

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JANET L. YELLEN,)
SECRETARY OF THE TREASURY,)
Petitioner,)
v.) No. 20-543
CONFEDERATED TRIBES OF THE)
CHEHALIS RESERVATION, ET AL.,)
Respondents.)

ALASKA NATIVE VILLAGE CORPORATION)
ASSOCIATION, INC., ET AL.,)
Petitioners,)
v.) No. 20-544
CONFEDERATED TRIBES OF THE)
CHEHALIS RESERVATION, ET AL.,)
Respondents.)

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1220 L Street, N.W., Suite 206

Washington, D.C. 20005

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1 APPEARANCES:

2

3 MATTHEW GUARNIERI, Assistant to the Solicitor General,
4 Department of Justice, Washington, D.C., for the
5 Petitioner in Case No. 20-543.

6 PAUL D. CLEMENT, ESQUIRE, Washington, D.C.; on behalf
7 of the Petitioners in Case No. 20-544.

8 JEFFREY S. RASMUSSEN, ESQUIRE, Louisville, Colorado;
9 on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 20-543,
5 Yellen versus the Confederated Tribes, and the
6 consolidated case.

7 Mr. Guarnieri.

8 ORAL ARGUMENT OF MATTHEW GUARNIERI

9 ON BEHALF OF THE PETITIONER IN CASE NO. 20-543

10 MR. GUARNIERI: Mr. Chief Justice, and
11 may it please the Court:

12 Our fundamental submission in this
13 case is that in defining "Indian Tribe" for ISDA
14 purposes, Congress did not deliberately include
15 Alaska native regional and village corporations
16 only to then exclude all of them by subjecting
17 them to a formal political recognition
18 requirement that no ANC meets or, indeed, has
19 ever met.

20 Instead, the settled understanding for
21 the last 45 years has been that ANCs are
22 eligible to be treated as Indian Tribes for ISDA
23 purposes, even though ANCs are not and have
24 never been federally recognized Indian Tribes.
25 That interpretation has been endorsed by all

1 three branches of the federal government.

2 Congress was acting against the
3 backdrop of those settled understandings when it
4 incorporated the ISDA definition of "Indian
5 Tribe" into the CARES Act in 2020. Congress
6 chose to make ANCs eligible to receive millions
7 of dollars of coronavirus relief funds to
8 benefit the many Alaska natives whom they serve.

9 The decision below contravenes that
10 policy judgment and threatens to shut ANCs out
11 of a wide range of important federal programs.
12 No sound principle of textual interpretation
13 justifies such a dramatic departure from the
14 status quo. Reading the ISDA definition to mean
15 that ANCs are included only in the event that
16 they are someday somehow recognized by the
17 United States for government-to-government
18 relations would render their deliberate
19 inclusion in the statute a dead letter. Either
20 the recognition clause must mean something else
21 or it does not apply to ANCs.

22 Now we principally urge the latter
23 approach, which the Department of the Interior
24 and the Indian Health Service adopted decades
25 ago and which the Ninth Circuit endorsed in the

1 Cook Inlet case.

2 In our view, Congress defined the
3 entities eligible to enter into ISDA agreements
4 as federally recognized Indian Tribes and also,
5 in addition, the entities that play a similar
6 role in the special case of Alaska, namely
7 Alaska native villages and Alaska native
8 corporations defined in and established pursuant
9 to ANCSA. That reading, unlike Respondents'
10 reading, gives effect to every word and clause
11 in the statute.

12 I welcome the Court's questions.

13 CHIEF JUSTICE ROBERTS: Counsel, as I
14 think you confirmed in this opening statement,
15 you rely heavily on the legislative history, the
16 congressional purpose, the post-enactment
17 history, and there was a time when this Court
18 also relied on those sources, but this -- this
19 is not that time.

20 And what is the best case you can cite
21 from recent years for your -- your general
22 approach?

23 MR. GUARNIERI: Well, I think the case
24 that -- that we find the most instructive is the
25 Court's decision against -- in United States

1 against Hayes, which is the case discussed in
2 our opening brief. In Hayes, the Court was
3 considering a statutory definition of the term
4 "misdemeanor" -- "domestic misdemeanor" violent
5 -- or, sorry, "misdemeanor crime of domestic
6 violence," and the -- the statutory definition
7 there had a prefatory clause and then two
8 subsections, and the question before the Court
9 was how to apply a modifier in the second
10 subsection.

11 And based on textual and contextual
12 evidence, the Court concluded that the modifier
13 that appeared in the second subclause of that
14 definition actually applied to its -- its
15 antecedent was one of the words in the prefatory
16 clause at the beginning of the definition.

17 And we think we're asking the Court
18 here for -- for an even less sort of -- the
19 interpretation that we're urging here is even
20 more naturally sort of derived from the text
21 than the interpretation the Court adopted in
22 Hayes.

23 And also, you know, to your -- to your
24 point, Mr. Chief Justice, I mean, we are making
25 a textual argument. It's not entirely

1 purposive. And -- and it's a text -- it's a
2 textual argument derived from ISDA's definition,
3 as well as from the other statutes that Congress
4 has enacted that in their text presuppose that
5 ANCs are eligible to be treated as Indian
6 Tribes.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas.

10 JUSTICE THOMAS: Thank you, Mr. Chief
11 Justice.

12 Counsel, would you give us again --
13 would you repeat -- maybe I missed it -- your --
14 your textual argument again?

15 It seems like the -- there -- it seems
16 -- I don't know how you cannot have the -- the
17 -- the phrase or clause at the end modifying the
18 entire list.

19 MR. GUARNIERI: Well, Justice Thomas,
20 the -- the textual argument is that if -- if you
21 look at -- the definition of ISDA should not be
22 read to include ANCs in a -- in -- Congress did
23 not deliberately and specifically refer to
24 Alaska native village and regional corporations
25 established pursuant to a then-recent federal

1 law only to exclude them in the very next
2 clause. We don't think the statute should be
3 read to be at war with itself.

4 JUSTICE THOMAS: Yeah, but what do you
5 do with the recognized language?

6 MR. GUARNIERI: Well, we think that
7 that clause, as the Interior Department
8 concluded in 1976 shortly after ISDA was
9 enacted, we think that clause is simply
10 inapplicable to the entities listed in the
11 Alaska clause and that that's really the -- the
12 only reading or the reading of the statute that
13 would avoid the glaring super -- super-fluidity
14 problem that the D.C. Circuit's reading created.

15 And, of course, as an -- as an
16 alternative, we have also advanced in this Court
17 the argument that, if you understand the
18 recognition clause to apply to the entities
19 listed in the Alaska clause, then recognition
20 cannot refer exclusively to formal federal
21 recognition for government-to-government
22 relations but must also include the lesser form
23 of recognition that Congress itself bestowed
24 upon ANCs by including them in the ISDA
25 definition.

1 JUSTICE THOMAS: In the subsequent
2 funding bills, has Congress with this --
3 recognizing that there's been this litigation,
4 does Congress use different language?

5 MR. GUARNIERI: Congress has gone both
6 ways on that issue, Justice Thomas. I mean, in
7 -- in the law that Congress enacted, I -- I
8 assume your -- your question is about the recent
9 coronavirus legislation?

10 JUSTICE THOMAS: Exactly.

11 MR. GUARNIERI: Well, in -- in the law
12 that Congress enacted in December of 2020,
13 Congress provided funds for housing programs
14 under a preexisting federal statute that
15 incorporates, in part, the ISDA language. And
16 Congress included a proviso there saying that,
17 for -- for the avoidance of doubt, that
18 definition includes ANCs.

19 Now, in the most recent law, the
20 America Rescue Plan Act, Congress provided
21 additional funds, coronavirus relief funds to
22 state and local governments and to tribal
23 governments using the List Act definition, which
24 excludes ANCs. So Congress determined not to
25 include ANCs in that program.

1 And, of course, Congress could have
2 done that in the CARES Act. It could have
3 reached for the List Act definition, which
4 everyone understands does not include ANCs, but
5 Congress instead used the -- the ISDA
6 definition, which has been uniformly understood
7 for decades to make ANCs eligible.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: I'm -- I'm just
12 curious as to whether -- what CARES Act
13 expenditures necessary related to COVID, et
14 cetera, do the Alaska corporations make that
15 kind of expenditure? Are there examples of
16 where they did or would normally or -- or it was
17 necessary, in other words, necessary is in the
18 CARES Act?

19 MR. GUARNIERI: Yes, Your Honor. I
20 think the -- the amicus brief filed by Cook
21 Inlet Region Incorporated, which is the regional
22 ANC covering the Alaska area, goes into that in
23 some detail. I mean, ANCs provide social
24 services to their members. And in the course of
25 doing so, they -- they have and can incur

1 necessary expenditures in response to the
2 pandemic, things like the purchase of personal
3 protective equipment, modifying facilities for
4 safe social distancing.

5 JUSTICE BREYER: Okay. I -- I see
6 that. What's actually bothering me here is I
7 gather there are roughly 150 statutes that
8 definitionally refer to the -- the -- the
9 language -- refer to the statute at issue here,
10 is that the ISDA, that's the -- that's the
11 statute, right, that has the definition. Okay.

12 I don't know what's in that 150
13 statutes. I suspect that some of them could
14 make sense to apply to the corporation, the
15 Alaska Indian -- the corporations, and some it
16 doesn't.

17 So I have a very hard time -- have you
18 been through those? Do we know that the view
19 that the -- you're -- you're taking now is -- is
20 -- is going to work in all those 150 statutes?

21 MR. GUARNIERI: Well, Justice Breyer,
22 we -- we have reviewed those statutes.

23 JUSTICE BREYER: Yeah.

24 MR. GUARNIERI: And I -- I agree that
25 the ISDA definition is quite frequently --

1 quite frequently appears in the U.S. code,
2 either by cross-reference or -- or by Congress
3 having used the same language.

4 Now, as we discussed at pages 33 to 34
5 of our opening brief, there are statutes in
6 which there are other textual and contextual
7 clues that indicate that either ANCs are not
8 included for other reasons or ANCs -- the
9 programs are sort of inapplicable to ANCs.

10 JUSTICE BREYER: Yeah.

11 MR. GUARNIERI: So I don't, you know
12 --

13 JUSTICE BREYER: How do you do that?
14 I mean, that's -- that's what I can't quite
15 figure out, because there's an argument, you
16 know, that even if the ISDA applies, the CARES
17 Act doesn't apply.

18 But I don't see, once you say the
19 ISDA, once that definition applies, and it's a
20 statute that really doesn't make sense to put
21 this kind of corporation in it, how do you read
22 them out of it?

23 MR. GUARNIERI: Well, I -- I think, in
24 general, it's a separate analysis for each
25 statute. I think, you know, one of the most

1 persuasive pieces of textual evidence -- and, of
2 course, there are -- there are instances in
3 which Congress has used the ISDA definition --

4 JUSTICE BREYER: Mm-hmm.

5 MR. GUARNIERI: -- and then has
6 expressly excluded the -- the Native Village --

7 JUSTICE BREYER: Yeah, yeah, yeah, I
8 grant you that.

9 MR. GUARNIERI: -- and that -- that --
10 that really only makes sense if Congress
11 understands the ISDA definition to include ANCs
12 as --

13 JUSTICE BREYER: All right. So that's
14 -- that's -- now you got me where -- thank you.
15 That's really helpful.

16 CHIEF JUSTICE ROBERTS: Justice Alito.

17 JUSTICE ALITO: Mr. Guarnieri, I -- I
18 think you have an absurdity argument, and I will
19 ask Respondents' counsel about that. But, if
20 you can't prevail on that basis, I can see one
21 textual argument that could possibly work for
22 you, and you make it only in passing, and that
23 is that the clause "which is recognized as
24 eligible" doesn't mean formal recognition in the
25 sense in which Indian Tribes are recognized.

1 Do you have any other textual
2 argument?

3 MR. GUARNIERI: Well, yes, Justice
4 Alito. I mean, our -- our -- well, first, we
5 would accept a decision by this Court on that
6 alternative ground, but, I mean, as to our
7 principal argument, I think the textual argument
8 is that the word "including" here functions as a
9 term of enlargement rather than to denote a
10 subset of -- of the specified entities.

11 JUSTICE ALITO: Yeah, I know. I
12 understand that point. I think that's possible.
13 I don't see how it helps you, because you still
14 have a clause modifying a list, and you want it
15 to jump over the last item in the list.

16 That's really odd, isn't it?

17 MR. GUARNIERI: I -- I take the point.
18 Let -- let me try a plain English example to
19 illustrate how -- how we think the ISDA
20 definition works here.

