plaintiffs' motions—but only in part. The court will preliminarily enjoin the Secretary from disbursing Title V funds to any ANC, but will not direct him at this time to disburse the entire $8 billion in emergency relief to Plaintiffs and other federally recognized tribes.

I.

A. Statutory Background

1. The CARES Act

Congress enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020), to respond to the devastating impacts of the COVID-19 pandemic. Its provisions direct tailored relief to specific sectors of American society, including economic aid to small businesses and employment retention programs for workers (Title I); unemployment insurance and other financial support systems for workers, businesses, and families (Title II); pandemic response and healthcare funding (Title III); support for economically struggling businesses regardless of size (Title IV); relief funding for State, Tribal, and local governments (Title V); and supplemental appropriations for federal agencies and programs (Title VI).

Title V, the title relevant here, amends the Social Security Act (42 U.S.C. 301 *et seq.*), and appropriates $150 billion for fiscal year 2020 for "payments to States, Tribal governments, and units of local government." 42 U.S.C. § 801(a)(1). Of that sum, $8 billion is "reserve[d] . . . for making payments to Tribal governments." *Id.* § 801(a)(2)(B). The Act requires the Secretary of the United States Department of the Treasury ("Secretary") to disburse the Title V funds to Tribal governments "not later than 30 days after" March 26, 2020, the date of enactment of this section—that is, by April 26, 2020. *Id.* § 801(b)(1). The Act further instructs that the funds are intended:

> to cover only those costs of the State, Tribal government, or unit of local government that—(1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19); (2) were not accounted for in the budget most recently approved as of the date of enactment of this section for the State or government; and (3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

Id. § 801(d).

For purposes of Title V funding, the CARES Act defines "Tribal government" as "the recognized governing body of an Indian tribe." *Id.* § 801(g)(5). The Act further provides that "[t]he term 'Indian Tribe' has the meaning given that term in [section 5304(e) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5304(e)]." *Id.* § 801(g)(1). The Indian Self-Determination and Education Assistance Act in turn 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).

2. The Alaska Native Claims Settlement Act

The Alaska Native Claims Settlement Act, enacted in 1971, Pub. L. No. 92-203, § 2(b), 85 Stat. 688, ("ANSCA") is "a comprehensive statute designed to settle all land claims by Alaska Natives," *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523 (1998). Among other things, ANSCA extinguished all aboriginal claims to Alaska land, and "[i]n return, Congress authorized the transfer of $962.5 million in state and federal funds and approximately 44 million acres of Alaska land to state-chartered private business corporations that were to be formed pursuant to the statute; all of the shareholders of these corporations were required to be Alaska Natives." *Id.* at 524 (citing ANCSA, §§ 6, 8, 14 (codified at 43 U.S.C. §§ 1605, 1607, 1613)). The transfer of reservation lands to private, state-chartered Native corporations, or ANCs, was "without any restraints on alienation or significant use restrictions," because Congress intended to avoid "'any permanent racially defined institutions, rights, privileges, or obligations.'" *Id.* at 532-33 (citing ANCSA, §§ 2b, 8, 14). "By ANCSA's very design, Native corporations can immediately convey former reservation lands to non-Natives, and such corporations are not restricted to using those lands for Indian purposes." *Id.* at 533.

Today, ANCs continue to own approximately 44 million acres of land. RESOURCE DEVELOPMENT COUNCIL, *Alaska Native Corporations*, https://www.akrdc.org/alaska-native-corporations (last visited Apr. 25, 2020) [hereinafter Res. Dev. Council]. The ANCs' "landholdings are equivalent to the total trust land base of all federally recognized Tribal governments in the Lower-48 states combined." First Am. Compl. for Declaratory and Inj. Relief, No. 20-cv-1059, ECF No. 14 [hereinafter Cheyenne River Am. Compl.], at 22. In fiscal year 2017, ANCs had a combined revenue of $9.1 billion, and the twelve regional ANCs have over 138,000 shareholders and employ more than 43,000 people worldwide. *See* Res. Dev. Council.

3. ISDEAA and ANCs

Congress enacted the Indian Self-Determination and Education Assistance Act, or ISDEAA, in 1975 "to help Indian tribes assume responsibility for aid programs that benefit their members." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 753 (2016). Under ISDEAA, tribes may enter into "self-determination contracts," or "638" agreements, with federal agencies to provide services that otherwise would have been provided by the federal government, such as education, law enforcement, and health care. 25 U.S.C. § 5321(a)(1); *Menominee Indian Tribe*, 136 S. Ct. at 753; *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 103 (D.D.C. 2019).

Historically, federal agencies have treated ANCs as "Indian tribes" under ISDEAA and therefore as eligible to enter into 638 agreements. *See Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1473-77 (9th Cir. 1987)

(setting forth history of agency treatment of ANCs under ISDEAA). However, the extent of actual 638 contracting with ANCs under ISDEAA is unclear. The Secretary's counsel, for instance, was unable to identify any present or past 638 agreement with an ANC, *see* Hr'g Tr., 4/24/20, at 38—albeit, in fairness, the Secretary had only a limited time to conduct due diligence.

B. Factual and Procedural Background

On April 13, 2020, the Secretary published on the Treasury Department's website a form titled "Certification for Requested Tribal Data" ("Certification"), which requested certain data to effectuate disbursement of CARES Act funds. *See* Confederated Tribes of the Chehalis Pls.' Mot. for TRO and Prelim. Injunction, ECF No. 3 [hereinafter Chehalis Mot.], Kanji Decl., Ex. 2, ECF No. 3-8 at 15-16 [hereinafter Certification].[1] The Certification sought the following information:

(1) "Name of Indian Tribe";

(2) "Population," defined as "Total number of Indian Tribe Citizens/Members/Shareholders, as of January 1, 2020";

(3) "Land Base," defined as "Total number of land acres held by the Indian Tribe and any tribally-owned entity (to include entities in which the Indian Tribe maintains at least 51% ownership) as of January 1, 2020" noting that such lands would "include lands held in trust by the United States, owned in restricted fee status,

[1] Unless otherwise noted, all citations to the docket refer to the *Confederated Tribes of the Chehalis Reservation et al. v. Mnuchin* docket, Case No. 20-cv-1002 (APM).

owned in fee, or selected pursuant to the Alaska Native Claims Settlement Act";

(4) "Employees," defined as "Total number of persons employed by the Indian Tribe and any tribally-owned entity (to include entities in which the Indian Tribe maintains at least 51% ownership) on January 1, 2020"; and,

(5) "Total expenditures for the most recently completed fiscal year."

Id. The Certification is notable in that it identifies metrics specific to ANCs. ANCs, and not traditional Tribes, have "shareholders." And the Certification asked for land base information for lands "selected pursuant to the Alaska Native Claims Settlement Act." Federally recognized tribes understood from the terms of the Certification that the Secretary had deemed ANCs eligible for Title V funds, and immediately protested this apparent decision. *See* Cheyenne River Sioux Tribe Pls.' Mot. for TRO and Prelim. Inj., Mem. of P. & A. in Support of Mot., ECF No. 4 [hereinafter Cheyenne River Mot.], Ducheneaux Decl., Exs. A-E, ECF No. 4-1 (letters from representatives of various tribal governments to Secretary Mnuchin, dated April 13, 2020, through April 16, 2020, asking that the Secretary not allow ANCs to be counted as Tribal governments under the CARES Act).[2]

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[2] Citations to the filings by the Cheyenne River Sioux Tribe Plaintiffs are found on the docket in *Cheyenne River Sioux Tribe et al. v. Mnuchin*, 20-cv-1059 (APM).

Four days later, on April 17, 2020, the first of three suits was filed challenging the Secretary's ostensible treatment of ANCs as eligible for funding under Title V of the CARES Act. The Confederated Tribes of the Chehalis Reservation, the Tulalip Tribes, the Houlton Band of Maliseet Indians, the Akiak Native Community, the Asa'carsarmiut Tribe, and the Aleut Community of St. Paul Island (collectively, "Chehalis Plaintiffs") filed an action against the Secretary under the Administrative Procedure Act ("APA"). Chehalis Compl., ECF No. 1. As amended, the single-claim complaint alleges that the Secretary's designation of ANCs as eligible to receive Title V funds was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Chahalis Am. Compl., ECF No. 7 [hereinafter Chahalis Am. Compl.], ¶ 119-22. Three days later, Plaintiffs moved for a temporary restraining order and preliminary injunctive relief. *See* Chehalis Mot. They ask the court both to enjoin the Secretary from disbursing any Title V funds to ANCs and to order the Secretary to disburse all $8 billion to federally recognized tribes. Chehalis Am. Compl. ¶ 123; Chehalis Mot., Proposed Order, ECF No. 3-7. Plaintiffs then filed an amended complaint, which added the Navajo Nation; Quinault Indian Tribe; Pueblo of Picuris; Elk Valley Rancheria, California; and San Carlos Apache Tribe as plaintiffs. See Am. Chehalis Compl., ECF No. 7 [hereinafter Am. Compl.]. Plaintiffs again brought the same single count for violations of the APA. *Id.* ¶¶ 117-23.

