Nos. 20-543 & 20-544

In the Supreme Court of the United States

JANET L. YELLEN,
SECRETARY OF THE TREASURY,
Petitioner,

v.

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

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

v.

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

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

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, *ET AL.* IN SUPPORT OF RESPONDENTS

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March 31, 2021

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INTEREST OF THE *AMICI CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest national organization comprising Tribal nations and their citizens. NCAI's mission is to protect and preserve the relationship between federally recognized Indian tribes, including Alaska Native villages, and the United States. NCAI also provides education to the public on Tribal nations and the functions they serve.

The following nine *amici* likewise are national and regional organizations representing federally recognized Indian tribes and their interests:

- Affiliated Tribes of Northwest Indians represents nearly fifty federally recognized Indian tribes from the greater Northwest and advocates for their tribal sovereignty and self-determination.
- All Pueblo Council of Governors, comprised of the governors of the nineteen Pueblo Nations of New Mexico and one in Texas, advocates for the social, cultural, and traditional well-being of the Pueblo Nations.
- California Tribal Chairpersons' Association consists of ninety federally recognized Indian

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[1] Pursuant to Rule 37.6 of the Rules of this Court, no counsel for either party authored this brief in whole or in part, and no person other than *amicus curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties have each consented to the filing of this brief. S. Ct. R. 37.3(a).

tribes from across California and advocates for their sovereign interests.

- Great Plains Tribal Chairmen's Association, Inc. is organized under Section 17 of the Indian Reorganization Act to support the sixteen Tribal nations of North Dakota, South Dakota, and Nebraska, and their treaty rights and inherent rights of self-government.
- Inter Tribal Association of Arizona, Inc. is a not-for-profit intertribal organization comprised of 21 federally recognized tribes, with lands in Arizona, as well as California, New Mexico, Nevada, and Utah. The member tribes of the Inter Tribal Association of Arizona have worked together since 1952 to provide a united voice for Tribes on matters of common concern.
- United South and Eastern Tribes Sovereignty Protection Fund advocates on behalf of 33 federally recognized Tribal nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico to advance their inherent sovereign authorities and rights.
- National Indian Gaming Association represents 184 sovereign Indian tribes, including Alaska Native villages. Its mission is to protect and preserve the general welfare of Indian tribes and Alaska Native villages striving for self-sufficiency through gaming enterprises in Indian country. It seeks to maintain and protect Indian sovereign governmental authority.

- Arizona Indian Gaming Association is comprised of eight federally recognized Indian tribes in Arizona. It is committed to protecting and promoting the self-reliance and sovereignty of Indian tribes by supporting tribal gaming enterprises on Arizona Indian lands.
- California Nations Indian Gaming Association promotes the sovereign interests of federally recognized Indian tribes through the development of sound policies and practices for conducting gaming activities in Indian country.

Amici Chickasaw Nation, Confederated Tribes and Bands of the Yakama Nation, Native Village of Paimiut, Prairie Island Indian Community, Rappahannock Tribe, Rincon Band of Luiseno Indians, Sault Ste. Marie Tribe of Chippewa Indians, Stockbridge-Munsee Band of Mohicans Indians, Walker River Paiute Tribe, and Wyandotte Nation are each federally recognized Indian tribes with direct interests in the allocation of relief funds intended to help Tribal governments respond to COVID-19.

* * *

This case involves critical matters of self-determination important to all *amici*, and their Tribal nation members have a strong interest in making use of the crucial relief funds intended to help Tribal governments respond to COVID-19. The leaders of several *amici* submitted declarations to the District Court on the dire consequences befalling, and the challenges facing, their Tribal nation members during

this crisis.[2]

All *amici curiae* strive to protect the governmental authority of federally recognized Indian tribes, including those in Alaska, and the unique trust responsibility owed them by the United States. Congress allocated the funds at issue here to Tribal governments by cross-referencing an "Indian tribe" definition that precludes any entity other than a federally recognized Indian tribe from its practical application. In doing so, Congress recognized that Tribal governmental status is unique. It therefore channeled these particular funds to tribes with which the United States has a government-to-government relationship, and that have a uniquely governmental responsibility for the welfare of their Tribal members.