21 I mean, suppose a state were to
22 prioritize for vaccinations all doctors, nurses,
23 and other healthcare workers, including their
24 spouses and minor children, whose jobs require
25 frequent contact with the public.

1 Now I think, in context, one would
2 naturally understand that the final clause in
3 that, the clause referring to jobs requiring
4 frequent contact with the public, really only
5 modifies and in context can only be understood
6 to modify the doctors, nurses, and other
7 healthcare workers who appear in the list at the
8 beginning.

9 And then there's just an including
10 clause stuck in the middle there, and perhaps
11 not the most elegant place, but in a place that
12 makes clear that the intent is to expand that
13 category of, you know, front-line workers to
14 also include their families and minor children.

15 And that's what Congress did in the
16 ISDA definition. Congress -- Congress -- the --
17 the definition is best read to refer to
18 federally recognized Indian Tribes and then also
19 including, in addition, the specific Alaska
20 native village and regional corporations that
21 Congress singled out for inclusion in an
22 Alaska-specific clause.

23 JUSTICE ALITO: All right. Well,
24 that's very close to what I refer to as the
25 absurdity argument.

1 If we were to take the other possible
2 textual approach and say that recognize doesn't
3 mean formal recognition, what effect would that
4 have in other statutes that use this same
5 definition?

6 Would you be willing to accept that,
7 or do you want -- would you want us to say this
8 is what it means only in the CARES Act and not
9 in the other statutes in which the same
10 definition is used?

11 MR. GUARNIERI: Well, Justice Alito, I
12 -- I think our alternative argument is a little
13 -- slightly different. I mean, I think we would
14 say that recognition -- on the alternative
15 argument, recognition doesn't refer exclusively
16 to federal recognition for
17 government-to-government relations.

18 but can also refer to the lesser
19 status that Congress conferred on ANCs. And --
20 and there's a reason I would emphasize that
21 distinction, and -- and it's that, you know -- I
22 mean, ISDA contracting is not entirely
23 discretionary, and so we do have some concern
24 that other organized groups of Indians who are
25 not federally recognized Indian Tribes would be

1 coming in and demanding that the Interior
2 Department engage in ISDA contracting with
3 them --

4 JUSTICE ALITO: All right. Thank you,
5 counsel. My time is up.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor.

8 JUSTICE SOTOMAYOR: Counsel, I -- I'm
9 a bit concerned, the way Justice Breyer is,
10 about what our ruling would mean here, and it's
11 consistent, in part, with what Justice Alito has
12 just asked you, which is how do we rule in a
13 narrow way that affects only the CARES Act and
14 not the many other acts that are involved where
15 ISDA mentioned the Johnson-O'Malley Act, the
16 Snyder Act, which I think is now the Indian
17 Health Improvement Act, and the Transfer Act?

18 But I'm also understanding, I believe,
19 and you can confirm or disaffirm, that there are
20 many other housing assistance, healthcare, and
21 social service to thousands of Alaska natives
22 each year by the ANCs.

23 Would our -- if we were to accept
24 Respondents' position and the D.C. Circuit's
25 holding below that ISDA does not -- cannot

1 include anyone but federally recognized tribes,
2 would we be putting at risk all of those other
3 services?

4 MR. GUARNIERI: Well, yes, Justice
5 Sotomayor --

6 JUSTICE SOTOMAYOR: And, if so, is the
7 federal government prepared to step in and
8 provide those services?

9 MR. GUARNIERI: Well, I -- that's --
10 that's exactly right, Justice Sotomayor. A
11 decision affirming the D.C. Circuit here and
12 adopting Respondents' construction would call
13 into question the treatment of ANCs under
14 numerous other federal laws that currently
15 provide important federal benefits to Alaska
16 natives, including housing assistance and energy
17 assistance.

18 And, you know, to -- to your broader
19 point, Justice Sotomayor, I mean, the -- the --
20 the interpretation that we are propounding here
21 is the interpretation that has prevailed for 45
22 years and that was the backdrop for Congress's
23 enactment of numerous other programs
24 incorporating the ISDA language. And so a
25 decision in Respondents' favor would threaten to

1 really --

2 JUSTICE SOTOMAYOR: Okay.

3 MR. GUARNIERI: -- seriously disrupt
4 the intent of the clause.

5 JUSTICE SOTOMAYOR: So, counsel, give
6 us the narrowest ruling that would let
7 Respondents win and not put those contracts at
8 risk.

9 MR. GUARNIERI: Well, of course,
10 Justice Sotomayor, we -- we think the
11 Respondents should not win. I mean, we're here
12 principally --

13 JUSTICE SOTOMAYOR: I -- I -- I -- I
14 respect that, counsel. I'm asking you to tell
15 me --

16 MR. GUARNIERI: Sure, sure. I -- I --
17 I take the point. Well, as between the -- the
18 arguments offered on the other side, a decision
19 finding that ANCs are excluded from receiving
20 CARES Act funds by some specific language in the
21 CARES Act, for example, the definition of a
22 tribal government in the CARES Act, would mean
23 that ANCs are ineligible to receive these
24 particular CARES Act funds but would not
25 necessarily call into their -- question their

1 eligibility to be treated as Indian Tribes for
2 ISDA purposes under the broader corpus of Indian
3 laws. So, certainly, a CARES Act-specific
4 decision would be a much more narrower ground.

5 The D.C. Circuit here really decided
6 the case on the broadest possible ground. I
7 mean, in the CARES Act dispute, the D.C. Circuit
8 concluded that ANCs have never been eligible to
9 be treated as Indian Tribes for ISDA purposes,
10 despite decades of practice to the contrary.

11 CHIEF JUSTICE ROBERTS: Justice Kagan.

12 JUSTICE KAGAN: Mr. Guarnieri, would
13 it be fair to say that your textual argument
14 really isn't a textual argument; it's an
15 argument that Congress just made a mistake?

16 MR. GUARNIERI: I -- Justice Kagan,
17 I'm not -- I'm not going to sit here and say
18 that this is the best possible way to draft a
19 statute of all of the possible ways to draft a
20 statute --

21 JUSTICE KAGAN: Well, I think we can
22 all agree on that. I mean, the question is -- I
23 mean, you're saying, look, they wouldn't have
24 put something in just to put something -- take
25 something out. I understand that.

1 But there's just no grammatical way to
2 read this statute the way you want to read it,
3 no grammatical way, which isn't to say that
4 that's not what Congress intended. I mean, I
5 would have thought that what you're really
6 saying is Congress made a bad grammatical error,
7 but we know what they meant.

8 MR. GUARNIERI: I -- I -- I think
9 that's a fair characterization, Justice Kagan.
10 I mean, in Hayes, the decision that I referred
11 to earlier in my colloquy with the Chief
12 Justice, the Court described the statute as less
13 than meticulously drafted, and I think we're
14 probably in that category here.

15 But, as you said, I mean, I think it's
16 very clear what the meaning of this statute was,
17 and that's why --

18 JUSTICE KAGAN: But then -- then the
19 question becomes, is it? You know, because I
20 think it's a high bar before we're so confident
21 that Congress made a mistake that we just say we
22 think Congress made a mistake, but they meant
23 something else.

24 MR. GUARNIERI: Right.

25 JUSTICE KAGAN: And -- and that comes

1 to this question of could they have meant what
2 they appear to mean, if you just look at the
3 text, which is that they included the ANCs so
4 that if those ANCs were recognized in the
5 future, they would qualify?

6 MR. GUARNIERI: Well, there's just
7 absolutely no hint in -- in the history of ISDA
8 that -- that Congress understood ANCs to be
9 included only on the condition that Congress
10 itself, in the future, were to somehow decide to
11 recognize for government-to-government relations
12 these recently established and privately owned
13 corporations.

14 We just don't think that that's a --
15 it's a -- a contextually implausible
16 result that --

17 JUSTICE KAGAN: But wasn't there,
18 Mr. Guarnieri, some uncertainty at the time
19 about what kinds of Alaskan groups would be
20 recognized? I mean, we often say that Alaska is
21 different. And that seems to be the case here,
22 that the government had recognized native groups
23 without traditional historic bonds. ANCs would
24 have resembled tribes in that they owned land.
25 I mean, we just have sort of different groups

1 here, and why might Congress not have thought,
2 well, we'll see how it all plays out and maybe
3 one day, given the -- the circumstances of
4 Alaska, these groups will be recognized?

5 MR. GUARNIERI: Justice Kagan, the --
6 the principal consideration going the other way
7 is that for 180 years, one of the core elements
8 of the United States Indian law has -- has been
9 the idea that Indian Tribes are possessed of an
10 inherent sovereignty, a sovereignty that is not
11 conferred on them by federal or state law.

12 And that is simply not true for ANCs,
13 and it has never been true, and it would have
14 been apparent to the Congress at the time it
15 enacted ISDA that it was not true. ANCs were
16 established pursuant to a special federal law.
17 They are incorporated under state law. And they
18 are not sovereign entities. And -- and that was
19 evident to everyone at the time.

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch.

23 JUSTICE GORSUCH: Good morning,
24 counsel. Putting aside what -- what has been
25 called the absurdity argument and just focusing

1 on the -- the last clause of the text, the
2 recognition clause, and assuming that that means
3 something and applies to ANCs, the D.C. Circuit
4 suggested that that's a settled term of art and
5 it refers to government-to-government relations.

6 What's your response to that argument?

7 MR. GUARNIERI: Well, I -- you know,
8 in -- in the lower courts, we also advocated
9 that the recognition clause should be understood
10 to refer to recognition in the formal
11 term-of-art sense, and that's an important
12 premise for our -- our main argument, which is
13 that the clause, as a matter of context, really
14 cannot be read to include the ANCs.

15 Now, in this Court, we have also --

16 JUSTICE GORSUCH: So am I right in
17 understanding that -- that, you know, that --
18 that -- that you think it is a term of art and
19 that it does refer to government-to-government
20 relations?

21 MR. GUARNIERI: Yes, Justice --
22 certainly, language like that has come to be
23 understood as a term of art. It's less clear to
24 us that that would have been apparent to
25 Congress in 1975 when it enacted ISDA.

1 I mean, the precise language at issue
2 here, "recognized as eligible," that phrase was
3 not common. It had appeared in perhaps a
4 handful of statutes prior to ISDA, but there was
5 no sort of longstanding -- no --

6 JUSTICE GORSUCH: You've got no --
7 you've got no better -- no better solution than
8 to -- than to agree that it's a formal term of
9 art referring to government-to-government
10 relations?

11 MR. GUARNIERI: Well, that's the way
12 that the executive branch has understood it
13 for -- in practice for the last several decades,
14 and -- and --

15 JUSTICE GORSUCH: Okay.

16 MR. GUARNIERI: -- we have also
17 understood it not to apply ANCs. That's the
18 settled construction, and it was the settled
19 construction when Congress incorporated that --
20 the meaning of ISDA into the CARES Act in 2020.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Chief
25 Justice.

1 Good morning, Mr. Guarnieri. I just
2 want to follow up on Justice Gorsuch's questions
3 there. I read your alternative argument in the
4 brief that -- to say that you agree with the
5 other Petitioner that we shouldn't read it as a
6 term of art. So I'm a little confused about
7 what your argument is.

8 MR. GUARNIERI: Well, Justice
9 Kavanaugh, it's -- it's an argument in the
10 alternative. I mean, our principal argument is
11 that the recognition clause refers to
12 recognition as a term of -- as a term of art for
13 formal -- the establishment and
14 institutionalization of formal
15 government-to-government relations, and -- and
16 that's why it cannot be read to apply to the
17 ANCs, because there's simply no sound basis to
18 think that Congress had in mind that ANCs would
19 be included only in the event that they were
20 somehow in the future recognized for
21 government-to-government relations.

22 Now, in the alternative, if the -- if
23 the Court disagrees with us on that point, then
24 we would -- we would argue that a -- a
25 reasonable and certainly a reading that is

1 available to the Court is that the recognition
2 clause applies to the ANCs but that it doesn't
3 refer exclusively to recognition in that
4 term-of-art sense.

5 Both of those constructions would be
6 far better than the D.C. Circuit's
7 constructions, which render the Alaska-specific
8 -- render the deliberate inclusion of ANCs just
9 a dead letter in the statute.

10 JUSTICE KAVANAUGH: To pick up on
11 questions, I think, Justice Breyer and Justice
12 Alito and Justice Sotomayor were asking about
13 the implications for other statutes, we have a
14 number of amicus briefs saying, for example, the
15 brief for the senators and congressmen saying
16 the potential ramifications would be staggering
17 if your position would not prevail.

