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PREVIEW—Yellen v. Confederated Tribes of the Chehalis Reservation: Whether Alaska Native Corporations are Eligible for CARES Act Relief Payments

Allison Barnwell
Alexander Blewett III School of Law at the University of Montana, allison.barnwell@umontana.edu

PREVIEW—Yellen v. Confederated Tribes of the Chehalis Reservation: *Whether Alaska Native Corporations are Eligible for CARES Act Relief Payments*

Allison Barnwell*

The Supreme Court of the United States will hear oral arguments in this matter on Monday, April 19, 2021, telephonically, at 10 a.m. Solicitor General Elizabeth B. Prelogar will likely argue for the United States Department of Treasury. Paul D. Clement will likely appear for the Petitioner Alaska Native Village Corporation Association. Riyaz A. Kanji will likely argue for the Confederated Tribes of the Chehalis, and Jeffrey S. Rasmussen will likely appear for the Ute Indian Tribe of the Uintah and Ouray Reservation.

I. INTRODUCTION

This case will determine whether Alaska Native Corporations, established by the Alaska Native Claims Settlement Act ("ANCSA"), are eligible for distribution of relief payments under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). The Department of the Treasury determined that Alaska Native Corporations are eligible to receive funds under the CARES Act, but some federally recognized tribes challenged the distribution of relief payments to Alaska Native Corporations. The question of whether Alaska Native Corporations are eligible for CARES Act relief payments may have broader implications for Alaska Native Corporations' ability to contract with the federal government for distribution of the benefits and services Congress designates for Native peoples. The outcome of this case could alter the unique status of Alaska Native Corporations under federal law.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1971, Congress enacted ANCSA to settle "claims by Natives and Native groups of Alaska, based on aboriginal land claims."[1] ANCSA transferred funds and lands to "state-chartered private business corporations," and in exchange, extinguished any aboriginal land claims and revoked most existing reservations for Alaska Native tribes.[2] Alaska Natives received stock in thirteen Alaska Native Regional Corporations and Alaska Natives residing in villages received stock in one of over two hundred Alaska Native Village Corporations (collectively, "ANCs").[3]

1. Br. for Fed. Pet'r at 3, Feb. 22, 2021, Nos. 20-543 and 20-544 (citing 43 U.S.C. § 1601(a) (2018)).

2. Br. for Fed. Pet'r at 4 (quoting Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 524 (1998)).

3. Br. for Fed. Pet'r at 4–5 (citing 43 U.S.C. § 1606).

In 2020, in response to the public health and economic impact of the COVID-19 pandemic, Congress passed the CARES Act.[4] The CARES Act set aside $8 billion for the Secretary of the Treasury to disburse to "Tribal governments" to help cover expenses incurred due to COVID-19.[5] The CARES Act further defined "Tribal governments" as "the recognized governing body of an Indian tribe."[6] An "Indian tribe" is defined to have "the meaning given that term in § 5304(e) of the Indian Self-Determination and Education Assistance Act."[7]

The purpose of the Indian Self-Determination and Education Assistance Act ("ISDA") was to encourage Indian self-governance by authorizing federal agencies to enter into contracts with "any Indian tribe" so that "tribal organization[s]" could deliver federally funded economic, infrastructure, health, or education services to Indians.[8] The ISDA defined an "Indian tribe" as:

> [A]ny Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.[9]

In April 2020, a group of tribes filed several lawsuits against the Secretary to prevent the disbursal of CARES Act funds to ANCs.[10] A group of ANCs intervened as defendants.[11] The United States District Court for the District of Columbia consolidated the cases brought by the various tribes and entered summary judgment for the Secretary and intervenor ANCs.[12] Framing the ISDA definition as a question of statutory construction, the United States Court of Appeals for the District of

4. Pub. L. No. 116-136, 134 Stat. 281 (2020). Title V of the CARES Act amended the Social Security Act, 42 U.S.C. § 301 *et seq.* (2018).

5. Br. for Fed. Pet'r at 8–9 (citing 42 U.S.C. § 801(a)(2)(B)).

6. Br. for Fed. Pet'r at 9 (citing 42 U.S.C. § 801(g)).)

7. Br. for Fed. Pet'r at 9.

8. Br. for Fed. Pet'r at 6–7 (citing 25 U.S.C. § 5321(a)(1)(2018)).

9. Br. for Fed. Pet'r at 7 (quoting 25 U.S.C. § 5304(e)).

10. Br. for Fed. Pet'r at 9–10. The federally recognized tribes that challenged the determination are the Akiak Native Community; the Aleut Community of St. Paul Island; the Arctic Village Council; the Asa'car'sarmiut Tribe; the Cheyenne River Sioux Tribe; the Confederated Tribes of the Chehalis Reservation; the Elk Valley Rancheria, California; the Houlton Band of Maliseet Indians; the Native Village of Venetie Tribal Government; the Navajo Nation; the Nondalton Tribal Council; the Oglala Sioux Tribe; the Pueblo of Picuris; the Quinault Indian Nation; the Rosebud Sioux Tribe; the San Carlos Apache Tribe; the Tulalip Tribes; and the Ute Tribe of the Uintah and Ouray Indian Reservation.