SUMMARY OF ARGUMENT

The key language at issue in this case is the portion of the Indian Self-Determination and Education Assistance Act ("ISDA") definition of "Indian tribe" that requires all qualifying Indian entities to be "recognized as eligible for the special programs and services provided by the United States

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[2] *See, e,g.,* Decl. Maria Dadgar, *Chehalis* v. *Mnuchin*, No. 1:20-cv-1002-APM (D.D.C. Apr. 23, 2020), ECF No. 20-1; Decl. of President of Inter-Council of Five Civilizes Tribes, *Chehalis* v. *Mnuchin*, No. 1:20-cv-1002-APM (D.D.C. Apr. 23, 2020), ECF No. 20-2; Decl. of Michael Chavarria, *Chehalis* v. *Mnuchin*, No. 1:20-cv-1002-APM (D.D.C. Apr. 23, 2020), ECF No. 20-3; Decl. of Bo Mazzetti, *Chehalis* v. *Mnuchin*, No. 1:20-cv-1002-APM (D.D.C. Apr. 23, 2020), ECF No. 20-4; Decl. of Leonard Forsman, *Chehalis* v. *Mnuchin*, No. 1:20-cv-1002-APM (D.D.C. Apr. 23, 2020), ECF No. 20-5.

to Indians because of their status as Indians." That language, known as the "recognition clause," denotes the formal political act of the United States recognizing that an Indian tribe exists as a Tribal government and that it has a unique government-to-government relationship with the United States. That is the meaning ascribed to that clause by every federal court to have considered it and by the federal government until it filed its petition in this case.

Petitioners' attempt to construe that language in any other way ignores the profound historical context in which the federal government has used it. The recognition clause has consistently been employed by the federal government to acknowledge a Tribal government and the attending trust responsibility that the United States owes to federally recognized Indian tribes, which includes assisting them in providing governmental programs and services to their communities. The Alaska Native Corporations ("ANCs") are not presently federally recognized. The United States does not recognize ANCs as Tribal governments, ANCs are not recognized as possessing sovereign authority or governmental powers, and the United States owes them no trust responsibility.

Petitioners' argument ignores the plain language of the statutory definition. Moreover, there are processes available to the ANCs to pursue federal recognition, some of which they have tried before. But here the ANCs seek an extraordinary shortcut. Indeed, Petitioners suggest that the ANCs, alone among all of the qualifying Indian entities listed in the ISDA definition of "Indian tribe," need not attain formal federal recognition in order to meet that definition.

There is no reason in law or policy to justify such a result.

On the contrary, reading the ISDA definition to encompass unrecognized entities like the ANCs would wreak havoc on the U.S. Code, as myriad federal statutes that employ the same language are unworkable for any entity that is not a federally recognized Indian tribe. Congress has therefore shown that when it uses the ISDA definition of "Indian tribe," as it did in Title V of the CARES Act, it limits eligibility to federally recognized Indian tribes.

It is those federally recognized Indian tribes—not unrecognized entities like the ANCs—that have incurred and continue to incur the uniquely governmental expenses that Congress intended to cover with its provision of funds in Title V of the CARES Act. Federally recognized tribes have undertaken extraordinary efforts to ensure continuity of government operations, maintain essential services and resources, and otherwise provide for the health and welfare of their communities throughout the COVID-19 crisis. This Court should ensure that the remaining Title V funds are reserved to support such efforts, not diverted to unrecognized entities with no such governmental responsibilities.

The Court of Appeals correctly concluded that the recognition clause stands for the United States' formal recognition of an Indian entity as a Tribal government with a unique government-to-government relationship with the United States, and that Title V of the CARES Act allocates funds only to Indian entities that are so recognized. That decision should be affirmed.