18 The Cook Inlet one says -- says it
19 would destabilize the entire tribal health and
20 social services system in Alaska. The brief of
21 the Alaska Federation of Natives says similar
22 things.

23 Do you agree with that, or is there --
24 or not?

25 MR. GUARNIERI: We do -- we do agree

1 with that. We have grave concerns about what
2 the effects of affirming the D.C. Circuit's
3 decision here would be on a wide range of other
4 federal programs.

5 Now, as -- as -- as a -- as a matter
6 of practice, there are relatively few ISDA
7 agreements currently in force, other than the
8 ISDA agreement that the Cook Inlet Region
9 incorporated, the ANC for the Anchorage area,
10 has to deliver federally funded healthcare
11 services to Alaska natives in Anchorage.

12 And, you know, with respect to that
13 specific ISDA agreement, Congress enacted a
14 statute that provides -- arguably provides a
15 statutory basis for that separate and apart from
16 ISDA.

17 So we're not -- we're not entirely
18 sure what the effect of a decision would be on
19 series arrangements, but, certainly, we are
20 gravely concerned about, you know, the
21 destabilizing effect of disrupting what has been
22 the status quo for a very long time.

23 JUSTICE KAVANAUGH: One last question.
24 How much money is exactly at stake and what will
25 happen to it if you lose?

1 MR. GUARNIERI: Initially, the
2 Department of Treasury allocated about 6 percent
3 of this 8 billion dollar fund to ANCs, which is
4 about \$530 million. But, as a result of
5 separate litigation, there are proceedings
6 ongoing in district court in DDC right now.

7 As the result of those proceedings,
8 Treasury is currently in the process of
9 reconsidering the methodology it used to
10 distribute at least a portion of these funds,
11 and that -- that could impact the amount of
12 funds available to go to the ANCs.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett.

16 JUSTICE BARRETT: Good morning, Mr.
17 Guarnieri. I want to go back to the eligibility
18 clause.

19 So you -- you told several of my
20 colleagues that the recognition clause, that one
21 way to understand it is that it's a term of art
22 but that it has -- well, that you could take its
23 ordinary meaning, simply, you know, an entity
24 that contracts with the federal government for
25 services that are designed to go to Indians

1 because of their status as Indians.

2 And you said, well, sure, you can look
3 at this, and I understand it's your backup
4 argument, but you can understand it in its
5 ordinary meaning as the other Petitioner
6 advocates for.

7 Now you say but a lesser-included
8 definition would be the term-of-art recognition
9 definition like we see in the later passed List
10 Act.

11 I don't really see how you can have a
12 -- a lesser included specialized definition. It
13 seems to me either it's ordinary meaning or it's
14 not. And, you know, you're kind of cagey in
15 your brief and I think a little bit at oral
16 argument too about whether, in fact, that
17 eligibility clause refers to FRT status.

18 So which is it? I mean, is this the
19 first time that the government has taken the
20 position that language like this doesn't refer
21 to FRT status?

22 MR. GUARNIERI: I -- I guess I would
23 -- I would put the point this way. I mean, we
24 think that that clause can be reasonably read to
25 refer to having a requisite status under federal

1 law, and then it just applies, you know, that
2 different entities would be able to satisfy that
3 requirement in different ways.

4 For the ANCs, Congress deemed them to
5 satisfy it by specifically including them among
6 the entities that are eligible to enter into
7 ISDA agreements.

8 For the generic terms listed at the
9 beginning of this statute, that is, any Indian
10 Tribe, band, nation or other organized group or
11 community, I mean, the established way for those
12 -- those groups to demonstrate that they have
13 the requisite status is to be acknowledged for
14 government-to-government relations with the
15 United States.

16 JUSTICE BARRETT: But -- but let me
17 just ask you. That sounds like you're folding
18 back into your argument about, well, specific
19 mention of the Alaskan entities would have not
20 made any sense if the eligibility clause was
21 designed to apply to them because ANCs by their
22 very composition have -- you know, they were
23 designed to channel money from the federal
24 government to their shareholders, and so they
25 had that status from the beginning.

1 So what I'm asking was a little bit
2 different because, if the ordinary meaning, say,
3 of that eligibility clause prevails, then we
4 don't have to -- we could rule in your favor
5 without doing this kind of fancy footwork around
6 the awkward grammatical reading of the statute.

7 MR. GUARNIERI: Well --

8 JUSTICE BARRETT: You don't really
9 seem to be endorsing that.

10 MR. GUARNIERI: Well, I -- I -- I --
11 we would -- we would entirely accept a decision
12 on those grounds, and I -- I don't mean to be
13 dancing around it. Our -- our -- our -- our
14 concern is that, in general, we -- we would hope
15 to preserve the ability to ensure that ISDA
16 agreements are -- are entered into with tribes
17 or federally recognized tribes that have a kind
18 of recognized status under federal law and not
19 simply groups of self-identified Indians who
20 come to the Interior Department and demand to
21 take over the delivery of federally funded
22 services.

23 That's why it's important to us as a
24 programmatic matter that, in general, the way
25 that Indian Tribes demonstrate that they have

1 the requisite status is through the
2 acknowledgment process, through the process of
3 --

4 CHIEF JUSTICE ROBERTS: A minute to
5 wrap up, counsel.

6 MR. GUARNIERI: Thank you, Mr. Chief
7 Justice.

8 I would just like to emphasize, again,
9 a couple of the points that I touched on this
10 morning.

11 First is ISDA's definition of "Indian
12 Tribe" should not be read to be at war with
13 itself. Congress did not deliberately and
14 specifically include ANCs in one clause only to
15 then exclude them in the very next clause.

16 Now our principal argument is that
17 this -- this -- this recognition is understood
18 as a term of art and the clause should not apply
19 to ANCs, but we would accept a decision under
20 which recognition is given somewhat more
21 capacious meaning and -- and the ANCs satisfy
22 that.

23 Second, I just want to emphasize again
24 that the question presented here arises under
25 the CARES Act, which Congress enacted in 2020,

1 and by that time, there can be no real question
2 that the ISDA definition was uniformly
3 understood to include ANCs, even though they are
4 not federally recognized Indian Tribes.

5 That was the administrative
6 construction. It was the Ninth Circuit's
7 construction in the Cook Inlet case, the
8 construction articulated in all of the leading
9 treatises in this area. That's the meaning
10 Congress incorporated, and that's the meaning we
11 ask this Court to endorse.

12 Thank you, Mr. Chief Justice.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Clement.

16 ORAL ARGUMENT OF PAUL D. CLEMENT ON
17 BEHALF OF THE PETITIONERS IN CASE NO. 20-544

18 MR. CLEMENT: Mr. Chief Justice, and
19 may it please the Court:

20 Nearly everything about Alaska is
21 different, including its native entities.
22 Congress established ANCs in the Settlement Act
23 as native entities unlike lower 48 tribes. ANCs
24 have never been sovereign, but they have always
25 played a critical role in distributing special

1 federal Indian benefits to Alaska natives.

2 Congress specifically added ANCs to
3 ISDA's definition of "Indian Tribes."
4 Respondents, however, contend that Congress
5 accomplished nothing because ANCs do not satisfy
6 the eligibility clause.

7 But, if that clause is only given its
8 ordinary meaning, ANCs plainly satisfy it.
9 Congress said recognized as eligible, not
10 recognized as sovereigns, and ANCs have long
11 been recognized as eligible for special federal
12 Indian benefits starting with the Settlement
13 Act.

14 If, instead, the phrase is given a
15 term-of-art meaning restricted to sovereign
16 tribes, then it is wholly inapplicable to
17 entities established by Congress as alternatives
18 to sovereign tribes.

19 Either reading is vastly preferable to
20 one that would defeat the ANCs' specific
21 inclusion in the definition.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 In your brief, you compare this
25 statute to the case of a caretaker being told to

1 feed the cats, the dogs, and goldfish, which are
2 barking, and -- but the force of that analogy
3 comes from the fact that it's impossible for the
4 goldfish to bark.

5 In this case, though, Congress has the
6 authority, right, to formally recognize the
7 ANCs, and so doesn't that undermine your
8 analogy?

9 MR. CLEMENT: I -- I don't think so,
10 Your Honor, because you're right to say that
11 Congress could in a subsequent act recognize the
12 ANCs, but that would be a complete departure
13 both from the nature of ANCs and the nature of
14 sovereign recognition.

15 CHIEF JUSTICE ROBERTS: But you do --

16 MR. CLEMENT: And, of course --

17 CHIEF JUSTICE ROBERTS: -- you do
18 agree that they have that authority, Congress
19 has the authority to recognize them? In other
20 words, this goldfish -- this goldfish can bark?

21 MR. CLEMENT: Well, only if --
22 essentially, if Congress passed the statute that
23 says that, when goldfish move their lips, we are
24 going to construe that to be barking, which is
25 to say, you know, it really is impossible based

1 on any understanding of the nature of either
2 ANCs or sovereign recognition to say that the
3 ANCs would be recognized as tribes.

4 CHIEF JUSTICE ROBERTS: If I end up --

5 MR. CLEMENT: And so --

6 CHIEF JUSTICE ROBERTS: -- if I end up
7 where Judge Henderson did and say that the
8 purpose is clear, but the text is also clear,
9 how do I come out the other way? How do you
10 resolve that conflict?

11 MR. CLEMENT: Well, I -- I think the
12 way to resolve that conflict -- the easiest way
13 is to give the -- the eligibility clause its
14 ordinary meaning. It says "recognized as
15 eligible." It doesn't say "recognized as
16 sovereign."

17 Now those may be the same thing in the
18 lower 48, but they're very different in Alaska
19 because of the Settlement Act. And so I think
20 that's the way you give meaning to every word in
21 the statute and also honor Congress's evident
22 intent both in 1975 and in 2020.

23 CHIEF JUSTICE ROBERTS: Justice
24 Thomas.

25 JUSTICE THOMAS: Thank you, Mr. Chief

1 Justice.

2 Mr. Clement, just some clarification.
3 Did the -- what's the overlap between the ANCs
4 and the 200-plus tribes in -- in Alaska?

5 MR. CLEMENT: Well, I guess one way to
6 answer that, Justice Thomas, is there -- I mean,
7 there -- so there's an overlap between the
8 village-level ANCs and the villages, but where
9 there is not an overlap is between the
10 membership and the shareholders of the regional
11 ANCs and the villages.

12 And if you look at just the Anchorage
13 area alone, you're talking about 54,000 Alaska
14 natives who get benefits from CIRI who are not a
15 member of one of the Anchorage area villages,
16 which aren't actually in Anchorage. They're
17 just in the surrounding region.

18 JUSTICE THOMAS: All right. So are
19 most of the -- are the shareholders of the
20 corporations, the ANCs, are they also members of
21 tribes too? Or are there non-tribal members who
22 are -- non-tribal individuals who are
23 shareholders?

24 MR. CLEMENT: There are many, many,
25 you know, tens of thousands of Alaska natives

1 who are shareholders of an ANC but not enrolled
2 members of any village-type tribe. So there's a
3 substantial number of that.

4 Of course, there is some overlap, but,
5 once you find that both entities are eligible,
6 there are various ways that it's relatively easy
7 to avoid double-counting.

8 JUSTICE THOMAS: And how would -- how
9 would you do that?

10 MR. CLEMENT: You would just make
11 adjustments for overlapping membership. You can
12 also -- for some formulas, you use things
13 different -- other than population. So there's
14 a variety of ways that -- that -- that the
15 Treasury Department actually did it in this very
16 distribution of funds.

17 And, more generally, the federal
18 government has found a way to make this work
19 because what you really do is you do have
20 identifiable native populations not just in
21 Anchorage but in Fairbanks, in Seward, and
22 Valdez who are not served by any village but are
23 served by the regional ANC, and those Alaska
24 natives will go radically underserved if the
25 ANCs are cut out of the statute.

1 JUSTICE THOMAS: What do you make of
2 the fact that, at least as I understand it,
3 there were no changes made to address the
4 confusion that we have or the controversy we
5 have in -- in this case in the American Rescue
6 Plan Act?

7 MR. CLEMENT: Well, I -- I think,
8 Justice Thomas, what's going on there is that --
9 that, you know, essentially, Congress didn't
10 want to prefigure how this Court would decide
11 this case. So, when Congress wanted to include
12 the federally recognized tribes only, it used
13 the List Act definition, and when it wanted to
14 include the ANCs, it specified that they were
15 included.

16 But I would say that the understanding
17 from 1975 through the reenactment in 1988 was
18 that the gold standard for including ANCs in a
19 statute was to use the ISDA definition.