Two other lawsuits followed. Plaintiffs Cheyenne River Sioux Tribe, Oglala Sioux Tribe, and Rosebud Sioux Tribe (collectively, "Cheyenne River Plaintiffs") filed their suit on April 22, 2020, *see* Cheyenne River

Compl., ECF No. 1, and moved for preliminary injunctive relief the same day, *see* Cheyenne River Mot.[3] Plaintiff Ute Indian Tribe of the Uintah and Ouray Reservation filed a third lawsuit and motion for a temporary restraining order the next day. *See* Ute Compl., ECF No. 1; Mot. for TRO and Prelim. Inj., ECF No. 5.[4] The court consolidated all three cases. *See* Docket 20-cv-1070, Minute Order, April 24, 2020; Docket 20-cv-1059, Minute Order, April 23, 2020.

A number of amici curiae submitted briefs in support of and in opposition to Plaintiffs' motions. The Alaska Native Village Corporation Association ("ANVCA"), a non-profit corporation that represents 177 Alaska Native village corporations, and the Alaska Native Claims Settlement Act Regional Association ("ARA"), a non-profit association whose mission is to "promote and foster continued growth and economic strength of the Alaska Native regional corporations for the benefit of their Alaska Native shareholders and communities," filed a joint brief supporting the ANCs' eligibility for Title V funding. *See* Br. of Amici Curiae, ECF No. 24 [hereinafter ANVCA Br.], at 1-2. Ahtna, Inc., an Alaska Native Regional Corporation created pursuant to ANCSA, also filed an amicus brief supporting the Secretary. Br. of Amicus Curiae Ahtna, Inc., ECF No. 23

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[3] On April 24, 2020, the Cheyenne River Plaintiffs filed an Amended Complaint, which added Nondalton Tribal Council, Arctic Village Council, and Native Village of Venetie Tribal Government as plaintiffs. *See* Cheyenne River Am. Compl.

[4] Citations to the filings by the Ute Tribe Plaintiffs are found on the docket in *Ute Tribe of the Uintah and Ouray Reservation v. Mnuchin,* 20-cv-1070 (APM).

[hereinafter Ahtna Br.], at 1. Additionally, the National Congress of American Indians along with a group of national and regional organizations of federally recognized Indian tribes, and the Native American Finance Officers Association, the Gila River Indian Community, the Penobscot Nation, and the Nottawaseppi Huron Band of the Potawatomi filed their own amicus briefs supporting Plaintiffs' position. *See generally* Br. of Amici Curiae National Congress of American Indians, et al., ECF No. 20; Amicus Curiae Br. of the Native American Finance Officers Association, the Gila River Indian Community, the Penobscot Nation, and the Nottawaseppi Huron Band of the Potawatomi, ECF No. 25.

On April 22, 2020, Defendant moved for an extension to oppose the pending motions. *See* Def.'s Mot. for Extension of Time, ECF No. 9. In its motion, Defendant represented that the Secretary "has not yet arrived at a final decision on the question whether Alaska native corporations qualify as 'Tribal governments' under Title V of the CARES Act." *Id.* at 1. In a status hearing the following day, counsel for Defendant reiterated that the Secretary still had made no determination as to whether ANCs would be eligible for Title V funding. Later that day, however, the Secretary announced a firm position. In a posting on the agency's website, the Secretary stated that, "[a]fter consultation with the Department of the Interior, Treasury has concluded that Alaska Native regional and village corporations as defined in or established pursuant to the Alaska Native Claims Settlement Act are eligible to receive payments from the Fund in the amounts to be determined by the Secretary of the

Treasury." U.S. TREASURY DEP'T, CORONAVIRUS RELIEF FUND PAYMENTS TO TRIBAL GOVERNMENTS (April 23, 2020) (footnote omitted).[5]

The court heard argument on Plaintiffs' motions the next day, April 24, 2020. *See* Minute Entry, April 24, 2020. Plaintiffs contend that ANCs are not eligible for Title V funding under the CARES Act, because no ANC meets the statutory definition of "Tribal government"—i.e., no ANC or ANC board of directors is "the recognized governing body of an Indian tribe." 42 U.S.C. § 801(g)(5). Plaintiffs' argument is essentially twofold: ANCs are not "Indian Tribes" under the ISDEAA definition incorporated into the CARES Act, and no ANC board of directors qualifies as a "recognized governing body." Chehalis Mot. at 16-21; Cheyenne Mot. at 20-27. Defendant, on the other hand, argues that ANCs are treated as "Tribal governments" under ISDEAA, relying primarily on a Bureau of Indian Affairs interpretation of the ISDEAA definition, upheld as reasonable by the Ninth Circuit over thirty years ago. Def.'s Cons. Opp'n to Pls.' Mot. for TRO and Prelim. Inj., ECF No. 21 [hereinafter Def.'s Opp'n] at 8-10 (citing *Cook Inlet*, 810 F.2d 1471). Defendant also contends that Plaintiffs have failed to demonstrate irreparable harm, *id.* at 19-22, and that, in any case, the Secretary's decision to disburse funds is committed to his discretion and is therefore unreviewable, *id.* at 7-8.

Following the hearing on Plaintiffs' motions, the Secretary confirmed that no Title V funds will be released

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[5] https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Payments-to-Tribal-Governments.pdf.

to Tribal governments until April 28, 2020. *See* Notice to Court, ECF No. 32.

III.

Before turning to the merits of Plaintiffs' requested relief, the court addresses a threshold contention made by Defendant. Defendant asserts that the Secretary's "ongoing decisions about how to implement an emergency relief fund . . . is not properly subject to judicial oversight." Def.'s Opp'n at 7. The CARES Act commits to the Executive Branch the decision how to allocate emergency relief payments, *id.* (citing 42 U.S.C. § 801(c)(7) ("[T]he Secretary shall determine" the amount of the payments, which are to be made "in such manner as the Secretary determines appropriate")), and therefore, Defendant contends, such a discretionary determination is beyond the court's authority to review under the APA, *see id.* That argument fails.

The D.C. Circuit recently explained that there are two categories of unreviewable discretionary agency actions, those that are "presumed immune from judicial review" and those that are presumptively reviewable but involve "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Physicians for Soc. Responsibility v. Wheeler*, No. 19-5104, 2020 WL 1921539, at *4 (D.C. Cir. Apr. 21, 2020) (citing *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). Defendant's argument falls into the former category. In *Lincoln v. Vigil*, the Supreme Court observed that "[t]he allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to

agency discretion." 508 U.S. 182, 192 (1993). Such decisions are treated as presumptively unreviewable, because "an agency's allocation of funds from a lump-sum appropriation requires 'a complicated balancing of a number of factors which are peculiarly within its expertise.'" *Id.* at 193 (quoting *Heckler*, 470 U.S. at 831). The Court added, however, that "an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes." *Id.*

That is precisely what Congress did here. True, Congress allocated a lump-sum amount for the Secretary to allocate to "Tribal governments." 42 U.S.C. § 801(a)(2)(B). But it also circumscribed the agency's discretion by supplying a concrete definition of "Tribal government" against which to measure eligibility for Title V funds and, correspondingly, for the court to conduct judicial review. *See id.* § 801(g)(5). Thus, while the Secretary's decisions as to *how* much to disburse might not be reviewable,[6] his decisions concerning *to whom* to disburse those funds most certainly is. *Cf. Milk Train, Inc. v. Veneman*, 310 F.3d 747, 752 (D.C. Cir. 2002) (holding that Congress's limitation on agency's "authority to disburse funds" provided a "statutory reference point" for judicial review).