ARGUMENT

In Title V of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020), Congress allocated emergency relief funds to various governmental entities, including "Tribal governments," defined as "the recognized governing body of an Indian Tribe." 42 U.S.C. § 801(a), (g)(5). The CARES Act defines "Indian tribe" as that term is defined in the Indian Self-Determination and Education Assistance Act of 1975 ("ISDA"). *Id.* § 801(g)(1) (citing 25 U.S.C. § 5304(e)). ISDA, in turn, defines an "Indian tribe" as:

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. §§ 1601 *et seq.*], **which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.**

25 U.S.C. § 5304(e) (emphasis added).

In this brief, *amici* provide critical context regarding the last clause of that definition, the "recognition clause." As Respondents have explained, the D.C. Circuit correctly concluded that the recognition clause modifies all of the nouns listed in the clauses that precede it. *See* Chehalis Br. 18-25. Congress's use of that language was not accidental. The concept of "recognition" has a long history in

federal Indian law, and that history is key to the proper resolution of this case. As the D.C. Circuit explained, Congress has employed the recognition clause (or similar language) across myriad statutes to denote Indian tribes that have been formally recognized by the federal government. Perhaps most significantly, the Federally Recognized Indian Tribe List Act of 1994 ("List Act") employs the same language as the recognition clause in directing the Secretary of the Interior to "keep[] a list of all federally recognized tribes." Pub. L. No. 103-454, § 103(6), 108 Stat. 4791, 4792 (1994); *see* 25 U.S.C. § 5131(a) (specifying that the Secretary's list must include "all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians"). No Alaska Native Corporation ("ANC") is presently on this list.

As explained below, the recognition clause reflects two principles that have long been fundamental to the relationship between the United States and Tribal governments. *First*, the United States government has from its nascency treated Tribal nations as sovereign entities and continues to so treat Indian tribes that are federally "recognized." Federal recognition thus confirms a distinct government-to-government relationship between Indian tribes and the United States. *Second*, when the United States "recognizes" an Indian tribe, it assumes the role of trustee, which includes the obligation to provide Indian tribes with special programs and services to support their status as governments with responsibility for the welfare of their citizens.

The ANCs would abandon the meaning long attributed to the recognition clause by the executive branch—including the Interior Department in the 1976 memorandum upon which the government now heavily relies, *see* Gov't Br. 24-25—and by federal courts: that it denotes the United States' formal recognition of an Indian tribe. *See Wyandot Nation of Kan. v. United States,* 858 F.3d 1392, 1398 (Fed. Cir. 2017); *Slockish v. U.S. Fed. Highway Admin.,* 682 F. Supp. 2d 1178, 1202 (D. Or. 2010); J.A. 45 (1976 memorandum from Interior Department's Assistant Solicitor for Indian Affairs stating that "profit-making regional and village corporations have not heretofore been recognized as eligible for BIA programs and services"); *see also Cook Inlet Native Ass'n v. Bowen,* 810 F.2d 1471, 1474 (9th Cir. 1987) (ANC does not have the "status" required by the recognition clause). The ANCs assert that their ability to benefit from the Alaska Native Claims Settlement Act ("ANSCA") is sufficient to bring them within the ambit of the recognition clause, regardless of whether they have been formally "recognized." *See* ANCs Br. 27-28. The government, for its part, contends in this litigation that the recognition clause has no "precise meaning." Gov't Br. 48.

The ANCs and the government, in other words, ascribe virtually no significance to the concept of recognition. That is not only profoundly ahistorical; it is also illogical, for Congress has employed ISDA's definition of "Indian tribe" (or closely similar language) in numerous federal statutes that have no relevance for, or make no sense when applied to, any entity other than a federally recognized Indian tribe.