20 JUSTICE THOMAS: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Breyer.

23 JUSTICE BREYER: With your other
24 argument that you said, well, they're eligible,
25 they're eligible, in mine, that would get us out

1 of this problem.

2 But I'm worried about the other 150
3 statutes. Have you looked at those? Do you
4 know just your definition -- that kind of
5 definition wouldn't cause a problem somewhere
6 else?

7 MR. CLEMENT: I have looked at those
8 definitions, Justice Breyer, and I don't think
9 it would create a problem in those other
10 statutes, and I guess what I would say is I
11 think the situation is asymmetrical.

12 If -- there -- there are a couple of
13 statutes, and Respondents point to them, that
14 seem to include the ANCs in the statute that
15 have otherwise addressed some sovereign function
16 that the ANCs really don't discharge, and that
17 modest degree of overinclusion is really
18 harmless error because they just don't
19 participate in the program.

20 Conversely, there are plenty of
21 statutes that embody the ISDA definition and are
22 -- plainly involve ANCs and have since their
23 inception. And as the federal government points
24 out in its brief, just in fiscal year 2020
25 alone, the ANCs received \$40 million in housing

1 assistance pursuant to NAHASDA, which basically
2 incorporates the definition from ISDEAA.

3 So I think the impact on other
4 statutes is completely asymmetrical. If the
5 ANCs fall out because they don't provide a
6 particular program, no harm, no foul.

7 If, instead, they're cut out of
8 programs they participated in for decades, there
9 are going to be tens of thousands of Alaska
10 natives who don't get benefits that Congress
11 plainly intended that they would receive not
12 just in the abstract but through ANC.

13 JUSTICE BREYER: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Alito.

15 JUSTICE ALITO: Is there a difference
16 between your interpretation of the recognition
17 clause and the Solicitor General's
18 interpretation? And if there is a difference,
19 what do you understand it to be?

20 MR. CLEMENT: I don't think there is a
21 difference, Justice Alito. I think, as you can
22 see from this morning's argument, though, the
23 probably -- the principal difference is I want
24 to leap to the ordinary language argument, and
25 my friend from the government seems to only want

1 to get sort of edged there.

2 But, you know, I don't think the other
3 side can really have it both ways. You're
4 either a textualist or you're not. And if
5 you're a textualist, why wouldn't you apply the
6 plain meaning of "recognized as eligible"?

7 Congress said "recognized as
8 eligible," not "recognized as sovereign." Those
9 may be interchangeable in the lower 48, but
10 they're very different terms in Alaska. And
11 that all goes back to the Settlement Act.
12 Congress didn't want to replicate the lower 48
13 of sovereign tribes more to reservations when
14 they distributed the benefits of the land
15 settlement, so they created these new entities
16 that were distinctly native entities, that
17 caused every Alaska native to enroll in one of
18 the regional ANCs. They didn't require them to
19 enroll in a village.

20 And then, four years later, Congress
21 said, in a process of furthering
22 self-determination, we want to include the ANCs.
23 It would be bizarre to cut them out on the
24 understanding that what Congress really wanted
25 is not to have ANCs play a role in

1 self-determination but only allow sovereign
2 entities to play a role in self-determination
3 when Congress just rejected that judgment in
4 Alaska.

5 JUSTICE ALITO: Let me -- I'd like you
6 to see if I'm correct on these two points. The
7 CARE Act provided a one-time distribution of
8 funds, and at the time when the CARE Act was
9 enacted, no ANC had been recognized?

10 MR. CLEMENT: Recognized as sovereign.
11 I would say that --

12 JUSTICE ALITO: Had been recognized as
13 --

14 MR. CLEMENT: -- they had been
15 recognized --

16 JUSTICE ALITO: None had been
17 recognized --

18 MR. CLEMENT: -- as eligible for
19 special federal benefits.

20 JUSTICE ALITO: -- none had been
21 recognized in the sense that the D.C. Circuit
22 thought was necessary. Are those two points
23 correct?

24 MR. CLEMENT: Those two points are
25 crystal clear.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor.

4 JUSTICE SOTOMAYOR: I -- I'm -- I'm a
5 bit confused, Mr. Clement. What do you see
6 "recognized as eligible" to mean?

7 MR. CLEMENT: So I -- I see
8 "recognized as eligible" to mean recognized by
9 the federal government as eligible to
10 participate in special federal Indian programs.

11 JUSTICE SOTOMAYOR: Okay.

12 MR. CLEMENT: And, like you said, in
13 the lower 48, recognition and sovereignty go
14 together. But, in Alaska in particular, they
15 sort of split that atom and they created these
16 entities, the ANCs, that are eligible to
17 participate in special federal Indian programs,
18 but they were never understood to be sovereign.

19 And so I think, if you recognize that
20 Alaska is different in this regard, then I think
21 that really solves the problem here. And as you
22 yourself pointed out, Your Honor --

23 JUSTICE SOTOMAYOR: No, I -- I -- I --
24 I don't disagree with you. I think that it
25 would make no sense to think that ISDA was based

1 on political recognition. But let's get to the
2 CARES Act, okay?

3 How would I see that as relevant to
4 saying that you were recognized to receive money
5 that was being given to governments when ANC are
6 not governments?

7 MR. CLEMENT: Oh, I think that's
8 relatively straightforward, Your Honor, because,
9 yes, the money is being given to tribal
10 governments, but tribal governments is just the
11 recognized governing body of a tribe as defined
12 in ISDEAA. And since ANCs are ISDEAA tribes and
13 they clearly have recognized governing bodies,
14 there really isn't any statutory problem there.

15 And if it helps, I would point you to
16 two other statutes, 40 U.S.C. 502(c)(3), 44
17 U.S.C. 3601(8), which are statutes that have a
18 statutory term of "tribal government" and
19 expressly include ANCs in the definition of
20 "tribal government." Somewhat ironically, they
21 include ANCs but not the villages in a
22 definition that is specifically directed to
23 tribal governments, so the CARES Act would not
24 be alone in including ANCs in a definition of
25 "tribal governments."

1 CHIEF JUSTICE ROBERTS: Justice --

2 JUSTICE SOTOMAYOR: Thank you,
3 counsel.

4 CHIEF JUSTICE ROBERTS: -- Kagan.
5 Justice Kagan.

6 JUSTICE KAGAN: Mr. Clement, taking
7 this "recognized as eligible" meaning, when did
8 ANCs become recognized as eligible?

9 MR. CLEMENT: So, Justice Kagan, I
10 think ANCs became recognized as eligible in 1971
11 in the Settlement Act because, if you understand
12 that the Settlement Act is distributing the
13 benefits from an aboriginal land settlement, the
14 traditional thing you would do in that
15 circumstance in the lower 48 is you would give
16 the proceeds to a tribe.

17 But Congress in 1971 understood that
18 Alaska didn't have tribes and reservations the
19 way they did in the lower 48, so they
20 specifically created these entities, the ANCs,
21 to receive the proceeds of the settlement, which
22 I would understand to be special federal Indian
23 benefits, and importantly --

24 JUSTICE KAGAN: Right. But, I mean,
25 Mr. Clement, I mean, for sure, that Act settled

1 land claims, but what does the settling of land
2 claims have to do with eligibility for benefits
3 writ large?

4 MR. CLEMENT: So two things, Your
5 Honor.

6 First of all, they were aboriginal
7 land claims. So right there you know these are
8 distinct native entities to receive distinctly
9 native benefits.

10 But then the second point I would
11 make, and I think this is important to
12 understand, is Alaska natives were eligible in
13 general for special federal Indian benefits even
14 before the Settlement Act through the Snyder
15 Act.

16 And the Snyder Act is one of the acts
17 that is empowered for self-determination under
18 ISDEAA. So, in a sense, this all works
19 perfectly together. Having just created
20 distinct native entities that every Alaska
21 native was a member of one of the regional ANCs,
22 then Congress in 1975 includes those entities in
23 a statute that's all about self-determination
24 with respect to funds that Alaska natives had
25 already all along even before 1971 been eligible

1 for.

2 JUSTICE KAGAN: Thank you, Mr.
3 Clement.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch.

6 JUSTICE GORSUCH: Good morning, Mr.
7 Clement. It seems to me that the government is
8 a little nervous about moving off of recognition
9 in its formal sense because it's concerned about
10 self-identifying groups declaring their
11 eligibility for a lot of federal programs.

12 And you're a little less concerned
13 about that, understandably, but there are a
14 couple of -- a couple of terms there that
15 just -- I struggle with.

16 To the extent we're defining a tribal
17 government for the CARES Act, isn't that an odd
18 fit for a corporate board?

19 MR. CLEMENT: Again, Justice Gorsuch,
20 I don't think that it is. And, you know,
21 various Indian Tribes, and you probably know
22 this better than I do, are organized in various
23 different ways. I'm sure there are lower 48
24 tribes that have some kind of corporate --
25 incorporation and some kind of board.

1 So it's not like you can't have a
2 native entity that is governed by a board of
3 directors, which is a very common, ordinary way
4 of referring to it. And as I alluded to in
5 answering Justice Sotomayor's questions, there's
6 at least two other statutes that specifically
7 include ANCs --

8 JUSTICE GORSUCH: Are -- are --

9 MR. CLEMENT: -- in the definition of
10 --

11 JUSTICE GORSUCH: -- are -- are you
12 aware of other tribal governments organized in
13 this fashion in the lower 48?

14 MR. CLEMENT: I -- I can't point you
15 to one in specific. But I -- I -- I -- I
16 understood --

17 JUSTICE GORSUCH: What -- what -- what
18 about the separate phrase, "to Indians because
19 of their status as Indians"? Again, that seems
20 like an odd fit for the ANCs given that, of
21 course, you could be a member of the corporation
22 without being a native today, a lot of
23 alienation has occurred and is permissible.

24 MR. CLEMENT: Well, two things, Your
25 Honor. There hasn't been that much alienation,

1 and anybody who's not a native doesn't get a
2 voting share. They just get a share.

3 But, with that minor clarification,
4 obviously, that sort of "special federal Indian
5 benefits for Indians" is -- is -- is a bit of an
6 odd phrase not just, I think, as to ANCs but to
7 any group because it really seems to be talking
8 about the benefits that the Alaskan natives or
9 the lower 48 natives themselves are eligible
10 because of their status as Indian.

11 But, to the extent entities have a
12 status, nobody doubts that ANCs have a native
13 status, and I think the fact that the real point
14 of the Self-Determination Act is to take natives
15 who are eligible for special federal Indian
16 benefits and instead of having the federal
17 government provide those directly, you have a
18 tribal entity do that.

19 And in Alaska, the ANCs have been
20 doing that for 45 years, and it's been working
21 exceptionally well. So there's no basis to
22 disturb that.

23 JUSTICE GORSUCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh.

1 JUSTICE KAVANAUGH: Thank you, Chief
2 Justice.

3 Good morning, Mr. Clement. I just
4 want to explore briefly your understanding of
5 the term-of-art canon.

6 Is it your understanding, I think,
7 from what you're saying, that the canon is
8 something of an exception to ordinary meaning?
9 In other words, sometimes you'll look at a
10 phrase or words and say the ordinary meaning is
11 X, but the term of art that we know is -- is Y?
12 Is that your understanding of how it works?

13 MR. CLEMENT: That is my
14 understanding, Justice Kavanaugh. And I do
15 think, as your question suggests, that the
16 strong preference is for ordinary meaning, which
17 is the rule, and term of art is the exception.

18 And in a situation like this, where
19 adopting the term-of-art reading would create a
20 real problem with the statute, that seems like
21 an obvious case to prefer the ordinary meaning.

22 JUSTICE KAVANAUGH: And what's your
23 best argument for why "recognized as eligible"
24 as ordinary meaning supports your position?

25 MR. CLEMENT: Well, I think it's a

1 pretty straightforward argument, Your Honor. I
2 mean, eligibility is not the same as
3 sovereignty. If Congress wanted everything to
4 turn on sovereignty, it would have said
5 "recognized as sovereign" or it might have even
6 said "eligible via recognition." But it didn't
7 use any of those terms.

8 And one other point I'd like to
9 emphasize is that the term-of-art argument is
10 much weaker in 1975 than it was in -- after the
11 List Act in 1994. In 1975, as the government's
12 lawyer suggested, "recognition" is not the
13 well-established term of art that it is. In
14 fact, in 1975, the federal government's
15 recognition process was kind of a mess.

16 When they tried to regularize it a
17 little bit in 1978 with their first regulations,
18 even those regulations talked about
19 acknowledgment. And even today, the -- the
20 federal government has an Office of Tribal
21 Acknowledgment, not an office of tribal
22 recognition. It's really not until 1994 in the
23 List Act that you can really see "recognized as
24 eligible" as being a term of art, and even then,
25 it's really only a term of art for the lower 48.