Relatedly, Defendant argues that the Secretary's decision is insulated from review, because it is in the na-

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[6] This observation should not be construed as a holding. The court offers no opinion as to whether it would be foreclosed from reviewing a decision on how much to award a particular Tribal government in Title V funds.

ture of a "time-pressed determination . . . to address a public health emergency." Def.'s Opp'n at 7. But Defendant cites no authority to support the contention that his decision to make funds available to a particular entity—even in contravention of a statutory mandate—evades judicial review simply because Congress appropriated the funds to address an emergency. *Curran v. Laird*, relied on by Defendant, Def.'s Opp'n at 7-8, is a different case. It concerned "decisions relating to the conduct of national defense" that lie outside the bounds of judicial reviewability. *Curran*, 420 F.2d 122, 128-29 (D.C. Cir. 1969). The Secretary's decision here, by contrast, concerns appropriations for domestic emergency spending that is cabined by specific statutory terms. The mere emergency nature of the funding does not render it unreviewable. *Cf. Milk Train*, 310 F.3d at 752 ("By providing in the 2000 Appropriations Act that the moneys are for 'economic losses incurred during 1999,' Congress limited the Secretary's authority to disburse funds." (internal citation omitted)).

Finally, Defendant asserts that, because Title V contains a provision that authorizes the Treasury Department's Inspector General to recoup payments, Congress somehow signaled that it "did not intend judicial oversight of the manner in which the funds are distributed." Def.'s Mot. at 8 (citations omitted). There is nothing in the text of the CARES Act relating to the powers of the Inspector General, however, that would overcome the "strong presumption of reviewability under the [APA]." *Physicians for Soc. Responsibility*, 2020 WL 1921539 at *4 (quoting *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003)).

IV.

The court turns now to the heart of Plaintiffs' motions. Injunctive relief is an "extraordinary and drastic remedy" that is "never awarded as [a matter] of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations and internal quotation marks omitted). A court may only grant the "extraordinary remedy . . . upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). Specifically, Plaintiffs must show that they are: (1) "likely to succeed on the merits"; (2) "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in [their] favor"; and (4) "an injunction is in the public interest." *Winter*, 555 U.S. at 20. Where, as here, the federal government is the opposing party, the balance of equities and public interest factors merge. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

In this jurisdiction, courts evaluate the four preliminary injunction factors on a "sliding scale"—if a "movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp,* 571 F.3d 1288, 1291-92 (D.C. Cir. 2009). *Winter v. Natural Resources Defense Council*, however, called that approach into question and raised doubts over whether the "sliding scale" framework continues to apply, or whether a movant must make a positive showing on all four factors without discounting the importance of one factor simply because one or more other factors have been convincingly established. *See Davis*, 571 F.3d at 1296 (Kavanaugh, J., concurring) ("[T]he old

sliding-scale approach to preliminary injunctions—under which a very strong likelihood of success could make up for a failure to show a likelihood of irreparable harm, or vice versa—is 'no longer controlling, or even viable.'") (quoting *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)); *but see Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018) (explaining that the D.C. Circuit "has not yet decided whether *Winter* . . . is properly read to suggest a 'sliding scale' approach to weighing the four factors be abandoned").

In the absence of a D.C. Circuit decision overruling it, the sliding scale framework remains binding precedent that this court must follow. "[D]istrict judges, like panels of [the D.C. Circuit], are obligated to follow controlling circuit precedent until either [the D.C. Circuit], sitting en banc, or the Supreme Court, overrule it." *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). Accordingly, at a minimum, a plaintiff seeking preliminary injunctive relief "must make a 'clear showing that four factors, taken together, warrant relief.'" *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (quoting *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 505 (D.C. Cir. 2016)). While the sliding scale does not absolve Plaintiffs of their burden to make an independent showing on each of the four factors, it "allow[s] that a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). "It is in this sense that all four factors 'must be balanced against each other.'" *Davis*, 571 F.3d at 1292 (quoting *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 361

(D.C. Cir. 1999)). The weighing of the four factors is within the district court's discretion. *See id.* at 1291.

V.

A. Irreparable Harm

The court begins with irreparable harm. A plaintiff seeking injunctive relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. To make such a showing, a plaintiff must demonstrate an injury that is "both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (emphasis and internal quotation marks omitted).

Plaintiffs easily satisfy their burden to show that they will suffer irreparable injury in the absence of immediate injunctive relief. The $8 billion dollars allocated by Congress for "Tribal governments" is a fixed sum that Plaintiffs and other Tribal governments are entitled to receive to cover costs of combatting the COVID-19 pandemic in their communities. *See* 42 U.S.C. § 801(d). Any dollars improperly paid to ANCs will reduce the funds to Plaintiffs. And, once disbursed, those funds will not be recoverable by judicial decree.[7] *See City of Houston, Tex. v. Dep't of Hous. &*

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[7] During oral argument, Defendant suggested that funds improperly allocated to ANCs could be recovered by the agency's Inspector General under his statutory recoupment authority. *See* Hr'g Tr. at 45. That seems unlikely. Title V empowers the agency's Inspector General to recoup funds if he "determines that a State, Tribal government, or unit of local government has failed to

Urban Dev., 24 F.3d 1421, 1424 (D.C. Cir. 1994) ("It is a well-settled matter of constitutional law that when an appropriation has lapsed or has been fully obligated, federal courts cannot order the expenditure of funds that were covered by that appropriation."); *Ambach v. Bell*, 686 F.2d 974, 986 (D.C. Cir. 1982) (holding that "interim relief" was proper in a case in which plaintiff States challenged the agency's formula for distributing educating funding, because, "[o]nce the . . . funds are distributed to the States and obligated, they cannot be recouped").[8] Thus, "[i]t will be impossible in the absence of a preliminary injunction to award the plaintiffs the relief they request if they should eventually prevail on the merits." *Ambach*, 686 F.2d at 986.

Defendant nevertheless maintains that Plaintiffs have failed to establish irreparable harm, asserting that any

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comply with subsection (d)." 42 U.S.C. § 801(f)(2). Subsection (d) limits use of Title V dollars to "expenditures incurred [from March 1, 2020, to December 30, 2020] due to the public health emergency" that "were not accounted for in the budget most recently approved." *Id.* § 801(d). The statute, therefore, does not appear to grant authority to the Inspector General to recoup monies that, say, are improperly disbursed to ANCs. Moreover, the statute directs that any recouped funds "shall be deposited in the general fund of the Treasury." *Id.* § 801(f)(2). Thus, even if the Inspector General could recover funds, there is no guarantee that those funds would be redistributed to qualifying Tribal governments.

[8] Defendant argues in a footnote that *City of Houston* and *Ambach* cannot stand for the proposition that the "inability to recover funds after they are obligated constitutes irreparable harm 'as a matter of law.'" Def.'s Opp'n at 19 n.14. The court makes no such holding. The court's finding of irreparable harm is premised not solely on the inability to recover allocated funds, but also the purpose for which Congress allocated those funds and the serious effect diminishing those funds will have on Plaintiffs.

injury arising from reduced CARES Act funds would be "economic in nature." Def.'s Mot. at 20; *see Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 120 (D.D.C. 2012) (stating the rule in this Circuit that "economic harm alone is generally not sufficient to warrant . . . granting of a motion for a preliminary injunction"). But to characterize Plaintiffs' claimed harm as merely "economic" is terribly misguided. These are not funds appropriated to carry out secondary or residual government functions. These are monies that Congress appropriated on an emergency basis to assist Tribal governments in providing core public services to battle a pandemic that is ravaging the nation, including in Indian country. As Plaintiffs' declarants establish, COVID-19 and the public health measures necessary to combat the novel coronavirus have caused their regular streams of revenue to run dry, creating a crisis in funding needed to deliver health care, procure medical equipment and supplies, and provide meals and expand food banks—just to name a few ways in which the CARES Act funds would be put to use. *See* Chehalis Mot. at 30-33; Cheyenne River Mot. at 32-34. The diminishment of these funds, which cannot be recovered once disbursed, makes "a very strong showing of irreparable harm." *Davis*, 571 F.3d at 1292.

Defendant asserts that Plaintiffs cannot show irreparable injury for another reason. Defendant argues that Plaintiffs have not established that "the delta between the payment amounts they stand to receive under Defendant's determination, and the amounts they would receive if ANCs were excluded, would make the difference between irreparable harm or not." Def.'s Mot. at 20. But demanding such a "delta" from Plaintiffs imposes an impossible burden. After all, Defendant has

not publicly confirmed how he will divide up the $8 billion that Congress allocated for "Tribal governments." Absent some indication of the actual formula that Defendant is using to make allocation decisions, Plaintiffs are in no position to identify the loss "delta" they will suffer if ANCs are awarded Title V dollars.