11. Br. for Fed. Pet'r at 10. The ANCs are the petitioners in consolidated case No. 20-544.

12. Confederated Tribes of the Chehalis Reservation v. Mnuchin, 471 F.Supp.3d 1, 4 (D.D.C. 2020).

Columbia reversed and held that ANCs did not meet the definition of "Indian tribe" under the ISDA and were therefore ineligible for CARES Act payments.[13]

III. SUMMARY OF ARGUMENTS

Janet Yellen ("Federal Petitioner"), in her official capacity as the Secretary of the Treasury, posits that ANCs are eligible to receive payments under the CARES Act because Congress expressly included ANCs in the ISDA definition of "Indian tribe."[14] Federal Petitioner asserts that by incorporating the ISDA definition into the CARES Act, Congress therefore included ANCs as eligible for CARES Act payments.[15] Furthermore, Federal Petitioner argues that reading the ISDA definition as the Respondents suggest would violate the canons of construction by creating superfluity in the statute.[16]

The Alaska Native Village Corporation Association ("ANVCA Petitioner") similarly argues that the ISDA language plainly means ANCs should be eligible for CARES Act funding.[17] More specifically, ANVCA Petitioner argues that Congress textually signaled its intent to include ANCs as eligible for ISDA contracts when Congress amended the ISDA but kept the definition of ANCs intact.[18] Finally, ANVCA Petitioner contends that the term "recognized" in the ISDA definition of "Indian tribe" is not a term of art, and merely has its ordinary meaning.[19]

Respondent Confederated Tribes of the Chehalis Reservation ("Confederated Tribes") argues that ANCs are not "Indian tribes" under the ISDA or under the CARES Act because in order to qualify under the ISDA, ANCs must be federally recognized.[20] No ANC is currently federally recognized.[21] Further, Confederated Tribes urge the Court to find that there is no superfluity issue within the plain text of the ISDA definition, Congress has not determined that ANCs are eligible under the ISDA, and federal statutes enacted after the ISDA do not conflict with the interpretation that ANCs cannot seek contracts under the ISDA.[22] Finally, Confederated Tribes argue that excluding ANCs from the definition under ISDA will not lead to a decrease in services available to Alaska Native peoples because ANCs do not hold any ISDA contracts.[23]

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13. Confederated Tribes of the Chehalis Reservation v. Mnuchin, 976 F.3d 15 (D.C. Cir. 2020).
14. Br. for Fed. Pet'r at 15.
15. Br. for Fed. Pet'r at 16.
16. Br. for Fed. Pet'r at 17–18.
17. Br. for Pet'r Alaska Native Village Corps at 21–22, Feb. 22, 2021, Nos. 20-543 and 20-544.
18. Br. for Pet'r Alaska Native Village Corps at 22.
19. Br. for Pet'r Alaska Native Village Corps at 23.
20. Br. for Resp't Confederated Tribes of the Chehalis Reservation at 16, Mar. 24, 2021, Nos. 20-543 and 20-544.
21. Br. for Resp't Confederated Tribes at 16.
22. Br. for Resp't Confederated Tribes at 16–17.
23. Br. for Resp't Confederated Tribes at 17.

Respondent Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute Indian Tribe") argues that only federally recognized tribes are eligible for CARES Act relief payments because the recognized tribes are the only governing bodies of Indian tribes.[24] Ute Indian Tribe asserts that Federal recognition has long been a foundational requirement of federal Indian law, and when Congress used the phrase "recognized" in the CARES Act it intended to incorporate the longstanding term of art.[25] According to Ute Indian Tribe, ANCs are not federally recognized governing bodies of Indian tribes, and therefore cannot qualify for CARES Act payments.[26] Further, Ute Indian Tribe argues the policy arguments advanced by both Petitioners are inapplicable to the legal arguments.[27] Instead, Ute Indian Tribe contends that granting CARES Act relief payments to ANCs would divert much needed funds from the recognized tribes of the United States into the hands of for-profit corporations.[28]

A. Federal Petitioner's Arguments

1. The Definition of "Indian Tribe" in the ISDA Definition.

Federal Petitioner focuses its argument on the definition of "Indian tribe" in the ISDA. The definition specifically mentions ANCs, and Federal Petitioner advances that the express mention of ANCs evinces congressional intent to make ANCs eligible to enter into contracts under the statute.[29] Federal Petitioner makes two main points in furtherance of this argument.