1 So making it a low -- a term of art
2 back in 1975 that applies to Alaska that would
3 have the effect of frustrating the inclusion of
4 the Alaska clause really doesn't make any sense.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.

8 JUSTICE BARRETT: Mr. Clement, why
9 wouldn't it make sense? I mean, as you just
10 pointed out, the List Act uses language that's
11 identical to the eligibility clause in ISDA, so
12 why then aren't ANCs really practically
13 automatically recognized under the List Act?

14 MR. CLEMENT: Well, they're not, Your
15 Honor, because, if you go into the details of
16 the List Act and you go and look at the note to
17 the definition, it's very clear that what
18 Congress was trying to do in the List Act was to
19 essentially force the Interior Department to
20 formalize its process for sovereign recognition.

21 And the ANCs, just based on any
22 traditional criteria for sovereign recognition,
23 just don't -- don't come within the terms of
24 that List Act process. I wonder what --

25 JUSTICE BARRETT: I mean, I understand

1 that, but doesn't Congress's use of that phrase
2 in the List Act undercut your argument that
3 eligibility isn't about sovereignty?

4 MR. CLEMENT: No, I don't think so,
5 Your Honor, and I think, again, for two reasons.

6 One is the language is not exactly
7 identical because it -- whenever Congress has
8 talked about recognition as meaning only
9 sovereignty in subsequent years after 1990 --
10 rather, 1975, they specifically tethered it to
11 recognition by the Secretary, and I think that
12 brings in the entirety of the -- the -- the
13 process for recognition and its sovereign
14 requirements.

15 And if you go back to 1975, the idea
16 that when Congress was trying to promote
17 self-determination in Alaska, it was going to
18 hinge that on whether the Alaska entities were
19 sovereign doesn't make any sense. Even as to
20 the villages, it took 18 years to figure out
21 whether the villages were sovereign. So --

22 JUSTICE BARRETT: I mean, I can see
23 that, but it's kind of at war with the -- the
24 plain meaning of the text if it's understood to
25 be a term of art. And, I mean, I take your

1 point that maybe it wasn't a term of art when
2 ISDA was enacted but became so later,
3 particularly after the List Act.

4 But can you think of any other
5 instance in statutory interpretation where
6 something has had its ordinary meaning in the
7 beginning and then gained a term of art where
8 then you interpret statutes differently
9 depending on where they fell along the continuum
10 of that process?

11 MR. CLEMENT: It seems to me -- I -- I
12 can't point you to that, but I would say two
13 things. One is, if a term only becomes a term
14 of art later, let's say 1994, I don't think you
15 would import it backwards to a -- a -- a statute
16 that was enacted earlier.

17 And I still don't think even in 1994
18 that "recognized" as it's used in ISDEAA is a
19 term of art. And the best evidence of that is
20 NAHASDA, which was passed one year later in
21 1995, and it basically mimics the ISDEAA
22 language and it has been interpreted from day
23 one to include the ANCs, and they got \$40
24 million of funding under it last year.

25 JUSTICE BARRETT: Thank you, Mr.

1 Clement.

2 CHIEF JUSTICE ROBERTS: A minute to
3 wrap up, counsel.

4 MR. CLEMENT: Thank you, Mr. Chief
5 Justice.

6 In the end, whether the eligibility
7 clause has an ordinary meaning that ANCs satisfy
8 or a term-of-art meaning that is wholly
9 inapplicable to them, there is no cause for
10 interpreting ISDEAA or the CARES Act to exclude
11 ANCs and the natives they serve.

12 Alaska natives were eligible for
13 special federal Indian benefits long before the
14 Settlement Act in ISDEAA. Nothing in either
15 statute terminated those benefits or made them
16 turn on membership in a sovereign tribe.

17 To the contrary, the Settlement Act
18 told every Alaska native to enroll not in a
19 village but in a regional ANC. As a direct
20 result of that congressional decision, there are
21 tens of thousands of Alaska natives whose only
22 native affiliation is with an ANC.

23 Cutting ANCs out of ISDEAA's
24 definition would leave those Alaska natives out
25 in the cold. Cutting out ANCs would also

1 destroy Alaska's self-determination success
2 story that depends on cooperation between ANCs
3 and sovereign villages.

4 In short, Alaska is different and
5 Alaska is working. This Court should reverse.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Rasmussen.

9 ORAL ARGUMENT OF JEFFREY S. RASMUSSEN
10 ON BEHALF OF THE RESPONDENTS

11 MR. RASMUSSEN: Thank you, Mr. Chief
12 Justice, and may it please the Court:

13 A unanimous panel of the D.C. Circuit
14 had no difficulty concluding that ANCs do not
15 qualify as Indian Tribes under ISDEAA and -- and
16 thus under the CARES Act. As the court of
17 appeals explained, under basic English sentence
18 construction, the recognition clause
19 unambiguously applies to each of the nouns that
20 precedes it, including each ANC. And by
21 referring to groups recognized as eligible for
22 the special programs available to Indians, the
23 recognition clause plainly refers to the formal
24 recognition -- recognized status.

25 Indeed, the U.S. agreed with that

1 until this case reached this Court. Petitioners
2 contend that the court of appeals'
3 interpretation would render this statute
4 inclusion of ANCs superfluous -- superfluous.

5 This is wrong for two reasons. First,
6 the cardinal rule is the plain meaning, and the
7 English language construction of sentence simple
8 and clear.

9 Second, as Petitioners do not even
10 contest, the political branches could, both in
11 1975 and today, have believed that their plenary
12 authority allowed them to recognize ANCs.

13 Therefore, there is no super- --
14 superfluity problem.

15 Nor is the court of appeals'
16 interpretation absurd because the Court could --
17 Congress could reasonably believe, when enacting
18 ISDA, that ANCs might be recognized in the
19 future.

20 Petitioners also invoke their doctrine
21 of ratification. That is wrong for three
22 reasons, the primary one being simply that it --
23 that doctrine does not trump the plain meaning.

24 The ANCs warn that, left standing, the
25 court of appeals' decision will deprive Alaska

1 natives of much-needed services and benefits.
2 In actuality, the opposite is true. Alaska
3 Native villages provide those benefits to Alaska
4 natives, and the primary example of an ANC doing
5 so, which is CIRI, is authorized by an
6 independent statute.

7 The court of appeals' decision should
8 be affirmed. I welcome the Court's questions.

9 CHIEF JUSTICE ROBERTS: Counsel, your
10 side's fundamental argument is that the text is
11 clear and that that doesn't include -- by the
12 time you get to the end of the sentence, it
13 doesn't include the ANCs. But the text itself,
14 in -- in the middle of the -- the clause, does
15 include the ANCs. And then that same clause,
16 under your reading, takes eligibility away from
17 the ANCs.

18 And my question is why doesn't that
19 text undermine the plain language argument? In
20 other words, we're not talking about some
21 overriding purpose. We're not talking about
22 legislative history.

23 What we're talking about is the text,
24 and the text says, in the list, ANCs. And then
25 the text takes away eligibility. And it seems

1 to me that that text creates ambiguity so that
2 it -- a textual reading isn't a plain reading.

3 What -- what's your answer to that?

4 MR. RASMUSSEN: Well, I think we've
5 got a couple of answers to that, but I think
6 first is that when Congress was acting in 1975,
7 this was completely uncertain. We have from
8 1971 until 1993 before it became clear.

9 And so there wasn't that -- that
10 certainty. And, certainly, when Congress was
11 enacting the ISDEAA, it did not know. And when
12 Congress doesn't know, this Court has never
13 said, oh, well, you've to go and figure that
14 out, Congress, and you've got to then come up
15 with the decision now when you enact this
16 statute.

17 Instead, what Congress did here is
18 what it commonly does, which is to provide a
19 series and then a qualifier at the end, and
20 that's to include all of the -- the entities
21 that come before that.

22 And so, in our -- in our brief to this
23 Court, we discuss that in the very next section
24 of the CARES Act, Congress does exactly that.
25 It refers to cities, towns, parishes that --

1 that are over 500,000 people. And Congress, in
2 that case, could have simply looked at a census
3 and said: Oh, parish -- there's no parish over
4 500,000. We should take that out.

5 But under the ANC's argument, because
6 it included parishes and then it included a
7 qualifier that plainly didn't apply to parishes,
8 all the parishes should have gotten money.

9 So --

10 CHIEF JUSTICE ROBERTS: Counsel, I'm
11 not sure -- I'm not sure I agree with your
12 argument about the uncertainties. ANCs have
13 never had sovereign authority. They didn't at
14 the time. That was the whole point. This was a
15 revolution in the relationship between the
16 national government and Native American
17 government. These were not governmental
18 organizations. There was no uncertainty at the
19 time. The whole point was that they were not
20 governmental entities.

21 MR. RASMUSSEN: There was certainly a
22 lot of back and forth on that issue during that
23 period of time. So there were then those
24 attempts. Further, it was also very clear that
25 ANCs could assert and that Congress under its

1 plenary authority could say we're going to make
2 ANCs tribes. In fact, that has been proposed on
3 occasion.

4 So there -- there's certainly the
5 possibility that ANCs, even if they didn't
6 qualify at that time, could have been --
7 Congress could have enacted something under its
8 plenary power later to say that they were.
9 Whether that would then be permissible would be
10 a separate issue for a later date.

11 CHIEF JUSTICE ROBERTS: Well, why
12 would Congress put ANCs in the language and then
13 take them out? I mean, is it -- is your
14 argument based solely on the uncertainty that at
15 some point in the future the Congress might undo
16 the whole ANCSA approach based on Congress's --
17 Alaska's distinct situation?

18 MR. RASMUSSEN: Well, no. Our -- our
19 argument, and perhaps the Chief Justice doesn't
20 agree with it, but we -- we believe there was
21 substantial uncertainty in 1975. That's
22 certainly what the court of appeals found, that
23 there was sufficient uncertainty.

24 When we're dealing with an act of
25 Congress, we don't expect them to be omniscient

1 here. We don't expect them to make that
2 resolution. We expect them to make sure that
3 they cast a wide enough net, and then they use
4 the exclusion clause, the qualification clause
5 at the end, to then eliminate those who wouldn't
6 qualify.

7 And that has the concept that is
8 essential here. And the Alaska Native
9 corporations then don't match that essential
10 concept.

11 CHIEF JUSTICE ROBERTS: Justice
12 Thomas.

13 JUSTICE THOMAS: Thank you, Mr. Chief
14 Justice.

15 Counsel, why do you think the Congress
16 cross-referenced ISDA rather than simply the
17 list of recognized tribes?

18 MR. RASMUSSEN: Well, there are a
19 number of statutes that define Indian Tribes
20 that Congress could have incorporated,
21 certainly. You know, obviously from the Tribes'
22 perspective, we would have rather they
23 specifically incorporated the List Act, but our
24 view is that the -- after 1993, it's clear that
25 the -- the ISDA really incorporates that concept

1 itself. So that there wasn't a problem.

2 Further, in the CARES Act itself,
3 Congress then references the recognized
4 governing body of an Indian Tribe. So, again,
5 it was reiterating that recognition concept in
6 the CARES Act itself, which is why the Ute
7 Tribe, the one I represent primarily, although I
8 am representing all tribes here today, the Ute
9 Tribe views this as something that it -- it
10 would be better to decide this case more
11 narrowly.

12 JUSTICE THOMAS: The -- Mr. Clement
13 made quite a bit of the broader recognition
14 language in the D.C. Circuit's opinion. And he
15 focused more on the language -- "recognized as
16 eligible" language.

17 Would you respond to his argument a
18 bit and what you think is -- is a refutation of
19 his argument?

20 MR. RASMUSSEN: Well, I think that the
21 primary one is, yes, from 1975 to 1993, there
22 was this uncertainty. 1993 makes that crystal
23 clear, that -- that the Alaska native
24 corporations do not qualify under that
25 qualification that is in the List Act. And,

1 they -- therefore, they do not qualify for the
2 same qualification that is within the ISDEAA.

3 We note the United States, until now,
4 has been saying that same exact thing all
5 through this case. Now they've got an
6 alternative argument that's no better, but
7 they've been saying that themselves, that they
8 don't qualify.

9 JUSTICE THOMAS: And what do you make
10 of -- of the ratification argument?

11 MR. RASMUSSEN: Well, ratification, we
12 -- we -- as we view it, there are three -- three
13 main issues and I alluded to one in my opening,
14 which is simply that ratification -- this
15 Court's decisions are very clear that
16 ratification simply does not trump plain
17 meaning.