From what is publicly known, however, the potential "delta" could be significant. On April 13, 2020, Defendant published a "Certification for Requested Tribal Data" form on the Agency's website, which sought certain information from Tribal government applicants for Title V funds. Chahalis Am. Compl. ¶ 101. Submission of the requested information is a condition of funding. *Id.* Defendant requested "Population" data from applicants, which included the number of "Shareholders." *Id.* ¶ 102. It also asked for information about "Land Base," which included "lands . . . selected pursuant to the Alaska Native Claims Settlement Act." *Id.* ¶ 103; Certification. An internal agency document leaked to the media three days later shows that, if Defendant were to disburse Title V funds based on "Population," "Land Base," and other data, ANCs could receive a substantial share of Title V funds. *See* Cheyenne River Mot. at 18. The leaked document shows that ANCs comprised 32.6% of the total population listed for all Tribal governments; 45.2% of the total land base; 16.6% of total employees; and 11% of total expenditures for the most recent completed year. *See id*; Sealed Mot. for Leave to File Document Under Seal, Ex. 2, ECF No. 5-2. If the agency were to base its allocation decisions on such data, using it as a proxy for need, ANCs stand to reap a considerable percentage of Title

V funds. The "delta" suffered by Plaintiffs therefore could be substantial.[9]

To be fair, since the start of this case, Defendant has maintained that its allocation formula remains a work in progress and that the data sought in the Certification should not be understood as proxies for how much funding a Tribal government will receive. Yet, it is this very uncertainty that amplifies the likelihood of harm. The agency has said that it will disclose how it made funding decisions; however, it has not committed to making that information public *before* disbursing the funds. But once those dollars are committed, Plaintiffs will have no path to recover them. *See supra* at 15-16 & n.7. Their injury therefore will be irreparable absent injunctive relief.

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[9] Curiously, there is no indication on the present record that the agency has considered data that matches the actual statutory criteria for disbursement of Title V funds to Tribal governments. The CARES Act provides that:

> the amount paid . . . to a Tribal government shall be the amount the Secretary shall determine, in consultation with the Secretary of the Interior and Indian Tribes, that is 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 the Tribal government (or tribally-owned entity) and determined in such manner as the Secretary determines appropriate to ensure that all amounts available under subsection (a)(2)(B) for fiscal year 2020 are distributed to Tribal governments.

42 U.S.C. § 801(c)(7) (emphasis added). Nothing on the present record suggests that the agency is making allocation decisions based, at least in part, on "increased expenditures" during the present fiscal year.

B. Likelihood of Success

Having found a strong case of irreparable harm, the court turns to the other key factor—likelihood of success on the merits. *See Nken*, 556 U.S. at 434 ("The first two factors of the traditional standard are the most critical."). Recall that under the "sliding scale" approach, "if the movant makes a very strong showing of irreparable harm and there is no substantial harm to the non-movant, then a correspondingly lower standard can be applied for likelihood of success."

Davis, 571 F.3d at 1292. That is not to say that a movant for whom the other three factors "clearly favor[]" injunctive relief can succeed by making only a modest showing of likelihood of success. *Id.* (quoting *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). Rather, likelihood of success remains a "foundational requirement" for injunctive relief. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019). As the court considers Plaintiffs' likelihood of success it bears in mind that the other factors of irreparable harm—as discussed above—and the balancing of the equities—as will be seen below—"clearly favor[]" injunctive relief. *Davis*, 571 F.2d at 1292.

1. In determining whether Congress intended for ANCs to be eligible for CARES Act funds, the court begins, as required, with the statutory text. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (stating that the "starting point" for statutory analysis "is the statutory text"). Title V of the CARES Act allocates $8 billion "for making payments to Tribal governments." 42 U.S.C. § 801(a)(2)(B). The Act defines the term "Tribal government" to mean "the recognized governing

body of an Indian Tribe." *Id.* § 801(g)(5). The Act also defines "Indian Tribe," giving it the same meaning as "that term in section 5304(e) of title 25"—a cross-reference to the definition of "Indian Tribe" under ISDEAA. *Id.* § 801(g)(1). ISDEAA, in turn, defines "Indian tribe" as follows:

> [A]ny Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

25 U.S.C. § 5304(e). Thus, taken together, Congress allocated $8 billion in the CARES Act "for making payments to" "the recognized governing body of" "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional village corporation . . . , which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *See* 42 U.S.C. § 801(a)(2)(B), (g)(1), (g)(5); 25 U.S.C. § 5304(e).

According to Plaintiffs, ANCs are not "Tribal governments," and thus are ineligible for funds under Title V of the CARES Act, for two reasons. First, they contend, ANCs are not "Indian Tribes" under the ISDEAA definition incorporated into the CARES Act, because no known ANC satisfies the limiting clause at the end of ISDEAA definition's —"which is recognized as eligible for the special programs and services provided by the

United States to Indians because of their status as Indians." *See* Chehalis Mot. at 16-21. The court refers to this text as the "eligibility clause." Second, Plaintiffs contend, no ANC board of directors qualifies as a "recognized governing body." *Id.* at 21-24; Cheyenne Mot. at 20-27. Both arguments rest, in part, on the contention that "recognition" is a term of art that is well understood in Indian law, and that no ANC has been "recognized" as "eligible for special programs and services provided by the United States to Indians because of their status as Indians" and, correspondingly, no ANC board of directors has been "recognized" as the "governing body of an Indian tribe." Chehalis Mot. at 19; Cheyenne Mot. at 24-26.

For purposes of this preliminary injunction, the court is persuaded that, presently, no ANC satisfies the definition of "Tribal government" under the CARES Act and therefore no ANC is eligible for any share of the $8 billion allocated by Congress for Tribal governments. For starters, neither Defendant nor any ANC amici has identified an ANC that satisfies the eligibility clause under ISDEAA's definition of Indian Tribe; that is, no ANC "is [presently] recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *See* 25 U.S.C. § 5304(e). As the Chehalis Plaintiffs point out, under the interpretative rule known as the series-qualifier canon, "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series," a modifier at the end of the list "normally applies to the entire series." *See* Chehalis Pls.' Reply in Supp. of Mot. for TRO & Prelim. Inj., ECF No. 30, at 5 (quoting *Lockhart v. United States*, 136 S. Ct. 958, 970

(2016) (Kagan, J., dissenting) (citing A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012)); *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2020) ("[T]he 'series-qualifier' canon . . . provides that a modifier at the beginning or end of a series of terms modifies all the terms.")). Applying that canon here, the eligibility clause applies equally to all entities and groups listed in the statute, including "any Alaska Native village or regional or village corporation." As no known ANC satisfies ISDEAA's eligibility clause, no ANC can partake in the $8 billion funding set aside for Tribal governments.

The court also agrees that the term "recognition" as used in Indian law statutes is a legal term of art, and that no ANC board of directors qualifies as a "recognized governing body" of an Indian Tribe. *Cf. Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 131 (D.D.C. 2015) ("Federal 'recognition' of an Indian tribe is a term of art that conveys a tribe's legal status vis-à-vis the United State[s]. . . . "), *aff'd*, 829 F.3d 754 (D.C. Cir. 2016); *see also Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 918 F.3d 610, 613 (9th Cir. 2019) ("'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."). "[I]t 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 was taken.'" *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (quoting *Molzof v. United States*, 502 U.S. 301, 307 (1992)). That rule of interpretation is particularly apt for statutes con-

cerning Indians. Federal recognition is "a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3], at 138 (2005 ed.)); *see also* Chehalis Mot. at 19 (quoting H.R. Rep. No. 103-781, at 2-3 (1994) (stating that recognition means a "formal political act, [which] permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation'"). "The definition of 'recognition' has evolved over time but historically the United States recognized tribes through treaties, executive orders, and acts of Congress." *Mackinac Tribe*, 829 F.3d at 755. Today, uniform procedures exist through the Bureau of Indian Affairs for a group to seek formal recognition. *See id.* at 756. As a legal term of art then, Congress's decision to qualify only "recognized governing bod[ies]" of Indian Tribes for CARES Act funds must be viewed through this historical lens. And no ANC board of directors satisfies that criteria. *Cf. Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1350 (9th Cir. 1990) (holding that a village corporation "is not a governmental unit with a local governing board organized under the Indian Reorganization Act . . . [and thus] does not meet one of the basic criteria of an Indian tribe" (citation omitted)).