First, Federal Petitioner notes that the language of the ISDA specifically mentions ANCs established pursuant to ANCSA in a special Alaska clause.[30] Federal Petitioner explains that the decision to include ANCs in the ISDA definition is consistent with role of ANCs under ANCSA.[31] ANCSA directed the establishment of ANCs, and in exchange for funds and select lands to be held by the ANCs, ANCSA extinguished all claims to aboriginal title in Alaska.[32] Federal Petitioner argues that Congress not only contemplated ANCs would disburse funds and manage lands transferred under ANCSA, but also anticipated ANCs would manage land into the future.[33] According to Federal Petitioner, the purpose and role of ANCs are consistent with the goals of the ISDA to achieve maximum Indian participation in the direction of federal services to Indian

24. Br. for Resp't Ute Indian Tribe at 9, Mar. 24, 2021, Nos. 20-543 and 20-544.
25. Br. for Resp't Ute Indian Tribe at 15.
26. Br. for Resp't Ute Indian Tribe at 21.
27. Br. for Resp't Ute Indian Tribe at 34.
28. Br. for Resp't Ute Indian Tribe at at 35–37.
29. Br. for Fed. Pet'r at 19.
30. Br. for Fed. Pet'r at 20.
31. Br. for Fed. Pet'r at 20.
32. Br. for Fed. Pet'r at 21.
33. Br. for Fed. Pet'r at 21.

communities.[34] Federal Petitioner argues that the ISDA, passed just two years after ANCSA, would not logically have excluded hundreds of Alaska Native entities recently established by Congress.[35] Federal Petitioner explains that the ISDA goal of promoting economic development in Indian communities is advanced by including ANCs in the definition of "Indian tribes" because ANCs were designed to address the economic needs of Alaska Natives.[36]

Second, the Federal Petitioner argues the drafting history of the ISDA supports the conclusion that Congress intended to ensure ANCs are eligible to contract with the federal government under ISDA.[37] The original bill for ISDA did not include ANCs, and the House Committee on Interior and Insular Affairs amended the language to include ANCs.[38]

2. Past Interpretations of the ISDA Definition.

Federal Petitioner lists federal agencies, one court opinion, and federal Indian law experts that have concluded ANCs qualify as Indian tribes under the ISDA.[39] First, Federal Petitioner points to several federal agencies that have determined ANCs should be treated as "Indian tribes" under the ISDA definition, including the Interior Department, Indian Health Services, and the Bureau of Indian Affairs ("BIA").[40] Second, Federal Petitioner turns to a Ninth Circuit opinion—the only court of appeals to hear the issue—that held ANCs should be eligible to be treated as Indian tribes under ISDA.[41] There, the Ninth Circuit determined that the plain language of the ISDA included ANCs, and excluding ANCs from the definition would violate rules of statutory construction.[42] Finally, Federal Petitioner supports its argument by pointing to experts in the field of Indian law that have long understood ANCs to be included in the ISDA definition.[43]

Federal Petitioner also contends that the CARES Act definition of eligible tribal governments incorporated the settled definition of Indian tribes from the ISDA, which Congress understood would include ANCs.[44] Further, Federal Petitioner argues that when Congress re-enacted the ISDA without changing the definition of Indian tribe, it is presumed to have known the administrative and judicial interpretations of the statute

34. Br. for Fed. Pet'r at 22.
35. Br. for Fed. Pet'r at 22.
36. Br. for Fed. Pet'r at 22.
37. Br. for Fed. Pet'r at 22.
38. Br. for Fed. Pet'r at 23 (citing H.R. Rep. No. 1600, 93d Cong., 2d Sess. 14 (1974)).
39. Br. for Fed. Pet'r at 24.
40. Br. for Fed. Pet'r at 24.
41. Br. for Fed. Pet'r at 26–27 (citing Cook Inlet Native Ass'n v. Bowen, 810 F.2d 1471, 1476 (9th Cir. 1987)).
42. Br. for Fed. Pet'r at 26–27.
43. Br. for Fed. Pet'r at 28 (citing to 1 Cohen's § 4.07[3][d][i]; Felix S. Cohen, Handbook of Federal Indian Law 769–70, n. 264, 267 (1982 ed.)).
44. Br. for Fed. Pet'r at 29.

and adopted those interpretations.[45] Federal Petitioner notes that in 1988, Congress reenacted ISDA's definition of "Indian tribe." Consequently, Federal Petitioner asserts, Congress' decision to not repeal or revise the definition of Indian tribe while making other changes is persuasive evidence Congress intended ratification of the administrative or judicial interpretation.[46]

Federal Petitioner argues that Congress incorporated the meaning of the term "Indian tribe" from the ISDA into the CARES Act.[47] Federal Petitioner points out that like other federal statutes that cross reference and incorporate the ISDA definition in order to administer grants to ANCs, the CARES Act should be read to include ANCs.[48] Further, Federal Petitioner asserts, Congress did not include any limiting language to exclude ANCs, as it has done in other statutes.[49]

Finally, Federal Petitioner urges the Court to read the CARES Act and ISDA definition in the context of other federal statutes that presume ANCs meet the definition of "Indian tribe" in ISDA.[50] Federal Petitioner lists some statutes that reference ANCs as eligible for ISDA contracts, and other statutes channeled through ISDA that specifically carve out ANC eligibility.[51]

3. The Court of Appeals Erred.

Federal Petitioner takes the position that the appellate court erred in reading the ISDA definition to require federal recognition of ANCs.[52] Instead, Federal Petitioner argues, the Alaska-specific clause in the ISDA definition is independent of the federal recognition clause and should not be read to require ANC's federal recognition.[53]

Federal Petitioner contends that the court of appeals misunderstood the relevant history of ISDA when it assumed that Congress could have been intended the recognition clause to apply to ANCs in the future.[54] Federal Petitioner notes the appellate court failed to cite any authority to suggest that Congress, when it passed the ISDA, contemplated ANCs could be eventually recognized as Indian tribes, and federally recognized tribes have always been understood in terms inapplicable to ANCs.[55]

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45. Br. for Fed. Pet'r at 29 (citing Lorillard v. Pons, 434 U.S. 575, 580–81 (1978)).