18 Also, to have ratification, you would
19 have to have something that is well settled and
20 known to Congress. And we don't have that here.
21 In fact, what we have is a lot of things that --
22 in my view, most of the things are on the other
23 side.

24 They can point to one 1976 memo, and
25 -- and then there is a number of other things

1 that point the exact opposite way. So we don't
2 see how they meet any of the three elements for
3 ratification.

4 JUSTICE THOMAS: In your brief you
5 seem to -- and I could be wrong -- you seem to
6 make a distinction between Indian Tribes and
7 people of Native American ancestry. What
8 difference would that make, if any?

9 MR. RASMUSSEN: When we -- the
10 recognized tribes, the ones that the United
11 States owes the trust duty to, then established
12 their membership. And that happens in Alaska as
13 well.

14 And so those are the people that have
15 the trust relationship through their tribe with
16 the United States. So when we're talking about
17 trust responsibilities, that's what we're
18 talking about.

19 So, you know, the ANCs have numerous
20 people who for whatever reason are not members
21 of tribes. We agree with Mr. Clement there.
22 But that -- that happens everywhere. There is
23 millions, actually, of people who say they're
24 Native American in the lower 48 who are not
25 members of tribes. That's not an uncommon

1 thing.

2 But this Court has always said tribes
3 define their membership and then the federal
4 recognition establishes the trust
5 responsibilities. And so that's where -- how
6 you have the trust responsibilities flowing to
7 enrolled members of tribes.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: Good morning. Thank
12 you.

13 Imagine you work for a company that
14 sends people subscription requests, you know,
15 they keep information about subscriptions to
16 vast numbers of publications, and I write back,
17 you get this letter, and you're in charge of
18 filling requests, Dear -- et cetera -- I would
19 like more information about any newspaper,
20 including The Atlantic Monthly, which is
21 published daily.

22 Would you be at a loss as to how to
23 fill that request?

24 MR. RASMUSSEN: I'm sorry, Justice
25 Breyer. It became muddled when you were giving

1 me the example.

2 JUSTICE BREYER: The example is you
3 get a letter from me or from somebody that says
4 please send me more information about any
5 newspaper on your list including The Atlantic
6 Monthly, which is published daily.

7 I'm just asking you if you would have
8 a problem giving me what I want. Is it you
9 wouldn't know what I want?

10 MR. RASMUSSEN: No, I think in that --
11 in that case you would. I think that's where
12 you get into whether what Congress did here was
13 absurd.

14 JUSTICE BREYER: Well, no, no, it's
15 not absurd. Is my question absurd? Do you have
16 a problem?

17 MR. RASMUSSEN: No, that's my point,
18 is that your question is not, but when you apply
19 that to the ISDEAA and you say would it be
20 absurd here to do that, yes, it would -- it
21 would be absurd.

22 JUSTICE BREYER: I'm just asking if
23 you have trouble filling my request. And I
24 think your answer is no. Very well.

25 MR. RASMUSSEN: Well -

1 JUSTICE BREYER: Then you take it
2 home. And you show it to your cousin, who is
3 the world's greatest grammarian. And you say,
4 see the kind of bad grammar I get. And he says
5 you're right to call that poor grammar, bad
6 grammar, but not incorrect grammar. It's not
7 good but it's far from perfect.

8 And I ask you that only because I've
9 never heard of a canon that says you have to use
10 perfect grammar or even that you have to use
11 good grammar when you are a member of Congress.

12 What do you think?

13 MR. RASMUSSEN: Right. Well, I would
14 agree that it's not that we -- and I'm sure the
15 Court knows this better than me, we don't expect
16 Congress to use perfect grammar, if we did that
17 in this case, we wouldn't have had a problem if
18 they used perfect grammar, but what we do for
19 the legal analysis is we start from the plain
20 text from what they wrote down.

21 And what they wrote down is actually
22 clear on the grammar. And then when we get to
23 should there be some reason that we don't apply
24 this plain language, here we would be left with,
25 well, it would have to be so bizarre that

1 Congress could not have meant what it said. You
2 know, we know literally what it said.

3 JUSTICE BREYER: Thank you.

4 MR. RASMUSSEN: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Alito.

6 JUSTICE ALITO: Mr. Rasmussen, suppose
7 that the definition of Indian Tribe in the CARES
8 Act had never been used before. It had not been
9 used in the ISDA. It had not been used in any
10 prior statute. It was crafted by Congress and
11 put in the CARES Act.

12 And the CARES Act provides a one-time
13 distribution of money. And at the time of the
14 enactment of the CARES Act, no ANC had been
15 recognized in the sense that you think is
16 necessary.

17 How then would you account for the
18 reference to ANCs in the definition of an Indian
19 Tribe? Would you make the same argument or
20 would your argument have to be different?

21 MR. RASMUSSEN: Well, we would make
22 the same argument but still you would have the
23 clear language, you know, if you were dealing
24 with something that is going to be a one-time
25 statute, as we are here with the CARES Act, I

1 think that that does change the analysis some,
2 but we would still be making the same argument.

3 JUSTICE ALITO: Well, how could you
4 make the same argument, because then the -- the
5 clause that refers to the -- to ANCs wouldn't be
6 surplusage, it would be -- it would be absurd?

7 MR. RASMUSSEN: Yeah, I think that you
8 could say, right, that's -- that's where I'm
9 saying I think that the standard they would have
10 to meet here is absurd.

11 JUSTICE ALITO: Well, it would be --

12 MR. RASMUSSEN: It would be absurd in
13 that case.

14 JUSTICE ALITO: It would be absurd,
15 would it not?

16 MR. RASMUSSEN: Only if Congress knew
17 all of that information, right.

18 JUSTICE ALITO: Well, Congress didn't
19 -- Congress didn't know it was making a one-time
20 distribution of funds? Congress didn't know or
21 we should not presume that Congress was aware
22 that no ANC had been recognized in the sense
23 that you think is important?

24 MR. RASMUSSEN: Again, I think that --
25 you're asking me what our argument would be.

1 And our argument would still be the same. We
2 would, though, have a much, much more difficult
3 argument on absurdity in that -- in that context
4 than we have now.

5 JUSTICE ALITO: You would not -- not
6 just have a more difficult argument on
7 absurdity, you would have an impossible argument
8 on absurdity, because you would have a clause
9 that means nothing, that contradicts the meaning
10 that you ascribed to this provision, right?

11 MR. RASMUSSEN: Well, I -- we would --
12 we would disagree on that, but, yeah, I can
13 understand where a Court would come out with
14 that decision, yes.

15 JUSTICE ALITO: Well, how do you
16 disagree? You say that no A -- an A -- in order
17 to be eligible for these funds, an entity has to
18 be recognized in a certain sense. No ANC had
19 been recognized in that sense at the time when
20 Congress made this one-time distribution of
21 funds.

22 And yet Congress referred to ANCs in
23 the definition of groups that are eligible for
24 these funds. There's a blatant contradiction.

25 MR. RASMUSSEN: Yes, I -- I would

1 agree, in that context there is. And that's why
2 I do think that, you know, again, I could
3 imagine a court saying that is absurd. I
4 wouldn't say that is absurd because I think,
5 again, the plain language and the complexity of
6 this is sufficient that, if Congress wants to,
7 you know, over-include and then use a qualifier
8 at the end to eliminate things, that's how we
9 often draft statutes.

10 We don't go and do that research to
11 find out what exactly -- whether there would be
12 any possibility of an ANC qualifying. The
13 Congress wouldn't do that.

14 JUSTICE ALITO: Suppose Congress says
15 any person over the age of 21 is eligible for
16 something, however, nobody between ages of 30
17 and 32 is eligible for this. You have
18 contradictory provisions.

19 MR. RASMUSSEN: Right.

20 JUSTICE ALITO: All right. Let me
21 come back to my example. Is there any reason
22 why we should not analyze the CARES Act as if
23 the definition of an Indian Tribe had been
24 created for that purpose and instead of
25 incorporating by reference a definition that was

1 adopted at a different time? Do you see a
2 difference between those two things?

3 MR. RASMUSSEN: I see that the CARES
4 Act itself then -- then incorporates that
5 requirement of recognition within itself.
6 That's where our view is that, instead of trying
7 to make a broad decision and going on to all
8 these other briefs that discuss all these
9 extraneous issues, we should be looking at the
10 CARES Act itself, which includes that concept of
11 recognition.

12 And we all know what that concept of
13 recognized Indian Tribe means.

14 JUSTICE ALITO: But you would escape
15 -- you tried to escape absurdity by saying that
16 when the ISDA definition was adopted, there was
17 a possibility that ANCs would be recognized in
18 the relevant sense, and at some point in the
19 future Congress might decide to recognize ANCs
20 in that sense.

21 But when you just look at the time
22 when the CARES Act was adopted, we know that no
23 ANC had been recognized in that sense.

24 MR. RASMUSSEN: Correct.

25 JUSTICE ALITO: All right. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor.

3 JUSTICE SOTOMAYOR: Counsel, we do
4 keep going around in a circle, and the circle
5 starts with the fact that even the government
6 recognizes, and you must too, that in 1974 the
7 recognition clause could not have meant
8 political recognition because that didn't exist
9 at the time. It only existed in the 1990s. So
10 45 years ago, in 1974 -- is my math right? --
11 when ISDA was passed, there was no term of art
12 that you were recognized as a government body.

13 So now what you're arguing, I think,
14 is that's clear today when the CARES Act was
15 passed, but as Justice Alito just pointed out,
16 then why would Congress have bothered to include
17 ANCs in the CARES Act at all since, after 45
18 years, it clearly knows now that no ANC has ever
19 been politically recognized?

20 Now I think the government's absurdity
21 -- absurdity argument has more force because in
22 45 years, not a one -- if we accept what the
23 D.C. Circuit said, that in 1974 it was uncertain
24 whether some would be recognized politically,
25 it's clear now it's not going to be.

1 So don't we have to accept
2 Mr. Clement's argument that ISDA's language, as
3 used in the CARES Act, cannot mean political
4 recognition?

5 MR. RASMUSSEN: No, because the CARES
6 Act itself then incorporates that same concept
7 of recognized governing body of an Indian Tribe.
8 And so that's where Congress did include that
9 concept within the CARES Act itself.

10 The concept is also within the ISDA,
11 and we now know, I think, yeah, that no --

12 JUSTICE SOTOMAYOR: Yeah, that --

13 MR. RASMUSSEN: -- ANCs qualify.

14 JUSTICE SOTOMAYOR: -- that's actually
15 your strongest argument. And I'm going to hope
16 that in its reply, the government will address
17 that question, which is it may not be the case
18 with some of ISDA's uses in other acts like the
19 Housing Act and in other provisions of care,
20 coronavirus care, where that governing body
21 definition isn't included, that one could
22 argue -- take up the recognition argument that
23 Mr. Clement has made more clearly.

24 But perhaps then I'll stop now and let
25 the government pick that up later.

1 CHIEF JUSTICE ROBERTS: Justice Kagan.

2 JUSTICE KAGAN: Mr. Rasmussen, you
3 know, I agree with you that grammar is very
4 important in understanding statutes and ^ in?
5 that grammar often allows us to choose between
6 two possible meanings of a statute. But you
7 have to have another possible meaning for
8 grammar to serve that function. And the
9 question is whether there really is another
10 conceivable meaning here.

11 So you said there is, because Congress
12 in the future could have recognized ANCs.
13 Justice Alito said to you it had never done that
14 in the past. But there's -- there's something
15 even more than that which seems to make this an
16 implausible understanding, which is that, you
17 know, putting aside whether it's theoretically
18 plausible, I mean, ANCs are just different from
19 the Tribes that were recognized at the time.

20 They are nonprofit corporations --
21 excuse me, for-profit corporations. No historic
22 bonds. Members who aren't -- shareholders who
23 aren't members of the tribe. And why should we
24 even think that Congress had that in mind as a
25 possibility at the time to make these federally

1 recognized tribes?

2 MR. RASMUSSEN: What we -- what we
3 have, actually, is the ANCs themselves saying
4 Congress could do this under its plenary power.
5 Plenary power is very, very broad. And so --

6 JUSTICE KAGAN: I'm not contesting the
7 -- you know, Congress's legal authority to do
8 it. I guess what I'm contesting is the idea
9 that anybody at the time would have thought that
10 Congress would do it.

11 MR. RASMUSSEN: Well, there was --
12 there's certainly been efforts to have the --
13 some of the ANCs federally recognized, at least
14 a few of them, to have them federally
15 recognized, that there has been that effort.
16 So, you know, to date, those haven't succeeded,
17 but there -- there's by no means certainty.