2. Context also supports Plaintiffs' reading of the CARES Act. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used,

and the broader context of the statute as a whole."). Congress placed monies for "Tribal governments" in the same title of the CARES Act as funding for other types of "governments." 42 U.S.C. § 801(a)(1). Title V appropriates money "for making payments to States, Tribal governments, and units of local government." *Id.*. "State" is defined as "the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa." *Id.* § 801(g)(4). The term "unit of local government" is also defined, and it means "a county, municipality, town, township, village, parish, borough, or other unit of general government below the State level with a population that exceeds 500,000." *Id.* § 801(g)(2). The term "Tribal government" must be read in this context. *See Lagos v. United States*, 138 S. Ct. 1684, 1688-89 (2018) (referencing "*noscitur a sociis*, the well-worn Latin phrase that tells us that statutory words are often known by the company they keep"). A "government" is commonly understood to refer to "[t]he sovereign power in a country or state" or "organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed." *Government*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Government*, MERRIAM-WEBSTER DICTIONARY ("[T]he body of persons that constitutes the governing authority of a political unit or organization," or "the organization, machinery, or agency through which a political unit exercises authority and performs functions and which is usually classified according to the distribution

of power within it").[10] Reading the CARES Act to allow the Secretary to disburse Title V dollars to for-profit corporations does not jibe with the Title's general purpose of funding the emergency needs of "governments." *See Richards v. United States*, 369 U.S. 1, 9 (1962) (explaining that a court must "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used" by Congress.").

3. Defendant and the ANC Amici advance their own textual analysis of the ISDEAA definition of "Indian tribe." Echoing the rationale of the Ninth Circuit's decision in *Cook Inlet*, 810 F.2d at 1474, Defendants and ANC Amici argue that to apply the eligibility clause to ANCs would read the words "regional or village corporation" out of the statute because ANCs cannot satisfy the eligibility clause. Def.'s Mot. at 10-11; Ahtna Br. at 20-21. ANCs cannot satisfy that clause because, as corporations organized under state law, they cannot be "recognized" as "eligible for special programs and services provided by the United States to Indians because of their status as Indians." So, Defendant and the ANC Amici maintain, the court must not apply the eligibility clause to those entities so as to give meaning to their placement in the statute. *Id.*

The court is unpersuaded. To be sure, courts must "interpret a statute to give meaning to every clause and word." *Donnelly v. FAA*, 411 F.3d 267, 271 (D.C. Cir. 2005). But the court cannot ignore the clear grammatical construct of the ISDEAA definition, which applies the eligibility clause to every entity and group listed in

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[10] https://www.merriam-webster.com/dictionary/government.

the statute. The possibility that ANCs might not qualify under the eligibility clause is hardly fatal to carrying out Congress's purpose under ISDEAA. "Alaska Native village[s]" are also in the statute. They can and do satisfy the eligibility clause—in fact, there are 229 federally recognized Alaska Native villages, *see* Chehalis Mot. at 18. Alaska Native villages are therefore able to fulfill ISDEAA's purpose of allowing Indian tribes to assume responsibility for federal aid programs that benefit its members; Congress expressed no preference for ANCs to fulfill the statute's objectives. Accordingly, the ISDEAA definition of "Indian tribe" does not compel reading the eligibility clause to not apply to ANCs, as Defendant and the ANC Amici posit.

4. Defendant and the ANCs rely heavily on agency guidance and case law to advance their position. *See* Def.'s Opp'n at 9-10; Ahtna Br. at 18-19. Those sources, Defendants assert, support reading the eligibility clause under ISDEAA as *not applying* to ANCs, contrary to the statute's plain text. Defendant, for instance, points out that "immediately after this definition was passed in 1975 as part of ISDEAA, the Bureau of Indian Affairs ("BIA") interpreted the [eligibility] clause *not* to apply to ANCs—i.e., that they need not satisfy the recognition clause." Def.'s Opp'n at 9. Evidently, BIA adheres to that interpretation today.[11] Additionally, Defendant and the ANC amici cite *Cook Inlet*, in which the Ninth

[11] Defendant does not cite to any contemporary guidance from BIA regarding the ISDEAA definition that could confirm that the agency continues to adhere to its original interpretation. However, all parties appear to agree that BIA has not deviated from its original interpretation.

Circuit confirmed BIA's reading of ISDEAA as "reasonable" and held that ANCs can be considered "Indian Tribes" for purposes of ISDEAA. 810 F.2d at 1476. These citations to long-standing agency interpretation and a decades-old Ninth Circuit decision, the court is told, bear on Congress's present-day intent to *include* ANCs for funding under Title V. The unstated assumption of this argument is that Congress is presumed to have known about these interpretations of ISDEAA and, by incorporating its definition of "Indian tribe" into the CARES Act, Congress meant to make ANCs eligible for Title V funding. Though not without some appeal, this argument is flawed for at least three reasons.

First, it is counter-textual. As discussed, a straightforward reading of the eligibility clause of the ISDEAA definition cannot be reasonably construed to exclude ANCs. Agency interpretations to the contrary, even if well-settled, cannot override congressional intent conveyed through a statute's plain text. *See SEC v. Sloan*, 436 U.S. 103, 118 (1978) ("[C]ourts are the final authorities on issues of statutory construction, and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." (internal quotation marks and citation omitted)); *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 349 (D.C. Cir. 2019) ("Even an agency's consistent and longstanding interpretation, if contrary to statute, can be overruled."). Nor can a judicial decision supplant the clear text of a statute, no matter how longstanding. *See Milner v. Dep't of Navy*, 562 U.S. 562, 576 (2011) (rejecting argument that lower court decision should stand because it had been followed and relied upon for 30 years,

"because we have no warrant to ignore clear statutory language on the ground that other courts have done so"). ISDEAA's plain meaning therefore surmounts any contrary agency or judicial interpretation.

Second, the administrative and judicial interpretations put forward by Defendant and the ANC amici are not as definitive as they appear at first blush. It is true that "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). But that presumption turns on whether existing interpretations have "settled the meaning" of a statutory provision. That simply is not the case here. For one, *Cook Inlet* is but one judicial decision, and "a lone appellate case hardly counts" as establishing a "'judicial consensus so broad and unquestioned that [a court] must presume Congress knew of and endorsed it.'" *United States v. Garcia Sota*, 948 F.3d 356, 360 (D.C. Cir. 2020) (quoting *Jama v. ICE*, 543 U.S. 335, 349 (2005)).[12]

More significantly, post-ISDEAA legislation and judicial decisions raise the possibility that Congress did *not* mean to signal, by adopting the ISDEAA definition,

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[12] Defendant maintains that the continuing validity of *Cook Inlet* is confirmed by a more recent decision from the Ninth Circuit, *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 988 (9th Cir. 1999). *See* Def.'s Opp'n at 9. But that more recent decision simply cites to *Cook Inlet* as part of its factual recitation, *see Cook Inlet Treaty Tribes*, 166 F.3d at 988, and, in any event, a subsequent decision from the same circuit does nothing to create a "broad and unquestioned" judicial consensus, *Jama*, 543 U.S. at 349.

that ANCs are eligible for Title V funds. In 1994, some two decades after enacting ISDEAA, Congress passed the Federally Recognized Indian Tribe List Act of 1994 ("List Act"), Pub. L. No. 103-454, § 103, 108 Stat. 4791. The List Act directed the Secretary of the Interior to "publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5131(a). The Act's purpose was to "maintain[ ] an accurate, up-to-date list of federally recognized tribes." *Koi Nation of N. Cal. v. Dep't of Interior*, 361 F. Supp. 3d 14, 59 (D.D.C. 2019). No ANC appears on the Secretary's last-published list, as of January 30, 2020. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5,462 (Jan. 30, 2020).[13]

Critically, since the List Act's passage, the government has taken the position, and courts have agreed, that the definition of "Indian tribe" in various federal statutes must be read in conjunction with the List Act. In other words, unless the entity or group appears on the Secretary's List, it does not qualify as an "Indian tribe." For instance, in *Wyandot Nation of Kan. v. United States*, the Federal Circuit held that the plaintiff was not a qualified "Indian tribe" permitted to demand an accounting under the American Indian Trust Fund

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[13] The most recent list contains 574 federally recognized Indian tribes, including 229 Alaska Native villages—including Plaintiffs Akiak Native Community, Asa'carsarmiut Tribe, and Aleut Community of St. Paul Island. *See* Chehalis Mot. at 18; 85 Fed. Reg. at 5,466, 5,467.