46. Br. for Fed. Pet'r at 30 (citing CFTC v. Schor, 478 U.S. 833, 846 (1986)).

47. Br. for Fed. Pet'r at 32.

48. Br. for Fed. Pet'r at 33.

49. Br. for Fed. Pet'r at 34.

50. Br. for Fed. Pet'r at 35.

51. Br. for Fed. Pet'r at 35–37.

52. Br. for Fed. Pet'r at 37–38.

53. Br. for Fed. Pet'r at 38.

54. Br. for Fed. Pet'r at 40.

55. Br. for Fed. Pet'r at 42 (citing Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); Worcester v. Georgia, 31 U.S. 515, 559 (1832)).

Finally, Federal Petitioner asserts that the appellate court erred in applying the "series-qualifier canon."[56] Under that canon, which states that a modifier that follows a straightforward construction of nouns or verbs in a series should be read to apply to each item in that series, ANCs would need to be federally recognized to be eligible for ISDA.[57] Federal Petitioner argues that ANCs cannot be federally recognized in the same way tribes can be recognized.[58]

4. The Recognition Clause in the ISDA Definition.

Federal Petitioner claims that the recognition clause in the ISDA definition should not be read to require federal recognition in the legal term of art sense, and instead should be read to require that Congress itself determines who is recognized based on the functions performed.[59] Federal Petitioner asserts that because ANCs perform functions to improve and meet the economic and social function of Alaska Natives, Congress effectively judged ANCs to have a federal status warranting eligibility under the ISDA.[60]

ANVCA's Arguments

1. The Plain Language of the ISDA Definition and the CARES Act.

Petitioner ANVCA incorporates many of the same arguments as Federal Petitioner, and like Federal Petitioner, focuses on the plain meaning of the ISDA definition.[61] ANVCA's arguments differ from the Federal Petitioner's arguments by presenting a more thorough analysis of the recognition clause in the ISDA definition, and how it should not exclude ANCs. ANVCA asserts that the clause about recognition in the ISDA is not in reference to federal recognition as a legal term of art. [62] Further, ANVCA argues that if the recognition clause in the ISDA definition applies to ANCs, Congress likely has already recognized ANCs as distinct Native entities "designed to administer the lands and funds conveyed in settlement of Native land claims and to play a continuing role in the distribution of benefits" to Alaska Natives.[63] ANVCA asserts that any other reading of the ISDA definition would render the specific mention of ANCs superfluous.[64]

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56. Br. for Fed. Pet'r at 43.
57. Br. for Fed. Pet'r at 43.
58. Br. for Fed. Pet'r at 43–44
59. Br. for Fed. Pet'r at 47.
60. Br. for Fed. Pet'r at 48.
61. Br. for Pet'r Alaska Native Village Corps at 26–27.
62. Br. for Pet'r Alaska Native Village Corps at 28–29.
63. Br. for Pet'r Alaska Native Village Corps at 29.
64. Br. for Pet'r Alaska Native Village Corps at 28–29 (explaining that an ANC established under ANCSA is not also eligible for List-Act recognition as a sovereign.).

2. The Appellate Court Erred.

Like the Federal Petitioner, ANVCA critiques the appellate court decision and argues that the appellate court erred in holding ANCs are ineligible for CARES Act payments.[65] ANVCA also incorporates Federal Petitioner's arguments that the appellate court erred when it failed to consider that Congress ratified the inclusion of ANCs in the ISDA definition by not amending or revising the ISDA.[66] ANVCA presents a list of other federal statutes that mention or imply that ANCs are eligible under ISDA.[67]

Finally, ANVCA asserts the appellate court assumed that the word "recognition" used in the ISDA definition referred to federally recognized tribes, but ANVCA argues the word should have its ordinary meaning in order to render the inclusion of ANCs in the ISDA definition meaningful.[68] According to ANVCA, Congress has already recognized the special status of ANCs as Native entities and therefore made them eligible under the ISDA definition.[69]

3. ANCs are "Indian Tribes" under ISDA.

ANVCA contends that the language in the CARES Act, which incorporates the definition of "Indian tribe" from the ISDA, resolves the case.[70] This position counters the Respondents' position that even if ANCs are eligible under ISDA as "Indian tribe[s]," they are not "Tribal governments" and therefore do not qualify for payments under the CARES Act.[71] However, ANVCA argues that the term "Tribal government" in the CARES Act is defined in statute to have the meaning of "Indian tribe" contained in the ISDA.[72] Moreover, ANVCA asserts, because Title V of the CARES Act does not define the term "recognized governing body," the ordinary meaning of the word applies.[73] ANVCA explains that the ordinary meaning of "governing body" applies to ANCs,[74] and that there is no evidence Congress intended the word "recognized" to be used in the term of art sense.[75]

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65. Br. for Pet'r Alaska Native Village Corps at 30–32 (citing Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881, 1890 (2019), for rule of interpretation that if possible, courts should give meaning to every word of a statute).