18 JUSTICE KAGAN: I mean, suppose I
19 thought that there was, you know, a 2 percent
20 chance that Congress would ever do that. What
21 should I do in interpreting the statute?

22 MR. RASMUSSEN: Well, I -- I think if
23 we go to 1975, there -- it was not that there was
24 a 2 percent chance, but if we go to today, the
25 whole point of including ANCs is so if that

1 possibility comes around, there -- and they meet
2 that definition, that they then are qualified,
3 they come in basically on an equal footing to
4 all the other tribes. That's -- that's what --
5 why that is in there.

6 JUSTICE KAGAN: Well, again, if we
7 could just go back to 1975 and ask, like, was
8 there really any realistic prospects that
9 Congress would have included ANCs as -- as
10 federally recognized tribes? And if I say, you
11 know, it's theoretically possible, Congress has
12 the authority to do this, but if you went around
13 and you polled Congress and you said do you
14 think of ANCs as federally recognized tribes,
15 they would say, well, of course not.

16 And -- and say I thought that there
17 was an extremely low probability that anybody
18 thought that that was, you know, a possibility.

19 MR. RASMUSSEN: Well --

20 JUSTICE KAGAN: Wouldn't they just
21 say, well, look, we can -- you know, it's a --
22 it's a theoretical possibility that we can put
23 it from our minds and -- and we can say they
24 wouldn't have included this clause about ANCs if
25 they didn't mean to include this clause about

1 ANCs?

2 MR. RASMUSSEN: I think that what --
3 what -- in the example that we used from the
4 CARES Act itself, that Congress does this in
5 statutes. It -- the -- when it casts its net
6 and then it includes a qualifier, it's letting
7 the qualifier do that work for it, instead of
8 making those decisions.

9 I mean, if Congress had not included
10 ANCs in that particular act, then it would be
11 saying, yeah, ANCs can never qualify. But it
12 didn't do that. Instead, it gave that as the
13 possibility, if they would meet the qualifier.

14 JUSTICE KAGAN: Thank you.

15 MR. RASMUSSEN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch.

18 JUSTICE GORSUCH: Mr. Rasmussen, first
19 I'd like you to address a kind of a practical
20 question. Your brief was -- expressed concern
21 that ruling for the ANCs would allow a sort of
22 double-dipping, that they'd be counted twice for
23 purposes of the CARES Act.

24 Mr. Clement responded to that concern
25 this morning by suggesting that the federal

1 government has lots of ways to administratively
2 ensure that that doesn't occur. If that's
3 right, it's hard to see what we're fighting
4 about here.

5 Can you explain your views?

6 MR. RASMUSSEN: Well, what we know is
7 that the United States has reserved -- I think,
8 if I recall correctly from our brief, it's in a
9 footnote in our brief and also in a footnote in
10 Utah's brief --

11 JUSTICE GORSUCH: About 530 million
12 dollars.

13 MR. RASMUSSEN: Well, about 71 million
14 dollars, if I recall correctly, was allocated to
15 the population of ANCs. And to the extent ANCs
16 have tribal members in them -- that is, enrolled
17 Indians in them -- those members -- enrolled
18 Indians have already been counted.

19 There's nothing in the record to
20 explain how the United States came up with this
21 large figure for the population of ANCs, but
22 whatever it would be, would either be double
23 counting or would be people who are not Indian,
24 who are not enrolled Indians.

25 JUSTICE GORSUCH: All right. Then let

1 me -- let me -- let me try my question again,
2 though. Mr. Clement says there are
3 administrative ways to deal with that problem
4 and that, therefore, we're really fighting over
5 nothing here.

6 Why isn't that correct?

7 MR. RASMUSSEN: Well, right now I
8 would say it's not correct because when we're
9 dealing with the CARES Act, there is -- the --
10 the allocation has already been formulated.
11 But, more broadly, to the extent that, again,
12 even -- no matter where we are, to the extent
13 that there are non-enrolled people of Indian
14 descent, they are not Indians for federal Indian
15 law purposes.

16 And the Indians are the ones that are
17 enrolled in the tribes in Alaska. People who
18 are of Indian descent and have -- can meet the
19 enrollment criteria of any tribe in Alaska can
20 become enrolled in the tribe in Alaska and
21 establish that government-to-government --

22 JUSTICE GORSUCH: All right.

23 MR. RASMUSSEN: -- relationship.

24 JUSTICE GORSUCH: Allow -- allow me to
25 move to a different set of questions, if I

1 might.

2 The CARES Act speaks of tribal
3 governments. And I asked Mr. Clement is that an
4 awkward fit with ANCs, for-profit corporations?
5 And he suggested no, that it's entirely possible
6 that native tribes in the lower 48 could
7 organize themselves in a similar fashion.

8 What -- what are your thoughts about
9 that?

10 MR. RASMUSSEN: That -- well, it is a
11 very awkward construction given that Title 5 is
12 all about governments, including tribal
13 governments, including the recognized governing
14 bodies of Indian Tribes. So we've got this
15 concept of government within that -- that
16 section repeatedly.

17 The money -- what we're dealing with
18 here is really -- and this goes back a little to
19 your last question -- what we're dealing with
20 here is whether that money goes directly to the
21 Indian Tribes, who then make the decision
22 whether to provide it to, for example, ANCs who
23 are doing services that benefit their members,
24 or whether it goes to the ANCs directly, cutting
25 out the tribes and eliminating their ability to

1 make that decision.

2 And so, in the lower 48, that's
3 exactly what's going on. The money went to the
4 tribes. The tribes made the decisions. They
5 can give it out to tribal organizations, similar
6 to ANCs, if they want to, and if those ANCs were
7 providing valuable services.

8 There are a few of them that are, but
9 what we've got here is a decision that every ANC
10 qualifies, and every ANC is going to get, you
11 know, at least \$100,000, and some of them are
12 going to get tens of millions.

13 JUSTICE GORSUCH: And -- and just to
14 return to a question that Justice Thomas posed
15 that I'm not sure I got the answer to, if -- if
16 effectively this recognition clause asks us to
17 -- to inquire whether the tribe's recognized,
18 why didn't Congress just cross-reference the
19 List Act?

20 MR. RASMUSSEN: It -- it -- it could
21 have. If Congress -- you know, the fact that
22 Congress doesn't --

23 JUSTICE GORSUCH: But it didn't. But
24 it didn't. It -- it -- it -- it
25 cross-referenced a different statute. What

1 should that difference tell us? You're saying

2 --

3 MR. RASMUSSEN: Nothing.

4 JUSTICE GORSUCH: -- nothing, I
5 believe.

6 MR. RASMUSSEN: Yeah, nothing.

7 JUSTICE GORSUCH: Isn't that awkward?

8 MR. RASMUSSEN: No, I don't think it
9 is at all because I think we now have clarity of
10 what that definition means. And so, when we
11 look at the other statutes where that is used,
12 as we discussed and as the National Congress of
13 American Indians discusses in depth in their
14 brief, when that statute -- that statutory
15 definition is used, it's often very clear that
16 it's excluding ANCs.

17 So we do have some clarity on, you
18 know, that this is a -- a statute that is
19 regularly used when it does not include ANCs --

20 JUSTICE GORSUCH: Thank --

21 MR. RASMUSSEN: -- because that's what
22 it means now.

23 JUSTICE GORSUCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh.

1 JUSTICE KAVANAUGH: Thank you, Chief
2 Justice.

3 Good morning, Mr. Rasmussen. I want
4 to give you an opportunity to respond to how I
5 think the two statutory arguments on the other
6 side merge potentially.

7 So it seems to me if we start with the
8 text and we look at "recognized as eligible," we
9 have a choice. Do we read that in its ordinary
10 meaning, as Mr. Clement says, or do we read it
11 as a term of art?

12 And that's a choice we have. And we
13 have to figure out, how do we resolve that? And
14 one of the ways we usually resolve that is
15 looking at the context to see how Congress might
16 have been using the phrase here.

17 And once we broaden out the lens and
18 look at the context, we see the express
19 inclusion of the ANCs and we see that they would
20 be left out completely, meaning many tens of
21 thousands of native Alaskans would be left out
22 completely not only from the CARES Act but from
23 many other social services statutes.

24 So, given that context, if that's
25 correct, why doesn't that absurdity or oddity or

1 whatever you want to call it help influence the
2 choice we have to make between whether to follow
3 ordinary meaning or term-of-art meaning for the
4 phrase "recognized as eligible"?

5 MR. RASMUSSEN: Well, I -- I think you
6 -- in the question, you have bought into a
7 couple of the incorrect statements made by the
8 ANCs in this case.

9 No Indian, no person who is a member
10 of a federally recognized tribe was not already
11 counted when the Congress -- when the Treasury
12 divided the money amongst the Indian Tribes.

13 So, when they're referring to Indians,
14 they're referring to people who are not enrolled
15 in any Indian Tribe. They don't have that
16 political relationship with the United States.
17 And they're also --

18 JUSTICE KAVANAUGH: Those people are
19 Alaska natives, correct?

20 MR. RASMUSSEN: They are Alaska
21 natives.

22 JUSTICE KAVANAUGH: And Alaska -- why
23 are you treating Alaska natives as kind of
24 second class?

25 MR. RASMUSSEN: We -- we are not.

1 This is -- again, this is actually more common
2 in the lower 48 states, that there are numerous
3 people who are not members of tribes who are
4 Indian, that they can be full-blood Indian even
5 and still not be enrolled in a tribe, that
6 that's not an uncommon thing. And that can
7 happen in Alaska too.

8 And if they -- those people wanted to
9 enroll in an Indian Tribe and they met the
10 qualifications for enrollment in an Indian
11 Tribe, they can do that. And then Congress
12 apportioned this money to the government and the
13 government, so the Indian government --

14 JUSTICE KAVANAUGH: Well, just -- just
15 to focus again on the question, we have a choice
16 of how to read the phrase "recognized as
17 eligible."

18 MR. RASMUSSEN: Mm-hmm.

19 JUSTICE KAVANAUGH: And when we figure
20 out do we go ordinary meaning or we go term of
21 art on that, it seems that the express inclusion
22 of the ANCs, and given some of the points that
23 have been made, no one thought the ANCs would
24 ever be politically recognized now or then or in
25 the future, doesn't that help us choose ordinary

1 meaning rather than term-of-art meaning here so
2 as to avoid that oddity, that absurdity, et
3 cetera?

4 MR. RASMUSSEN: Well, the -- in the
5 ISDEAA, it doesn't just say recognized. It goes
6 on to explain what that means. And then, in
7 1993, Congress -- the United States adopts the
8 -- the List Act and uses that same exact phrase
9 to then say these are the tribes that we're
10 referring -- these are the entities we're
11 referring to. We're going to list them so that
12 everybody knows. That was what that was
13 designed to do, was to provide that clarity for
14 everybody, and that's what it does.

15 JUSTICE KAVANAUGH: And on the -- on
16 the ratification argument, you said, well, that
17 doesn't apply when there's a plain meaning. But
18 I'm not sure we have a plain meaning. And your
19 argument's really not plain meaning because
20 you're relying on a term-of-art construction of
21 "recognized as eligible."

22 MR. RASMUSSEN: We're -- we're only
23 relying -- I -- I view it as -- and, certainly,
24 we -- the interpretation of the ISDEAA, you
25 could use a plain meaning or a term-of-art

1 meaning in order to get at this answer.

2 What it's using is a term that later
3 becomes the term that is used frequently and
4 that Congress then has the United States define
5 through the List Act and define the members that
6 meet that qualification, that meet that
7 definition.

8 JUSTICE KAVANAUGH: And let me ask one
9 other thing. The amicus briefs from Senators
10 Murkowski and Sullivan and Congressman Young
11 from the Alaska Federation of Natives, from the
12 State of Alaska, from Cook Inlet, they used
13 terms like "stunning," "egregious,"
14 "destabilizing," "staggering," in terms of the
15 effects that an affirmance would have on this
16 program but also many other programs.

17 Now they know Alaska. They know how
18 these statutes fit together. The members of
19 Congress from Alaska are -- are appropriately
20 attentive to this. Why are they wrong in
21 describing the consequences of choosing the term
22 of art over ordinary meaning?

23 MR. RASMUSSEN: Well, I -- I think,
24 you know, I would not question that they know
25 Alaska, but I think they also are motivated by

1 getting \$533 million up into Alaska instead of
2 into the lower 48, mostly into the lower 48
3 states, divided amongst all the tribes. They're
4 -- so that's part of what they're doing.

