No. 20-544

In the
Supreme Court of the United States

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

Petitioners,

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

v.

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al.,

Respondents.

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

REPLY BRIEF

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December 23, 2020

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REPLY BRIEF

The case for certiorari here is straightforward and overwhelming. Both the federal government and the intervening Alaska Native Corporations (ANCs) have filed petitions seeking review of a decision that creates an acknowledged circuit conflict. The decision is wrong, it disregards the longstanding executive view, and it upends the established order of Native life in Alaska, while denying emergency aid to a vulnerable population.

Remarkably, respondents attempt to deny all of that. While the D.C. Circuit acknowledged its disagreement with the Ninth Circuit and focused (to a fault) on the state of the law in 1975, respondents insist that its decision affects only the CARES Act and thus that the acknowledged circuit split is illusory. While the federal government seeks review of a decision that it views as rejecting its decades-long administrative construction, respondents second-guess the executive view of the executive's own position. While the State of Alaska, Alaska's congressional delegation, and the Alaska Federation of Natives (AFN) all attest to ANCs' critical role in Native life, the devastating effects of the pandemic in Alaska, and the decision below's threat to longstanding cooperation among Native entities in Alaska, respondents downplay the impact on Alaska and its Natives. In reality, the D.C. Circuit understands its opinion, the federal government understands its position, and the *amici* rooted in Alaska understand the dire situation there. The circuit split, rejection of administrative precedent, and devastating effect on Alaska are all real. This Court should grant certiorari.

I. Respondents' Efforts To Deny The Open And Acknowledged Circuit Split Are Unavailing.

In the Ninth Circuit, ANCs are "Indian tribes" under the Indian Self-Determination and Education Assistance Act (ISDEAA or ISDA) and so are eligible for the myriad federal programs that use the ISDEAA definition; that has been settled for more than three decades. *See Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471 (9th Cir. 1987); Pet.17-20. In the D.C. Circuit, by contrast, ANCs now are *not* ISDEAA "Indian tribes," and are *not* eligible for those same programs, including the CARES Act, which expressly adopts the ISDEAA definition. Pet.App.13-14. That circuit split is undeniable and acknowledged: The D.C. Circuit made clear that it was "declin[ing] to follow" *Bowen*. Pet.App.25.

Respondents nonetheless assert that there is no circuit split because *Bowen* interpreted ISDEAA and the decision below was solely about the CARES Act, not ISDEAA. Confed.BIO.19; Ute.BIO.8; Najavo.BIO.2-4. That remarkable claim does not survive even a cursory reading of the decision below, in which the analysis begins (and largely ends) with the text of ISDEAA and focuses to a fault on Congress' supposed uncertainty about ANCs' status in 1975, when ISDEAA was enacted. The text of the CARES Act, as opposed to ISDEAA, barely makes a cameo. To be sure, the funds at issue were authorized by the CARES Act. But the funds were denied to ANCs because the CARES Act, like so many other federal statutes, *borrowed the ISDEAA definition* and the D.C. Circuit held that ANCs are not ISDEAA tribes. Indeed, while some respondents made and continue to

press an argument specific to the CARES Act—namely, that even if ANCs are tribes under ISDEAA, they are not tribal governments under the CARES Act because they lack "governing bodies," Ute.BIO.9-12; Navajo.BIO.4-20—none of the four judges to consider that argument has accepted it, and with good reason, (*see infra*). Thus, the decision below is plainly a decision about ISDEAA, and it just as plainly conflicts with *Bowen*.

Respondents attempt a similar gambit with the Ninth Circuit, claiming that *Bowen* did not really settle the ISDEAA question, but rather dealt only with "the narrow agency practice at issue" there. Confed.BIO.17. Once again, the decision itself belies respondents' effort to narrow it. The plaintiff in *Bowen*, like plaintiffs/respondents here, argued that ANCs were not "tribes" under ISDEAA despite their express inclusion in the statutory text. The Ninth Circuit squarely rejected that argument and held that ANCs are "tribes" under ISDEAA to "give effect" to "the language" of the statute and avoid "render[ing] one part [of the statute] inoperative." *Bowen*, 810 F.2d at 1474-76. That is exactly the opposite of what the D.C. Circuit held below. *See* Pet.App.10-25. Respondents separately try to recast *Bowen* as all about "deference" to the executive's view that ANCs are ISDEAA tribes. Confed.BIO.17-18. But that would hardly eliminate the conflict, as the D.C. Circuit squarely rejected the executive's interpretation and any claim to deference. *See* Pet.App.24-25.