66. Br. for Pet'r Alaska Native Village Corps at 36–37 (citing *Bowen*, 810 F.2d at 1473–76)).

67. Br. for Pet'r Alaska Native Village Corps at 38–41 (citing 25 U.S.C. § 4103(13)(B) (2018) and the Indian Tribal Energy Development and Self Determination Act, 25 U.S.C. § 3501(4)(A)).

68. Br. for Pet'r Alaska Native Village Corps at 41–42.

69. Br. for Pet'r Alaska Native Village Corps at 42–44.

70. Br. for Pet'r Alaska Native Village Corps at 46.

71. Br. for Pet'r Alaska Native Village Corps at 46.

72. Br. for Pet'r Alaska Native Village Corps at 47.

73. Br. for Pet'r Alaska Native Village Corps at 47 (citing Encino Motorcars, LLC v. Navarro, 138 S. Ct. 2117, 1140 (2016)).

74. Br. for Pet'r Alaska Native Village Corps at 47.

75. Br. for Pet'r Alaska Native Village Corps at 48.

4. Policy Arguments.

Finally, ANVCA argues that it makes no sense for Congress to have excluded ANCs from the CARES Act relief payments because ANCs were designed to distribute benefits and services to Alaska Natives.[76] ANVCA notes that many Alaska Natives are not affiliated with any federally recognized tribe, and many Alaskan federally recognized tribes are ill-equipped to distribute the CARES Act relief payments.[77] Moreover, ANVCA contends, the impact of excluding ANCs from the definition of "Indian tribe" in the ISDA could be even greater than the immediate implication of disqualifying ANCs from relief payments.[78] ANVCA argues that many Alaska Natives only receive services that Congress makes available to Native peoples through ANCs' eligibility as "Indian tribe[s]" under the ISDA.[79]

Respondent Confederated Tribes' Arguments

1. The Plain Text of the ISDA Definition Requires Recognition.

Respondent Confederated Tribes, like both Petitioners, focuses on the interpretation of the plain text of the ISDA. Confederated Tribes, however, unlike the Petitioners, argues that the text and structure of the ISDA definition of "Indian tribe" disqualifies all ANCs because it requires federal recognition.[80] According to Confederated Tribes, the clause requiring recognition comes at the end of the definition, which modifies the entire preceding text of the definition.[81] Further, the recognition clause applies to the initial list of Indian groups in the definition, and therefore should also apply to ANCs.[82]

Confederated Tribes critiques the Petitioners' position that because ANCs are specifically mentioned in the ISDA that Congress intended ANCs to be included as eligible.[83] Confederated Tribes argues that the Petitioners' reading erases the requirement of federal recognition.[84] Federal recognition, according to Confederated Tribes, is a "formal political act" between two governments, and no ANC has been recognized.[85] Confederated Tribes explains that Congress has consistently used recognition to accord or divest an Indian group of eligibility for

76. Br. for Pet'r Alaska Native Village Corps at 49.
77. Br. for Pet'r Alaska Native Village Corps at 50.
78. Br. for Pet'r Alaska Native Village Corps at 50.
79. Br. for Pet'r Alaska Native Village Corps at 50–51.
80. Br. for Resp't Confederated Tribes at 20.
81. Br. for Resp't Confederated Tribes at 20.
82. Br. for Resp't Confederated Tribes at 20.
83. Br. for Resp't Confederated Tribes at 24–25.
84. Br. for Resp't Confederated Tribes at 24.
85. Br. for Resp't Confederated Tribes at 24 (citing California Valley Miwok Tribe v. United States, 515 F.3d 1262, 1263 (D.C. Cir. 2008)).

federal programs.[86] By not formally recognizing ANCs, Confederated Tribes asserts, Congress deliberately excluded ANCs from eligibility for federal Indian programs and services.[87]

2. Petitioners' Interpretation is Flawed.

Confederated Tribes argues the plain text of ISDA does not create a problem with superfluity, contrary Petitioners' position.[88] Instead, Confederated Tribes claims that the Alaska specific phrase in the definition is redundant.[89] Confederated Tribes urges the Court to find that in order to qualify as an "Indian Tribe," an ANC would need to be federally recognized.[90] Confederated Tribes further notes that Congress could recognize ANCs based on its plenary power over Indian affairs, but it has not done so.[91]

Confederated Tribes does not agree with Petitioners' argument that it would be absurd to recognize ANCs,[92] and argues instead that discussions around recognition of village or regional corporations have occurred since ANCSA.[93] Moreover, Confederated Tribes points out that recognition of Alaska tribes differs from recognition of tribes in the contiguous United States because under the Alaska Indian Reorganization Act (IRA), Congress authorized groups of Alaska Native peoples to organize based on a common economic bond[94] and did not "require descent or any connection to a historical Indian tribe."[95] This history, according to Confederated Tribes, shows that it is not absurd for Congress to have contemplated recognition of ANCs when it passed ISDA.[96]

Confederated Tribes further argues that Congress has not ratified Petitioners' interpretation of ISDA, because the meaning of the text plainly

86. Br. for Resp't Confederated Tribes at 25–26 (referencing Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 3 AM. INDIAN L. REV. 139, 151 (1977); Indian Tribal Restoration Act, Pub. L. No. 95-281, § 4, 92 Stat. 246, 247 (1978)).