Management Reform Act ("Reform Act"), Pub. L. No. 103-412, 108 Stat. 4239 (1994), because the plaintiff "is not on the list maintained by the Secretary of the Interior." 858 F.3d 1392, 1396, 1397–98 (Fed. Cir. 2017). The Reform Act's definition of "Indian tribe" is *identical* to the ISDEAA definition of that term. Compare 25 U.S.C. § 4001(2) *with* 25 U.S.C. § 5304(e). Interpreting the very same statutory language at issue here, the government in *Wyandot* argued that "a tribe cannot be a recognized Indian tribe within the meaning of the Reform Act unless it is recognized as such by the Secretary of the Interior under the List Act," 858 F.3d at 1398, and even asserted that the eligibility clause found in the Reform Act's definition of "Indian Tribe"—that is, the exact same clause contained in the ISDEAA definition of "Indian Tribe"—"is a phrase of art defined in the List Act, 25 U.S.C. § [5131(a)]," Br. of United States as Appellee, *Wyandot Nation of Kansas v. United States*, No. 2016-1654 (Doc. 18), 2016 WL 4442763, *24, *35 (Fed. Cir. Aug. 11, 2016). The Federal Circuit "was persuaded that the List Act regulatory scheme exclusively governs federal recognition of Indian tribes." 858 F.3d at 1398.

The decision in *Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178 (D. Or. 2010), supplies another example. There, the statute at issue was the National Historic Preservation Act, which defines "Indian tribe" in the same exact way as under ISDEAA. *Compare* 54 U.S.C. § 300309 *with* 25 U.S.C. § 5304(e). The government argued there, as it did in *Wyandot*, that the plaintiffs could not state a claim under the relevant statute, because they were "not federally recognized tribes." 682 F. Supp. 2d at 1202 (citing the Secretary's List as of

December 19, 1988). The court agreed and dismissed the plaintiffs' claims. *See id.*

Defendant does not satisfactorily explain why, in post-List Act cases like *Wyandot* and *Slockish*, the government has insisted that courts read the same definition of "Indian tribe" at issue here with the List Act, but not in this case. But no matter. The point is that when Congress incorporated the ISDEAA definition into the CARES Act, it is entirely plausible for it to have understood, based on cases like *Wyandot* and *Slockish*, that CARES Act eligibility under Title V would be limited only to federally recognized tribes. Those cases, along with the government's post-List Act litigation positions, defeats the notion that the Ninth Circuit's decision in *Cook Inlet* is such settled law that Congress used that case's understanding of the ISDEAA definition of "Indian tribe" in the CARES Act.[14]

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[14] Amici ANVCA and ARA make the additional point that in *American Federation of Government Employees, AFL-CIO v. United States* ("*AFGE*"), 330 F.3d 513, 516 (D.C. Cir. 2003), the D.C. Circuit noted that certain Alaska Native Regional and village corporations qualify as "Indian Tribes" under ISDEAA. *See* Not. and Request to Correct Procedural Defect, Not. of Controlling Authority, ECF No. 34. But amici overread *AFGE*. While they are correct that the court in *AFGE* referred to the ANCs at issue as "Indian Tribes" and cited to ISDEAA, the case sheds no light on the issues relevant here. *AFGE* concerned an equal protection challenge to an appropriations act that gave preference to firms with 51 percent Native American ownership in defense contracting. 330 F.3d at 516-17. The court had no occasion to consider ANCs' status as it pertains to the ISDEAA definition, and the court's statement that the ANCs "are federally recognized Indian tribes" is better viewed as dicta. *See id.*

Third, Congress's adoption of the ISDEAA definition cannot be divorced from actual agency practice under ISDEAA, which seemingly is to contract with ANCs only, if at all, with tribal consent or as a last resort. Although BIA has long viewed ANCs as qualifying as "Indian tribes" under ISDEAA, *see Cook Inlet*, 810 F.2d 1474, there is scant evidence on the present record—in fact, none—that BIA or any other federal agency has actually entered into a "self-determination contract," or 638 agreement, with an ANC. Defendant's counsel's inability to identify any such current or past agreement between a federal agency and an ANC is telling *see* Hr'g Tr. at 38, and suggests that such contracts are at least rare. Moreover, at least one agency, the Indian Health Service, has adopted guidelines that create a contracting hierarchy that prefers agreements for health services with Alaskan villages councils over ANCs. *See* Alaska Area Guidelines for Tribal Clearances for Indian Self-Determination Contracts, 46 Fed. Reg. 27,178-02 (May 18, 1981). Based on those guidelines, one court has held that an ANC cannot maintain a self-determination contract absent tribal villages' consent. *See Ukpeagvik Inupiat Corp. v. Dep't of Health and Human Servs.*, Case No. 3:13-cv-00073-TMB, 2013 WL 12119576, at *2-3 (D. Alaska May 20, 2013).

This real-world treatment of ANCs by federal agencies under ISDEAA is informative. It tells the court, even if an ANC can be potentially treated as an "Indian tribe" under ISDEAA, they rarely are. And that infrequent treatment prevents the court from concluding at this stage that, by using ISDEAA's definition of "Indian tribe" in the CARES Act, Congress necessarily signaled its intent to treat ANCs and federally recognized tribes as equals for purposes of Title V funding eligibility.

5. Defendant and the ANC amici make another argument concerning Congress's selection of the ISDEAA definition of "Indian tribe" for the CARES Act. They point out that the List Act's definition of "Indian tribe" clearly excludes ANCs. *See* Def.'s Opp'n at 11; Ahtna Br. at 18-19. The List Act defines "Indian tribe" to mean "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. § 5130(2). That clearly defined exclusion of ANCs begs the question: If Congress wanted to exclude ANCs from receiving CARES Act funds, why not incorporate the definition of "Indian tribe" from the List Act, or refer expressly to the published list itself? As amicus Ahtna puts it, "if Congress wanted to exclude [ANCs] it could have done so and in a much less convoluted way." Ahtna Br. at 19. That is a fair point, but it loses its luster when viewed against the backdrop of the post-List Act case law and government litigation positions described above. Congress could have intended that the ISDEAA definition of "Indian Tribe" exclude ANCs under the CARES Act in the same way that the identical ISDEAA definitions exclude non-federally recognized tribes under the Reform Act and the National Historic Preservation Act. The court therefore can glean no definitive congressional intent as to the inclusion or exclusion of ANCs under the CARES Act by Congress's selection of the ISDEAA definition over the List Act definition.

6. Defendant also resists reading the word "recognized" used in the CARES Act's definition of "Tribal government" as a legal term of art. *See* Def.'s Opp'n at 18. The Secretary points out that "recognized" as used in the

CARES Act does not necessarily mean *federal* recognition, as understood in other statutes. Statutes that do expressly concern federal recognition, according to Defendant, use different words to signify that term of art. The List Act, for example, uses the phrase "recognized tribes published by the Secretary," 25 U.S.C. § 5130(3), and the Indian Gaming Regulatory Act refers to tribes or groups that are "recognized as eligible by the Secretary," 25 U.S.C. § 2703(5)(A).

The court, however, does not view those modest statutory textual differences as bearing the weight that Defendant gives them. As already discussed, in other statutes where the word "recognized" appears alone in the statutory text, such as the Reform Act and the National Historic Preservation Act, *see* 25 U.S.C. § 4001(2); 54 U.S.C. § 300309, the government has equated the term with federal recognition, *see Wyandot*, 858 F.3d at 1398; *Slockish*, 682 F. Supp. 2d at 1202. It is not clear why the government takes a different view here. Moreover, given the history and significance of the term "recognition" in Indian law, the court doubts that Congress would have used the term if it did not mean to equate it with federal recognition. The word "recognize" as it appears in the CARES Act is thus best understood as a legal term of art that no ANC presently satisfies.

7. Finally, Defendant refutes that statutory context supports Plaintiffs' position. Citing the fact that tribal governments generate revenues from for-profit business operations, like casinos, Defendant contend that "Plaintiffs' argument assumes incorrectly that there is a clean dividing line between government and business operations. . . . [such that] Title V eligibility cannot turn on whether the recipient is engaged in profitable

businesses." Def.'s Mot. at 11-12. But Plaintiffs' position, with which the court agrees, does not depend on a "clean dividing line." Rather, the question is whether treating an ANC's board of directors as a "Tribal government" makes sense when the other identified recipients of Title V funds include "States" and "units of local government." *See* 42 U.S.C. § 801(a)(1). It does not.

* * *

In summary, the court finds that Plaintiffs have met their burden of showing a likelihood of success on the merits of their claim.