Respondents next suggest that *Bowen* has been overtaken by events because Congress enacted a statute to authorize the ANC at issue in *Bowen* to

operate certain healthcare facilities. Confed.BIO.17. That claim is doubly mistaken. First, the Ninth Circuit and courts within it continue to treat *Bowen* as governing precedent and ANCs as "tribes" under ISDEAA. *See, e.g.*, *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 988 (9th Cir. 1999); *Ukpeagvik Inupiat Corp. v. U.S. Dep't of Health & Human Servs.*, No. 3:13-CV-00073-TMB, 2013 WL 12119576, at *2 n.21 (D. Alaska May 20, 2013). While respondents try to muddy those clear waters by citing a recent Ninth Circuit tribal sovereign immunity decision, *see* Chehalis.BIO.18, that case has literally nothing to do with—nor even mentions—ISDEAA, ANCs, or Alaska.

Second, the statute respondents invoke (§325(d)), *see* Confed.BIO.17, actually confirms ANCs' status as ISDEAA tribes. Pursuant to §325(d), the regional ANC based in Anchorage and its designated tribal organization (collectively, CIRI) assumed certain of the federal government's responsibilities at Anchorage health facilities serving Natives from throughout Alaska. Because ISDEAA requires a tribe or tribal organization that serves multiple "tribes" to obtain authorizations from each ISDEAA "tribe" served, *see* 25 U.S.C. §5304(*l*), questions arose over whether CIRI would need approval from hundreds of tribes. Section 325(d) resolved the dispute by authorizing CIRI to provide specified services "without submission of any further authorizing resolutions from any other Alaska Native Region, village corporation, Indian Reorganization Act council, or tribe, no matter where located." Pub. L. No. 105-83, §325(d), 111 Stat. 1543, 1598 (1997). As only ISDEAA "tribes" can provide authorizing resolutions, Congress' decision to forgo authorizing resolutions

from "other" ANCs confirms its understanding that ANCs are ISDEAA "tribes." Moreover, since §325(d) confirmed CIRI's authority only for certain specified services, *Bowen* continues to control CIRI's ISDEAA authority to provide other services and the ISDEAA authority of all other ANCs throughout Alaska.

Nor is it plausible that the decision below and *Bowen* can peacefully coexist. In the Ninth Circuit, home to every ANC, ANCs are ISDEAA "Indian tribes" and thus remain eligible to contract and compact with the federal government for Indian law programs and services. In the D.C. Circuit, home to the agencies that administer federal Indian law programs and services, ANCs now are *not* ISDEAA "Indian tribes" and *not* eligible for those same programs and services. Every ANC can obtain a declaratory judgment of eligibility within the Ninth Circuit, and any FRT can seek to disqualify ANCs in the District. That situation is untenable. "Until the clash between the Ninth Circuit (*Bowen*) and D.C. Circuit is resolved, confusion will reign, to the detriment of Alaska Natives." AFN.Br.24.

II. The Decision Below Is Wrong.

1. Respondents cannot escape the fundamental problem that reading ISDEAA's "Indian tribe" definition to exclude ANCs *despite their express inclusion in the statute* defies the text Congress enacted in 1975 (and reenacted in 1988). ISDEAA defines "Indian tribe" to mean:

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established

> pursuant to [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). ANCs—*i.e.*, "Alaska Native … regional [and] village corporation[s] … established pursuant to [ANCSA]"—are thus quite literally "includ[ed]" in ISDEAA's definition of "Indian tribe." To hold that ANCs are not ISDEAA "Indian tribes" would read an entire clause, deliberately added late in the legislative process for the sole purpose of including ANCs, out of the statute.