87. Br. for Resp't Confederated Tribes at 28–29 (citing as an example the list of 218 groups in Alaska, not including ANCs, that the BIA recognized a definite responsibility to provide federal services. BIA, *American Indians and Their Federal Relationship*, Preface, 2–6 (1972), https://tinyurl.com/nn7ayunc.)

88. Br. for Resp't Confederated Tribes at 31.

89. Br. for Resp't Confederated Tribes at 31.

90. Br. for Resp't Confederated Tribes at 32.

91. Br. for Resp't Confederated Tribes at 32 (citing United States v. Lara, 541 U.S. 193, 200 (2004)).

92. Br. for Resp't Confederated Tribes at 34.

93. Br. for Resp't Confederated Tribes at 34 (citing 122 Cong. Rec. 29,480 (Sept. 9, 1976) and S. Rep. No. 100-201, at 23 (1987)).

94. Br. for Resp't Confederated Tribes at 35–36 (referencing the 1936 Amendment to the Indian Reorganization Act, ch. 254, Pub. L. No. 74-538, § 1, 49 Stat. 1250; *see also* Congressional recognition of the Tlingit and Haida Indians to file lawsuit, Act of June 19, 1935, § 7, 49 Stat. 388, 389, 390).

95. Br. for Resp't Confederated Tribes at 36 (citing 85 Fed. Reg. 37-01, 42 (Jan. 2, 2020)).

96. Br. for Resp't Confederated Tribes at 35.

requires federal recognition.[97] Confederated Tribes conjectures that the plain text requirement for federal recognition is why Federal Petitioner did not ask for deference for its interpretation of the statutes in question.[98] According to Confederated Tribes, if the text were ambiguous and deserved deference, Petitioner's claim that Congress ratified administrative and judicial interpretations would also fail because the administrative and judicial interpretations of the ISDA definition are "well-settled."[99] Further, Confederated Tribes asserts that a single Ninth Circuit decision from 1987 did not settle the ISDA's meaning.[100]

Finally, Confederated Tribes takes the position that statutes enacted after the ISDA do not presuppose ANCs meet the ISDA definition.[101] Confederated Tribes argues that the statutes listed by the Petitioner do not confirm that ANCs meet the definition of "Indian tribe" under ISDA.[102] Confederated Tribes notes that Congress knows how to include ANCs by omitting the recognition clause from statutes, as it has done in other statutes, but it did not do so here.[103]

3. Policy Arguments.

Confederated Tribes takes the position that ANCs are not the primary distributors of federal services or programs in Alaska, and therefore excluding ANCs from CARES Act relief payments will not affect most services in Alaska for Alaska Natives.[104] Rather, Confederated Tribes asserts that treating ANCs as "Indian tribes" under ISDA would change the status quo by promoting ANCs to compete with the federally recognized tribes for ISDA contracts.[105] According to Confederated Tribes, allowing ANCs to pursue federal contracts under ISDA would "vest ANCs with new and untold tribal powers . . . ."[106]

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97. Br. for Resp't Confederated Tribes at 37.

98. Br. for Resp't Confederated Tribes at 38.

99. Br. for Resp't Confederated Tribes at 39 (citing Bragdon v. Abbott, 524 U.S. 624, 645 (1998)).

100. Br. for Resp't Confederated Tribes at 47 (citing *Bowen*, 810 F.2d 1471).

101. Br. for Resp't Confederated Tribes at 48.

102. Br. for Resp't Confederated Tribes at 48–50 (discussing the Native American Housing Assistance and Self Determination Act, 25 U.S.C. § 4103(13)(B), and other statutes that expressly exclude ANCs, like 25 U.S.C. § 3501(4) and 42 U.S.C. § 9601(36)).

103. Br. for Resp't Confederated Tribes at 51 (citing as an example 16 U.S.C. § 470bb(5), 16 U.S.C. § 4302(4), and 20 U.S.C. 1401(13)).