C. Balance of the Equities and the Public Interest

The court turns finally to the remaining two injunctive relief factors: the balance of the equities and the public interest. Where the federal government is the opposing party, these two factors merge. *See Nken*, 556 U.S. at 435. Thus, in this case, the balance of the equities requires the court to "weigh[] the harm to [Plaintiffs] if there is no injunction against the harm to [the Treasury Department] if there is." *Pursuing Am.'s Greatness*, 831 F.3d at 511. The agency's harm and "the public interest are one and the same, because the government's interest *is* the public interest." *Id.*

For the reasons already discussed, the harm to Plaintiffs absent an injunction will be great. The court need not recite the challenges that Plaintiffs are presently facing and will continue to face with reduced funding, though it notes that other Indian tribal governments who are not involved in this action also would benefit from an injunction. On the other side of the balance, the tangible harm claimed by the agency from an injunc-

tion is not substantiated. Defendant contends that halting disbursement of funds to ANCs would harm the native Alaskan communities that they serve. *See* Def.'s Opp'n at 23. But neither Defendant nor the ANC Amici present actual evidence demonstrating that ANCs are currently providing public services comparable to Plaintiffs to combat the coronavirus pandemic. *See id.* at 23 (citing no evidence and simply cross-referencing ANVCA Br. at 15-16, which identifies no coronavirus-related public services); Ahtna Br. at 2-3 (stating that Ahtna provides a "litany of social, educational, and health-related services," but not specifying what those are services are with respect to the coronavirus pandemic or specifying how Title V funds would be used); ANVCA Br. at 16 (asserting, without detail or factual support, that "[s]ervices ANCs currently provide pale in comparison to what will be demanded of them in the future"). Moreover, it appears that ANCs may be eligible for funding made available in other parts of the CARES Act, *see* Def.'s Br. at 11 (stating that Congress could have "reasonably provided two avenues of relief for an entity in the CARES Act"), so whatever coronavirus-related services they do provide arguably could come from a different pot of appropriated funds. The claimed harm to ANCs from an injunction is simply not supported by the record.

Both sides also assert that the public interest is served by carrying out Congress's intent; in Plaintiffs' view, that means denying ANCs Title V funds, and in Defendant's view, that means not interfering with the discretionary allocation of funds to ANCs. *See* Chehalis Mot. at 36-37; Cheyenne River Mot. at 34-35; Def.'s Opp'n at 23. Because, as already discussed, the court finds that Plaintiffs have established a likelihood of success of

showing that ANCs do not qualify for Title V funds, the public interest factor favors preliminarily enjoining the Secretary from disbursing Title V funds to ANCs. *See League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (stating that "there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations'") (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)).

VI.

Although the court has determined that an injunction is warranted, it does not grant relief to the full extent requested by Plaintiffs. The D.C. Circuit has "long held that '[a]n injunction must be narrowly tailored to remedy the specific harm shown.'" *Neb. Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) (quoting *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 108 (D.C. Cir. 1976)). Here, preliminarily enjoining the Secretary from disbursing funds to ANCs remedies the immediate harm that Plaintiffs face—the payment of Title V funds to ANCs that will be unrecoverable once made. The added relief that Plaintiffs seek—an order directing the Secretary to distribute the full $8 billion only to federally recognized tribes—is greater than necessary to protect them against that injury. To be sure, the more limited remedy could mean that Plaintiffs will receive a lesser share of Title V funds in the short term, if the Secretary decides to award some money to ANCs and withholds those payments to comply with the court's order. But at least such funds will remain available for later disbursement to federally recognized tribes for

coronavirus-related public services, if the court ultimately enters a final judgment in Plaintiffs' favor.

VII.

For the foregoing reasons, the court grants in part the Chehalis Plaintiffs', Cheyenne River Plaintiffs', and Ute Plaintiff's Motions for a Temporary Restraining Order and Preliminary Injunction, ECF No. 3; No. 20-cv-1059, ECF No 4; No. 20-cv-1070, ECF No. 5. An Order entering the preliminary injunction accompanies this Memorandum Opinion.

Dated: Apr. 27, 2020

/s/ AMIT P. MEHTA
AMIT P. MEHTA
United States District Court Judge

APPENDIX G

1. 25 U.S.C. 5304(e) provides:

Definitions

For purposes of this chapter, the term—

(e) "Indian tribe" means 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;

2. 42 U.S.C. 801 provides:

Coronavirus relief fund

(a) Appropriation

(1) In general

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for making payments to States, Tribal governments, and units of local government under this section, $150,000,000,000 for fiscal year 2020.

(2) Reservation of funds

Of the amount appropriated under paragraph (1), the Secretary shall reserve—

(A) $3,000,000,000 of such amount for making payments to the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa; and

(B) $8,000,000,000 of such amount for making payments to Tribal governments.

(b) Authority to make payments

(1) In general

Subject to paragraph (2), not later than 30 days after March 27, 2020, the Secretary shall pay each State and Tribal government, and each unit of local government that meets the condition described in paragraph (2), the amount determined for the State, Tribal government, or unit of local government, for fiscal year 2020 under subsection (c).

(2) Direct payments to units of local government

If a unit of local government of a State submits the certification required by subsection (e) for purposes of receiving a direct payment from the Secretary under the authority of this paragraph, the Secretary shall reduce the amount determined for that State by the relative unit of local government population proportion amount described in subsection (c)(5) and pay such amount directly to such unit of local government.

(c) Payment amounts

(1) In general

Subject to paragraph (2), the amount paid under this section for fiscal year 2020 to a State that is 1 of the 50 States shall be the amount equal to the relative population proportion amount determined for the State under paragraph (3) for such fiscal year.

(2) Minimum payment

(A) In general

No State that is 1 of the 50 States shall receive a payment under this section for fiscal year 2020 that is less than $1,250,000,000.

(B) Pro rata adjustments

The Secretary shall adjust on a pro rata basis the amount of the payments for each of the 50 States determined under this subsection without regard to this subparagraph to the extent necessary to comply with the requirements of subparagraph (A).

(3) Relative population proportion amount

For purposes of paragraph (1), the relative population proportion amount determined under this paragraph for a State for fiscal year 2020 is the product of—

(A) the amount appropriated under paragraph (1) of subsection (a) for fiscal year 2020 that remains after the application of paragraph (2) of that subsection; and

(B) the relative State population proportion (as defined in paragraph (4)).

(4) Relative State population proportion defined

For purposes of paragraph (3)(B), the term "relative State population proportion" means, with respect to a State, the quotient of—

(A) the population of the State; and

(B) the total population of all States (excluding the District of Columbia and territories specified in subsection (a)(2)(A)).

(5) Relative unit of local government population proportion amount

For purposes of subsection (b)(2), the term "relative unit of local government population proportion amount" means, with respect to a unit of local government and a State, the amount equal to the product of—

(A) 45 percent of the amount of the payment determined for the State under this subsection (without regard to this paragraph); and

(B) the amount equal to the quotient of—

(i) the population of the unit of local government; and

(ii) the total population of the State in which the unit of local government is located.

(6) District of Columbia and territories

The amount paid under this section for fiscal year 2020 to a State that is the District of Columbia or a territory specified in subsection (a)(2)(A) shall be the amount equal to the product of—

(A) the amount set aside under subsection (a)(2)(A) for such fiscal year; and

(B) each such District's and territory's share of the combined total population of the District of Columbia and all such territories, as determined by the Secretary.

(7) Tribal governments

From the amount set aside under subsection (a)(2)(B) for fiscal year 2020, the amount paid under this section for fiscal year 2020 to a Tribal government shall be the amount the Secretary shall determine, in consultation with the Secretary of the Interior and Indian Tribes, that is 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 the Tribal government (or tribally-owned entity) and determined in such manner as the Secretary determines appropriate to ensure that all amounts available under subsection (a)(2)(B) for fiscal year 2020 are distributed to Tribal governments.

(8) Data

For purposes of this subsection, the population of States and units of local governments shall be determined based on the most recent year for which data are available from the Bureau of the Census.

(d) Use of funds

A State, Tribal government, and unit of local government shall use the funds provided under a payment made under this section to cover only those costs of the State, Tribal government, or unit of local government that—

(1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);

(2) were not accounted for in the budget most recently approved as of March 27, 2020, for the State or government; and

(3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

(e) Certification

In order to receive a payment under this section, a unit of local government shall provide the Secretary with a certification signed by the Chief Executive for the unit of local government that the local government's proposed uses of the funds are consistent with subsection (d).

(f) Inspector General oversight; recoupment

(1) Oversight authority

The Inspector General of the Department of the Treasury shall conduct monitoring and oversight of the receipt, disbursement, and use of funds made available under this section.