Respondents suggest that the superfluity problem is not as bad as it seems because "the universe of" FRTs recognized under the List Act "expands and contracts over time." Confed.BIO.26. But respondents do not deny that the list has never expanded to include any ANC, and they offer no theory of how it ever could given that ANCs were established as *sui generis*, non-sovereign entities by ANCSA. Nor do respondents confront the anachronism that Congress created ANCs in 1971 "*never* intend[ing] that ANCs would be 'recognized' as separate sovereign political bodies," Alaska.Br.4; *see* Delegation.Br.9, and yet *specifically added them* just four years later to legislative language that already included the "recognized as eligible" clause, *see* U.S.Pet.23-24. Rather than asserting an unprecedented case of collective amnesia, respondents just note that some "Alaska Native *villages*" are "recognized" under the List Act. Confed.BIO.26 (emphasis added). But far from solving the superfluity problem, that reinforces it, as ISDEAA's definition expressly includes "any

Alaska Native village" *separately from* its inclusion of "regional or village corporation[s] … established pursuant to [ANCSA]," 25 U.S.C. §5304(e); *see* Pet.App.59, and Native villages were already included in the legislative language before ANCs were added, *see Hearings Before the Subcommittee on Indian Affairs: S. 1017 and Related Bills*, 93d Cong., 2, 118 (May 20, 1974).

Respondents likewise have no meaningful response to the countless subsequent legislative acts that confirm that Congress understood ANCs to be included in the ISDEAA definition all along. As to Congress' 1988 reenactment of the ISDEAA definition after both the executive and the Ninth Circuit had confirmed ANCs' status as ISDEAA tribes, respondents have little to say: They merely observe that Congress tweaked other definitions, while reenacting the "Indian tribe" definition without change. Exactly. When Congress reenacts language without modification while altering other language, the inference that Congress is aware of and endorses the shared administrative and judicial construction of that language is at its zenith. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012). Respondents quibble that *Bowen* was just a single appellate decision, but it was a decision from the home circuit of every ANC, and it accepted an administrative construction nearly contemporaneous with ISDEAA. Moreover, the inference that Congress was aware of and endorsed *Bowen* is reinforced by its enactment of §325(d), which, as noted, reinforces the view that ANCs are ISDEAA tribes (that can give or withhold consent for multi-tribal undertakings).

Respondents have even less to say about the numerous other later-enacted statutes that plainly evince Congress' understanding that ANCs satisfy ISDEAA's definition of "Indian tribe." *See* Pet.25-26. Indeed, if the decision below is right, then dozens of federal statutes, many enacted after the List Act, will collapse on themselves or contain inexplicable references to tribes "recognized … pursuant to [ISDEAA]." *E.g.*, 25 U.S.C. §4103(13)(B). Respondents offer no substantive response, other than that those statutes are not at issue. But when respondents' entire argument hinges on a claim that the term "recognized" has some uniform, term-of-art meaning throughout federal Indian law, they cannot simply ignore the problem that Congress routinely uses both ISDEAA's definition of "Indian tribe" and the term "recognized" in ways that flatly refute their claim.

Respondents nonetheless contend that "the restrictive force of the recognition clause" compelled the D.C. Circuit to conclude that the statute somehow excludes an entire category of entities that it expressly "includ[es]." Confed.BIO.26. But no principle of grammar or statutory construction compels courts to interpret statutory text as "at war with itself." U.S.Pet.13-14. If the recognition clause has a term-of-art meaning referencing the kind of historical and sovereign status reflected in List Act recognition, then it is plainly inapplicable to ANCs, as the executive has long maintained. There is no basis for combining nouns and modifiers in ways that are "linguistically impossible" or result in a "contradiction in terms." *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1141 (2018). An "ANC, which is recognized pursuant

to the List Act," is (and always has been) just such an oxymoronic null set. If, by contrast, the recognition clause is given its ordinary plain meaning, then ANCs readily satisfy the clause. Not only have "all three branches of the federal government" recognized ANCs as "'Indian tribes' under ISDA," Alaska.Br.4, but ANCs have participated in "the special programs and services provided by the United States to Indians because of their status as Indians" for nearly 45 years, *see* Delegation.Br.13-14. Either of those readings is vastly preferable to one that ousts ANCs from ISDEAA (and pandemic-relief funding) despite Congress' express decision to include them.

Respondents further protest that giving the text its ordinary meaning "would extend recognition to *any* Indian group receiving *any* services, including *non*-federally recognized tribes." Confed.BIO.30. But qualifying as a "tribe" for *statutory* purposes—under ISDEAA, the CARES Act, or any of the many other federal statutes incorporating ISDEAA's definition, *see* Delegation.Br.16-19 & App.B—does not confer recognition in the specialized historical sense used by the List Act, which depends on whether "the Secretary of the Interior acknowledges [the group] to exist as an Indian tribe." 25 U.S.C. §5130(2). Nor would confirming ANCs' "Indian tribe" status under ISDEAA mean that "[f]ederal officials could … grant and revoke tribal status with a tweak to program eligibility." Confed.BIO.30-31. ANCs' eligibility is established in ANCSA and confirmed in ISDEAA itself. *See* U.S.Pet.30-31. It does not depend on administrative fiat.