104. Br. for Resp't Confederated Tribes at 52.

105. Br. for Resp't Confederated Tribes at 52–53.

106. Br. for Resp't Confederated Tribes at 54.

Respondent Ute Indian Tribes' Arguments

1. Federal Recognition in the CARES Act Language.

Respondent Ute Indian Tribe presents slightly different arguments than Confederated Tribes. Ute Indian Tribe argues that the language of the CARES Act, which states that relief payments will be administered to the "recognized governing body of an Indian Tribe," controls this case.[107] Ute Indian Tribe explains that ANCs are not recognized as separate sovereign governments, and therefore do not qualify for CARES Act payments.[108]

Further, Ute Indian Tribe agrees with Respondent Confederated Tribes that when Congress used the word "recognized," it did so with the understanding that it is a legal term of art establishing a government-to-government relationship between the United States and the recognized tribe.[109] According to Ute Indian Tribe, there are federally recognized tribes in Alaska that qualify for CARES Act relief payments, and tribal members of the recognized tribes have already received funds through the CARES Act.[110]

2. A Tribal Government Must be Recognized and Meet the Definition of "Indian Tribe" in the ISDA.

Ute Indian Tribe suggests the Court need not take up the arguments that ANCs qualify as "Indian tribes" under ISDA because it can answer the narrower question of whether ANCs are eligible for payments under the CARES Act.[111] Ute Indian Tribe argues that ANCs are not eligible under the CARES Act because they are not recognized governing bodies, but they also are not eligible under ISDA because they are not recognized.[112] Ute Indian Tribe claims that the Petitioners' attempted to omit discussion of the recognition requirement in the CARES Act, and stirred confusion by focusing on the ISDA definition of "Indian tribe."[113]

3. The Plain Language of the ISDA Requires Recognition.

Ute Indian Tribe repeats the arguments made by Confederated Tribes and asks the Court to find that the ISDA definition requires ANCs to be recognized.[114] Further, Ute Indian Tribe adds to the Confederated Tribes argument by noting that without the recognition requirement in

107. Br. for Resp't Ute Indian Tribe at 10 (citing 42 U.S.C. § 801(g)(5)).
108. Br. for Resp't Confederated Tribes at 10–13.
109. Br. for Resp't Confederated Tribes at 15–16 (citing Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237, 248 (2014)).
110. Br. for Resp't Confederated Tribes at 18–22.
111. Br. for Resp't Confederated Tribes at 25.
112. Br. for Resp't Confederated Tribes at 24–25.
113. Br. for Resp't Ute Indian Tribe at 24–25.
114. Br. for Resp't Ute Indian Tribe at 27–28.

ISDA, any organized group of Indians would be eligible for ISDA contracts.[115]

Finally, Ute Indian Tribe incorporates the Confederated Tribes' arguments that Congress did not ratify the ISDA definition, and also points out that Congress did not ratify the Petitioners' suggested reading of the CARES Act.[116]

4. Policy Arguments.

Ute Indian Tribe argues that Alaska already received more money than all but two other states in the CARES Act, and those funds were disbursed to all Alaska residents, including Alaska Native residents.[117] Further, Ute Indian Tribe explains that the argument that Alaska Natives who are not enrolled in a federally recognized tribe in Alaska will be left out if ANCs are excluded from relief payments also holds true in other states with ethnically Native American people who are not enrolled in a recognized tribe.[118] However, Ute Indian Tribe reminds the Court that those people who are not enrolled in a federally recognized tribe will not miss out on CARES Act relief entirely, because the State of Alaska is also using its CARES Act relief funds to provide services and benefits to all Alaskans regardless of race or ethnicity.[119] Finally, Ute Indian Tribe claims it is morally wrong to divert funds from the recognized governing bodies of tribes to ANCs.[120]

IV. ANALYSIS

The question presented in this case is whether ANCs are eligible for disbursement of CARES Act payments.[121] To answer the question, the Court will need to address whether Congress intended ANCs to be included in the CARES Act funding when it specified that "Tribal governments" should receive payments.[122] Because the definition of "Tribal governments" references the ISDA definition of "Indian tribes," the Court may also need to determine whether ANCs qualify as "Indian tribes" under ISDA.[123] By relying on statutory construction principles, the Court will likely find for the Petitioners.

A. CARES Act Statutory Language

The Court must first determine whether the language of the CARES Act excludes ANCs from eligibility for relief payments. The

115. Br. for Resp't Ute Indian Tribe at 28.
116. Br. for Resp't Ute Indian Tribe at 33.
117. Br. for Resp't Ute Indian Tribe at 35.
118. Br. for Resp't Ute Indian Tribe at 36.
119. Br. for Resp't Ute Indian Tribe at 37.
120. Br. for Resp't Ute Indian Tribe at 37.
121. Br. for Resp't Ute Indian Tribe at i.
122. Br. for Resp't Ute Indian Tribe at 24.
123. Br. for Resp't Ute Indian Tribe at 24.

CARES Act relief payments are available only to "recognized governing bodies of Indian tribes."[124] Ute Indian Tribe argues that the language in the CARES Act precludes ANCs from eligibility for relief payments because ANCs are not "recognized," and the Petitioners minimize the language in the Act and instead focus on the ISDA definition of "Indian tribe."[125] The Petitioners also assert that the term "recognized" is not a term of art as used in federal Indian law, but instead refers to the ordinary dictionary definition of the word.[126]

Ultimately, the question the Court must determine under the CARES Act language comes down to whether the words "recognized governing bodies" contained in the CARES Act excludes ANCs.[127] The Petitioners have a narrow path to a favorable outcome. Petitioners' argument that the term should not be understood to convey the federal Indian law meaning of "recognized" may carry weight because Congress chose not to use a more narrowing definition of federally recognized tribe, as it has done in other statutes.[128] The Court may also find that Congress contemplated the ISDA applied to ANCs, and therefore the word "recognized" used in the CARES Act must carry its ordinary dictionary definition and not the meaning attached to the word in federal Indian law. However, if the Court agrees with the Respondent Ute Indian Tribe that the CARES Act reference to "recognized" means recognition of a tribe as sovereign-to-sovereign, all parties agree that ANCs cannot meet the definition.[129]