(2) Recoupment

If the Inspector General of the Department of the Treasury determines that a State, Tribal government, or unit of local government has failed to comply with subsection (d), the amount equal to the amount of funds used in violation of such subsection shall be booked as a debt of such entity owed to the Federal Government. Amounts recovered under this subsection shall be deposited into the general fund of the Treasury.

(3) Appropriation

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated to the Office of the Inspector General of the Department of the Treasury, $35,000,000 to carry out oversight and recoupment activities under this subsection. Amounts appropriated under the preceding sentence shall remain available until expended.

(4) Authority of Inspector General

Nothing in this subsection shall be construed to diminish the authority of any Inspector General, including such authority as provided in the Inspector General Act of 1978 (5 U.S.C. App.).

(g) Definitions

In this section:

(1) Indian Tribe

The term "Indian Tribe" has the meaning given that term in section 5304(e) of title 25.

(2) Local government

The term "unit of local government" means a county, municipality, town, township, village, parish, borough, or other unit of general government below the State level with a population that exceeds 500,000.

(3) Secretary

The term "Secretary" means the Secretary of the Treasury.

(4) State

The term "State" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa.

(5) Tribal government

The term "Tribal government" means the recognized governing body of an Indian Tribe.

3. 43 U.S.C. 1601(b) provides:

Congressional findings and declaration of policy

Congress finds and declares that—

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a

reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

4. 43 U.S.C. 1606 provides in pertinent part:

Regional Corporations

(a) Division of Alaska into twelve geographic regions; common heritage and common interest of region; area of region commensurate with operations of Native association; boundary disputes, arbitration

For purposes of this chapter, the State of Alaska shall be divided by the Secretary within one year after December 18, 1971, into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. In the absence of good cause shown to the contrary, such regions shall approximate the areas covered by the operations of the following existing Native associations:

(1) Arctic Slope Native Association (Barrow, Point Hope);

(2) Bering Straits Association (Seward Peninsula, Unalakleet, Saint Lawrence Island);

(3) Northwest Alaska Native Association (Kotzebue);

(4) Association of Village Council Presidents (southwest coast, all villages in the Bethel area, including all villages on the Lower Yukon River and the Lower Kuskokwim River);

(5) Tanana Chiefs' Conference (Koyukuk, Middle and Upper Yukon Rivers, Upper Kuskokwim, Tanana River);

(6) Cook Inlet Association (Kenai, Tyonek, Eklutna, Iliamna);

(7) Bristol Bay Native Association (Dillingham, Upper Alaska Peninsula);

(8) Aleut League (Aleutian Islands, Pribilof Islands and that part of the Alaska Peninsula which is in the Aleut League);

(9) Chugach Native Association (Cordova, Tatitlek, Port Graham, English Bay, Valdez, and Seward);

(10) Tlingit-Haida Central Council (southeastern Alaska, including Metlakatla);

(11) Kodiak Area Native Association (all villages on and around Kodiak Island); and

(12) Copper River Native Association (Copper Center, Glennallen, Chitina, Mentasta).

Any dispute over the boundaries of a region or regions shall be resolved by a board of arbitrators consisting of one person selected by each of the Native associations involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Native associations involved.

(b) Region mergers; limitation

The Secretary may, on request made within one year of December 18, 1971, by representative and responsible leaders of the Native associations listed in subsection (a), merge two or more of the twelve regions: *Provided*, That the twelve regions may not be reduced to less than seven, and there may be no fewer than seven Regional Corporations.

(c) Establishment of thirteenth region for nonresident Natives; majority vote; Regional Corporation for thirteenth region

If a majority of all eligible Natives eighteen years of age or older who are not permanent residents of Alaska elect, pursuant to section 1604(c) of this title, to be enrolled in a thirteenth region for Natives who are nonresidents of Alaska, the Secretary shall establish such a region for the benefit of the Natives who elected to be enrolled therein, and they may establish a Regional Corporation pursuant to this chapter.

(d) Incorporation; business for profit; eligibility for benefits; provisions in articles for carrying out chapter

Five incorporators within each region, named by the Native association in the region, shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit, which shall be eligible for the benefits of this chapter so long as it is organized and functions in accordance with this chapter. The articles of incorporation shall include provisions necessary to carry out the terms of this chapter.

(e) Original articles and bylaws: approval by Secretary prior to filing, submission for approval; amendments to articles: approval by Secretary; withholding approval in event of creation of inequities among Native individuals or groups

The original articles of incorporation and bylaws shall be approved by the Secretary before they are filed, and they shall be submitted for approval within eighteen months after December 18, 1971. The articles of incorporation may not be amended during the Regional Corporation's first five years without the approval of the Secretary. The Secretary may withhold approval under this section if in his judgment inequities among Native individuals or groups of Native individuals would be created.

(f) Board of directors; management; stockholders; provisions in articles or bylaws for number, term, and method of election

The management of the Regional Corporation shall be vested in a board of directors, all of whom, with the exception of the initial board, shall be stockholders over the age of eighteen. The number, terms, and method of election of members of the board of directors shall be fixed in the articles of incorporation or bylaws of the Regional Corporation.

(g) Issuance of stock

(1) Settlement Common Stock

(A) The Regional Corporation shall be authorized to issue such number of shares of Settlement Common Stock (divided into such classes as may be specified in the articles of incorporation to reflect the provisions of this chapter) as may be needed to issue

one hundred shares of stock to each Native enrolled in the region pursuant to section 1604 of this title.

* * * * *

(r) Benefits for shareholders or immediate families

The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.

5. 43 U.S.C. 1607 provides:

Village Corporations

(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under chapter

The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

(b) Regional Corporation: approval of initial articles; review and approval of amendments to articles and annual budgets; assistance in preparation of articles and other documents

The initial articles of incorporation for each Village Corporation shall be subject to the approval of the Regional Corporation for the region in which the village is located. Amendments to the articles of incorporation and the annual budgets of the Village Corporations shall, for a period of five years, be subject to review and approval by the Regional Corporation. The Regional Corporation shall assist and advise Native villages in the preparation of articles of incorporation and other documents necessary to meet the requirements of this subsection.

(c) Applicability of section 1606

The provisions of subsections (g), (h) (other than paragraph (4)), and (o) of section 1606 of this title shall apply in all respects to Village Corporations, Urban Corporations, and Group Corporations.

6. 43 U.S.C. 1629c(a)-(b) provides:

Duration of alienability restrictions

(a) General rule

Alienability restrictions shall continue until terminated in accordance with the procedures established by this section. No such termination shall take effect until after July 16, 1993: *Provided*, *however*, That this prohibition shall not apply to a Native Corporation whose board of directors approves, no later than March 1, 1992, a resolution (certified by the corporate secretary of such

corporation) electing to decline the application of such prohibition.

(b) Opt-out procedure

(1)(A) A Native Corporation may amend its articles of incorporation to terminate alienability restrictions in accordance with this subsection. Only one amendment to terminate alienability restrictions shall be considered and voted on prior to December 18, 1991. Rejection of the amendment shall not preclude consideration prior to December 18, 1991, of subsequent amendments to terminate alienability restrictions.

(B) If an amendment to terminate alienability restrictions is considered, voted on, and rejected prior to December 18, 1991, then subsequent amendments to terminate alienability restrictions after December 18, 1991, shall be considered and voted on—

(i) in the case of an amendment submitted by the board of directors of the corporation on its own motion, not earlier than five years after the rejection of the most recently rejected amendment to terminate restrictions; or

(ii) in the case of an amendment submitted by the board of directors of the corporation pursuant to a shareholder petition, not earlier than two years after the rejection of the most recently rejected amendment to terminate restrictions.

(C) If no amendment to terminate alienability restrictions is considered and voted on prior to December 18, 1991, then amendments to terminate alienability restrictions after December 18, 1991, shall be considered and voted on—

(i) in the case of an amendment submitted by the board of directors of the corporation on its own motion, not more than once every five years; or

(ii) in the case of an amendment submitted by the board of directors of the corporation pursuant to a shareholder petition, not more than once every two years.

(2) An amendment authorized by paragraph (1) shall specify the time of termination, either by establishing a date certain or by describing the specific event upon which alienability restrictions shall terminate.

(3) Dissenters rights may be granted by the corporation in connection with the rejection of an amendment to terminate alienability restrictions in accordance with section 1629d of this title. Once dissenters rights have been so granted, they shall not be granted again in connection with subsequent amendments to terminate alienability restrictions.

* * * * *