2. Rather than defend the decision below or focus on the text of ISDEAA, two sets of respondents advance an alternative argument that no judge has accepted—namely, that even if ANCs are "Indian tribes" under ISDEAA, they are not "tribal governments" under the CARES Act because ANCs lack "recognized governing bodies." Ute.BIO.9-12; Navajo.BIO.4-20. The district court squarely rejected that argument, Pet.App.70-78, and the D.C. Circuit did not even bother to address it, preferring instead to construe ISDEAA and create a circuit split.

This alternative argument has been unsuccessful for a reason. The CARES Act cross-references ISDEAA's definition of "Indian tribe" solely for purposes of defining "Tribal government." Thus, arguing that ANCs may be "tribes" but not "tribal governments" is akin to arguing that a statute giving funds to "state governments" and expressly defining "state" to include the District of Columbia nonetheless gives the District no funds because it lacks a state government. Moreover, ANCs quite plainly have "recognized governing bodies" in their boards of directors. In the end, this meritless argument just underscores that the decision below turned solely on the language of ISDEAA for a reason: If ANCs are "tribes" for ISDEAA purposes, as the text provides and decades of judicial and administrative decisions confirm, there is no plausible argument for excluding ANCs and their members from desperately needed relief funds.

III. The Question Presented Is Exceptionally Important.

The stakes here are extraordinary, both in terms of the immediate crisis and going forward. Everyone familiar with Alaska—the State, the congressional delegation, and AFN—has confirmed two central facts: 1) for decades, ANCs have played a critical and cooperative role in getting federal statutory benefits to Alaska Natives; and 2) the current situation is dire and exacerbated by the fact that ANCs have yet to receive a penny in Title V funding. As to the former, respondents simply insist that ANCs' participation in ISDEAA, NAHASDA, and countless other statutes has been *ultra vires*. That argument is deeply flawed, but it only underscores the stakes. Respondents suggest that ANCs may still play a role in distributing ISDEAA funds by serving as a "tribal organization" designated by a FRT. But, for decades, ANCs have participated as ISDEAA "tribes," not as someone else's designee—and ANCs play their greatest role, in terms of sheer volume of Natives served, in areas where there are very few FRTs to do any designating. The reality, as the Alaska-based *amici* have all confirmed, is that ANCs play a critical role in distributing federal funds to Natives in Alaska because they are tribes under ISDEAA and have long been recognized as such.

As to the devastating impact of the pandemic on Alaska and its Natives, respondents follow the decision below in suggesting that "either the State of Alaska or [HHS] will be able to fill the void," Pet.App.26. But the federal government has acknowledged that there is no mechanism through which it could move CARES Act funds earmarked for

ANCs to the State or HHS, U.S.Pet.32-33, and the State has made clear that it is not "financially or administratively capable of" filling the void and "providing the programs and services ANCs … have long provided," Alaska.Br.5, 20-25. More perniciously, some respondents suggest that their successful effort to prevent a single cent of Title V funding from flowing to ANCs has precipitated no great crisis, because a few ANCs have received some PPP funds. These respondents apparently forget that tribal business entities, such as FRTs' own casinos, are expressly included among the entities eligible for PPP funds, *see* 15 U.S.C. §636(a)(36)(D)(i); *id.* §657a(b)(2)(C), and that a number of FRTs themselves—*i.e.*, in addition to their separately-chartered casinos—have obtained PPP funds directly, *see* ProPublica, https://bit.ly/33nkeKM (last visited Dec. 22, 2020).

Finally, respondents urge this Court to deny review because FRTs desperately need the Title V funds held up pending final resolution of this litigation. Confed.BIO.36-40. But the only undistributed funds are those the Secretary earmarked for ANCs. FRTs have already received the substantial sums allocated to them—well over $7 billion. ANCs, by contrast, have not received a penny, even though Alaska Natives suffer disproportionately from the pandemic and face geographical and logistical challenges that make relief efforts uniquely expensive. In short, there is an ongoing crisis in Alaska and an urgent need to release withheld federal relief funds. But the solution lies not in denying review and relief to Alaska Natives, but in granting review and restoring Congress' intent to allow ANCs

to redress the pandemic and to participate in countless federal programs employing the ISDEAA definition.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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