The Court could find that the meaning of the word "recognized" in the CARES Act does not reference the legal term of art, in which case ANCs are likely sufficiently "recognized governing bodies." Whether the Court adopts the Petitioners' interpretation will likely depend on whether the Court agrees with Petitioners that the ISDA applies to ANCs. If the Court finds the ISDA definition of "Indian tribes" includes ANCs, the Court will also likely find ANCs are "recognized governing bodies" because it is unlikely Congress included ANCs by referencing the ISDA definition but excluded ANCs in the same sentence by requiring recognition.

On the other hand, if the Court finds the ISDA definition of "Indian tribes," disqualifies ANCs, it is also likely the Court will find that ANCs are twice disqualified from CARES Act payment eligibility—through the recognition requirement in the CARES Act language and through the recognition requirement in the ISDA.

Petitioners' argument that the term should not be understood to convey the federal Indian law meaning of "recognized" may carry weight because Congress chose not to use a more narrow definition of federally

124. Br. for Resp't Ute Indian Tribe at 10.

125. Br. for Resp't Ute Indian Tribe at 10; Br. for Pet'r Alaska Native Village Corps. at 25.

126. Br. for Pet'r at 41; Br. for Fed. Pet'r at 47.

127. *See* Br. for Resp't Ute Indian Tribe. at 16.

128. *See* Br. for Pet'r at 44.

129. Br. for Pet'r at 24–25.

recognized tribe, as it has done in other statutes.[130] Petitioners' argument that "recognized" does not carry the meaning assigned in federal Indian law will most likely prevail because it is also likely the Court will find the ISDA definition expressly includes ANCs. Congress could have used more specific language referring to List-Act federally recognized tribes, but instead it incorporated a definition that expressly includes mention of ANCs.

B. ISDA Definition of "Indian Tribes"

The Supreme Court could decide the case on the basis of the language in the CARES Act alone, as the Ute Indian Tribe suggests it should. However, the Court will also likely address the parties' disagreement as to whether the ANCs qualify as "Indian tribes" under the ISDA definition.[131] Petitioners argue that ANCs are "Indian tribes" because ISDA expressly lists ANCs in its definition and to find otherwise would render the inclusion of ANCs superfluous.[132] However, Respondents counter that the series qualifier canon requires the statute to be read in a way that applies the recognition clause to ANCs.[133] Since ANCs are not recognized, they do not meet the definition.[134]

The Court may look to the amicus brief of the Alaska delegation, which includes Senator Murkowski's claim that Congress intentionally incorporated the ISDA definition in order to include ANCs and make them eligible for CARES Act payments.[135] The Court may also be persuaded by the amicus brief for the Cook Inlet Regional Corporation ("CIRI"), which represents Native Alaskans in the Anchorage area, and has several ISDA agreements to provide services for its members.[136] CIRI asserts that, as an ANC, it has always been eligible for ISDA agreements and should continue to be eligible.[137]

The Court will likely rely on principles of statutory construction to determine which interpretation of the ISDA definition should prevail and will likely find that given the statute as a whole, Petitioners' arguments for an interpretation that includes ANCs carries the most weight. Congress chose to incorporate the ISDA definition of "Indian tribe" that mentions ANCs. This evinces congressional intent to include ANCs as eligible for CARES Act payments. Moreover, ANCs were designed to distribute benefits and services of the land exchange in ANCSA, and are therefore designed to distribute benefits to Alaska Natives. ISDA is similarly

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130. Br. for Resp't Confederated Tribes at 51.
131. Br. for Resp't Ute Indian Tribe at 24.
132. Br. for Fed. Pet'r at 29.
133. Br. for Resp't Confederated Tribe at 18.
134. Br. for Resp't Confederated Tribe at 25.
135. Br. for US Senators Lisa Murkowski, et. al. Amicus at 20, Feb. 26, 2021, No. 20-543 and 20-544.
136. Br. for Cook Inlet Region, Inc. Amicus at 4, Mar. 1, 2021, No. 20-543 and 20-544.
137. Br. for Cook Inlet Region, Inc. Amicus at 4.

designed, and Congress would likely have expected ANCs to qualify for ISDA agreements. Moreover, if the recognition clause at the end of the ISDA definition applies to ANCs, then the inclusion of ANCs in the definition is rendered superfluous because no ANC is federally recognized.

V. CONCLUSION

While the Court will determine the narrow question of whether ANCs should receive relief payments under the CARES Act in this case, the implications of the decision may have a broader impact. The Supreme Court's decision will have immediate and timely effects for ANC members or other CARES Act eligible Tribal governing bodies who need funds to help recover from the effects of the pandemic. On a larger scale, however, this case represents one of many problems in reconciling federal Indian law with the unique status of Alaska Native Tribes and ANCs.