5 But, when we look at the record in
6 this case and the examples that they use, those
7 are not accurate.

8 For example, CIRI, as the United
9 States forthrightly admits, there -- there --
10 there aren't very many of these ISDEAA contracts
11 in Alaska. You get the exact opposite
12 impression from all of the other briefs by the
13 Petitioners and their supporters --

14 JUSTICE KAVANAUGH: Thank you.

15 MR. RASMUSSEN: -- but there are very
16 few.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett.

20 JUSTICE BARRETT: Mr. Rasmussen, I
21 want to be sure that I understand your position.
22 You told Justice Thomas and then I think you
23 repeated again to Justice Kavanaugh that what it
24 takes to establish a trust relationship between
25 a native Alaskan or a Native American from the

1 lower 48 is enrollment in a tribe.

2 Did I understand that correctly?

3 MR. RASMUSSEN: The -- the common way
4 of doing it now is enrollment, that it would be
5 enrolled or enrollable under almost every tribe
6 because they have status.

7 JUSTICE BARRETT: Okay. Well, then
8 what do we make -- I'm going to read you this
9 language from ANCSA, and I'm wondering how to
10 fit that in with your theory.

11 It says: "Alaska natives shall remain
12 eligible for all federal Indian programs on the
13 same basis as other native Americans
14 notwithstanding any other provision of law."

15 I would take that to mean that because
16 of Alaska's unusual, indeed, very distinct
17 method of handling benefits to native Americans,
18 that that amendment to ANCSA makes clear that
19 that trust relationship exists even though they
20 don't enroll in tribes. Am I wrong about that?

21 MR. RASMUSSEN: Yes, I would say that
22 that is incorrect, that even if you get to
23 commerce clause issues, that you simply can't go
24 that far. But, in the --

25 JUSTICE BARRETT: I don't understand

1 why.

2 MR. RASMUSSEN: Okay. Well, in -- in
3 the ANCSA, what it is doing is saying on the
4 same basis as others, and that same basis, as we
5 all know now, is enrollment.

6 It -- it -- at the point in time when
7 that happens --

8 JUSTICE BARRETT: So is your position
9 that native Alaskans have no right to any
10 benefits, even though they are -- even though
11 they are automatically put in ANCs if they don't
12 enroll in Alaskan villages, you know, the
13 equivalent of tribes, it's your position that
14 despite this language in ANCSA they're entitled
15 to nothing from the federal government?

16 MR. RASMUSSEN: No, it's not our
17 position they're entitled to nothing from the
18 federal government because they're --

19 JUSTICE BARRETT: As Indians, not as
20 Alaskan citizens or American citizens. I'm
21 saying, as Indians, it's your position that they
22 are treated differently if they don't enroll in
23 a village?

24 MR. RASMUSSEN: No. That -- that is
25 not our position, that many of the programs that

1 we are talking about, so, for instance, NAHASDA,
2 the housing program, and many of these other
3 programs --

4 JUSTICE BARRETT: Mr. Rasmussen, I
5 think you're not understanding my question. You
6 asserted broadly that the trust relationship
7 between the United States and a native person is
8 established when that native person enrolls in a
9 tribe.

10 And I took you to be saying that the
11 United States doesn't have any kind of trust
12 obligation to a native person who is unenrolled.
13 And you invoked the example of those who live in
14 the lower 48 who have not affiliated with any
15 tribe, although it strikes me as different
16 because native Alaskans, it's not just a
17 free-floating group that self-identifies but are
18 put into as shareholders in ANCs if they choose
19 not to enroll in a village.

20 So I'm trying to understand how to
21 reconcile what you said with this language in
22 ANCSA, and you're referring to other statutes
23 apart from ANCSA.

24 MR. RASMUSSEN: What -- what I'm
25 referring to is that in -- within the ANCSA, it

1 is saying on the same basis as other tribes.
2 And that then does bring in that -- that concept
3 of, well, if you want to be -- have that
4 relationship, you have to enroll in a tribe.

5 There are 220 tribes up in Alaska, and
6 you have to enroll in one of them.

7 JUSTICE BARRETT: And it's your
8 position that every native Alaskan is eligible
9 for membership in one of those tribes? That
10 wasn't my understanding.

11 MR. RASMUSSEN: I don't know whether
12 they are or not. That -- whether they are --
13 whether they would be would be -- would be up to
14 the tribes and there's, you know, like --

15 JUSTICE BARRETT: So every native
16 Alaskan who's unaffiliated with a tribe but is a
17 shareholder in an ANC isn't eligible for
18 benefits as -- you know, as Indians?

19 I mean, it's not just about what
20 intermediary you receive those benefits through
21 or whether you receive them directly from the
22 BIA or another federal entity. You're saying
23 that they are then no different than, say, any
24 other citizen of Alaska that is not native
25 Alaskan?

1 MR. RASMUSSEN: Well, I'm having
2 trouble communicating this, but there are other
3 programs that do extend more broadly than to
4 enrolled members of tribes, that include people
5 -- for example, NAHASDA, that includes people
6 who are members of state-recognized tribes. And
7 there are -- NAHASDA, I believe, includes some
8 similar language that would incorporate --

9 JUSTICE BARRETT: Let me just shift
10 gears before my time expires, Mr. Rasmussen.

11 You were -- earlier in your argument,
12 you were saying -- characterizing this as
13 somewhat of a dispute when Justice Gorsuch was
14 asking you about double-counting, about who
15 delivers the benefits, whether it's the villages
16 or the ANCs, but isn't this really about whether
17 the lower 48 are allocated more money; in other
18 words, that the primary dispute here isn't about
19 governance or who serves as the intermediary or
20 the ANCs being able to trump how the villages
21 might decide things but what piece of the pie
22 goes where?

23 MR. RASMUSSEN: No, our view is that
24 this is a fundamental question about tribal
25 sovereignty and that the tribes are the

1 sovereigns. Congress was giving the money to
2 the sovereigns for them to make the decision
3 that would --

4 JUSTICE BARRETT: My time has expired.
5 Thank you.

6 MR. RASMUSSEN: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Rasmussen,
8 we have a little bit of time left for any
9 questions my colleagues may have that they
10 didn't get a chance to get to.

11 And I'll -- I'll start us off. I want
12 to follow up on the question Justice Barrett and
13 Justice Kavanaugh were asking because I thought
14 that's what the case was really all about.

15 In other words, there are Alaskan
16 natives who are not enrolled members of a
17 village who receive significant services from
18 ANCs, services that the availability of what is
19 directly impacted by the COVID pandemic.

20 And tens of thousands of people fit
21 that description. And I -- I understand you're
22 -- you're doing what lawyers do, which is
23 trying, you know, to get more money for your
24 clients. But the enrolled members receive those
25 benefits and, if you prevail, I gather, will

1 receive more. But the Alaska natives who
2 benefit from the services provided by the ANCs
3 will get -- will get nothing.

4 And I just wonder if that's what
5 Congress -- and maybe, you know, your plain
6 language argument, maybe the answer is that,
7 well, that doesn't matter, but I wonder if
8 there's anybody in Congress who would think that
9 Alaska natives receive significant benefits if
10 they're enrolled in a tribe but not if their
11 benefits are provided through the ANCs.

12 I did not understand Congress to be
13 sort of pushing in favor of enrollment at the
14 expense of participation by ANCs.

15 MR. RASMUSSEN: Again, that there are
16 significant -- excuse me -- there are
17 significant programs that are of benefit to
18 tribal members and others who are affiliated
19 with -- with the tribe.

20 That money goes through tribes. Then
21 how the tribes are permitted to spend that
22 money, whether they can provide it to, for
23 example, members of their community who are not
24 enrolled or others, is determined by the
25 specific statutes at issue. There are a number

1 of statutes that certainly permit them to do
2 that.

3 In this particular case, what we have
4 -- and I think that one fundamental problem that
5 we have here is that the actual record in this
6 case only shows three ISDEAA contracts that are
7 under separate statutes for cadastral surveys.
8 The ANCs own the land and so the cadastral
9 survey, they have the authority to -- to obtain
10 that money.

11 The only other one we have of record
12 is CIRI, and as we've talked about, that has a
13 special statute. So the parade of horrors
14 that they provide of, oh, this is going to
15 deprive people of money or services, is simply
16 false.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. RASMUSSEN: There is no --

20 CHIEF JUSTICE ROBERTS: Thank you.

21 Any of my other colleagues have
22 remaining questions?

23 (No response.)

24 CHIEF JUSTICE ROBERTS: Okay. Take a
25 minute to wrap up, Mr. Rasmussen.

1 MR. RASMUSSEN: Thank you, Your Honor.
2 Again, our view is that the plain
3 language is the touchstone. This Court has said
4 that repeatedly. The plain language is the
5 touchstone for making these decisions.

6 We don't go to ratification. We don't
7 go to other doctrines when the language is
8 plain. This sentence construction here is very
9 clear, and, therefore, the court below was
10 correct when it said this is what -- how this
11 case should be decided.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Guarnieri, rebuttal?

16 REBUTTAL ARGUMENT OF MATTHEW GUARNIERI
17 ON BEHALF OF THE PETITIONER IN CASE NO. 20-543

18 MR. GUARNIERI: Thank you, Mr. Chief
19 Justice. I have just a couple of points to
20 make.

21 First, with respect to our primary
22 argument, that is, the argument that if the
23 recognition clause is understood to refer to
24 formal political recognition, then it should not
25 be read to apply to ANCs, I think, really, the

1 -- the pivot point for that argument, as the
2 questions this morning have made clear, is
3 whether you think there was any evidence of
4 uncertainty about the status of ANCs when
5 Congress enacted that language in 1975.

6 And neither the court of appeals nor
7 Respondents have ever identified any evidence
8 that Congress was at any time uncertain about
9 the sovereign status of ANCs.

10 And there's textual evidence in ISDA
11 to that effect. I mean, the ISDA definition
12 recites that ANCs were established pursuant to
13 ANCSA. So it's entirely implausible to think
14 that Congress itself was uncertain about the
15 sovereignty or, I should say, lack of
16 sovereignty about these corporations that
17 Congress itself had established in a -- in a
18 then-recent federal law.

19 Certainly, there was no doubt about
20 that point in 2020 when Congress enacted the
21 CARES Act and incorporated into it the ISDA
22 definition.

23 And as I think Justice Alito's
24 perceptive questions have pointed out, I mean,
25 it makes no sense to think that the CARES Act

1 incorporated for a -- purposes of a one-time
2 distribution of funds, the CARES Act
3 incorporated a definition under which ANCs would
4 be included only if at some theoretical point in
5 the future Congress chooses to fundamentally
6 reinvent the concept of recognition and
7 recognize as eligible for
8 government-to-government relations these private
9 corporations.

10 Now the second point I want to address
11 is the CARES Act language about the definition
12 of a tribal government. The CARES Act defined
13 the tribal government in terms that are almost
14 word-for-word identical to the definition of a
15 tribal organization in ISDA.

16 And as the district court explained at
17 pages 68 to 70 -- 68A to 70A of the appendix,
18 ANCs have long been understood to -- to have --
19 to have a recognized governing body for ISDA
20 purposes, and so too they have a recognized
21 governing body for CARES Act purposes.

22 And third, with respect to our
23 alternative argument, I mean, Mr. Clement has --
24 has ably addressed that argument. And -- and I
25 would just add that, you know, our -- our -- our

1 point is simply that it's possible that
2 different entities could demonstrate that they
3 are recognized as eligible to -- to participate
4 in ISDA contracting in different ways. For the
5 lower 48 states, the paradigm is acknowledgment
6 by the federal government. But, for ANCs,
7 Congress has already deemed them to be eligible
8 by including them in this special Alaska clause
9 in the ISDA definition.

10 And then, finally, on the
11 practicalities, I mean, many thousands of Alaska
12 natives are not enrolled members of a federally
13 recognized Indian Tribe, and that's by design
14 and that's how Congress set it up in ANCSA.

15 And a decision finding that ANCs are
16 ineligible to receive these CARES Act funds and
17 potentially ineligible to participate in the
18 many other federal programs that rely on the
19 same language as the ISDA definition would have
20 serious, serious consequences for the delivery
21 of federal services and benefits to Alaska
22 natives. It would disrupt the status quo that
23 has prevailed for -- for decades.

24 And we ask this Court to reject that
25 interpretation and to reverse.

1 CHIEF JUSTICE ROBERTS: Thank --

2 MR. GUARNIERI: Thank you.

3 CHIEF JUSTICE ROBERTS: -- thank you,
4 counsel. The case is submitted.

5 (Whereupon, at 11:44 a.m., the case
6 was submitted.)

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