Federally recognized Indian tribes—including the 229 in Alaska—are using their unique governmental authorities to provide emergency responses to address COVID-19 and are thus incurring the "necessary" costs of such services, for which the limited Title V funds at issue here are intended. While *amici* do not question that some ANCs undertake many worthy efforts on behalf of Alaska Natives, including in response to the COVID-19 crisis, Congress specified that Title V assistance should go to Tribal governments, in recognition of their unique status as sovereigns with governmental responsibilities to their citizens and a government-to-government relationship with the United States, which ANCs do not have. Diverting those funds would impair the ability of Tribal governments to provide critical assistance to their communities.

I. THE RECOGNITION CLAUSE REFLECTS THE UNITED STATES' HISTORIC TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES

Congress did not employ the distinctive language of the recognition clause in ISDA casually. That language reflects two interrelated concepts regarding the relationship between the United States and Indian tribes that for centuries have underpinned both this Court's Indian law jurisprudence and Congress's exercise of its distinctive responsibility, set forth in the Constitution, to structure the relationship between the federal government and Tribal governments. Those concepts may be stated succinctly: First, the federal government treats "recognized"

Indian tribes as distinct sovereign entities—as Tribal *governments*. And second, in doing so, the federal government assumes a trust responsibility to support them in their provision of governmental services to their citizens.[3]

These concepts have defined the United States' relationship with Indian tribes from the outset. Indeed, the Constitution itself establishes a sovereign-to-sovereign relationship between the federal government and Indian tribes. *See* U.S. Const. art. I, §8, cl. 3 (empowering Congress to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes"); U.S. Const. art. I, § 2, cl. 3 (excluding "Indians not taxed" for purposes of congressional apportionment). And the trust responsibility inherent in that sovereign-to-sovereign relationship found expression in the organic law of the United States, *see* Northwest Ordinance of 1787, art. III, 1 Stat. 50, 51 n.(*a*) (1789) (enshrining a policy of "utmost good faith toward the Indians"), as well as in numerous early treaties pledging the protection of the United States to Indian tribes, *see, e.g.*, Treaty with the Six Nations 1784, preamble, 7 Stat. 1, 15 (1846) (acknowledging the Six Nations as being under the protection of the United States); Articles of a Treaty, Jan. 10, 1786, preamble & art. 2, 7 Stat. 1, 24 (1846) (acknowledging the Chickasaw Nation as being under

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[3] *See* RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS § 4 cmt. e (Am. L. Inst., Tentative Draft No. 1 2015) (noting that the United States has "agreed to provide Indians with access to governmental services" in order to "fulfill[] what it perceives as a special obligation to protect Indian tribes and their members").

the protection of the United States); *see also Worcester* v. *Georgia*, 31 U.S. 515, 551-52 (1832) (describing U.S. treaty with Cherokee Nation that "acknowledge[d] the Cherokees to be under the protection of the United States of America").

This complex relationship is reflected in this Court's early reference to Indian tribes as "domestic dependent nations." *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 2 (1831); *see also Elk v. Wilkins*, 112 U.S. 94, 100 (1884). As "nations," tribes exercise sovereign authority, enter into treaties and agreements, and actively govern their citizens and territories. *See Worcester,* 31 U.S. at 520; *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 788 (2014). But those nations are also under the protection of the United States and, as such, the federal government owes them a trust responsibility. *See Worcester*, 31 U.S. at 555 (recognizing that a Tribal government's relationship with the United States involves "a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master"); *Oneida Cnty. v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985) (discussing trust doctrine).

These dual concepts—federal recognition of Indian tribes as separate yet dependent sovereigns and the United States' corresponding trust responsibility—are inextricably bound. *See United States v. Sandoval*, 231 U.S. 28, 46–47 (1913); *Mont. Bank of Circle, N.A. v. United States,* 7 Ct. Cl. 601, 613 (1985). And these two concepts find expression in ISDA's recognition clause, which first confirms Indian

tribes' sovereign status by using the term "recognized," and then describes the United States' trust responsibility by referencing the "special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5304(e).

Indeed, ISDA—a foundational law structuring the federal government's relationship with Indian tribes in the modern era—plainly reflects Congress's determination that the federal government's trust responsibility includes an obligation to provide "special programs and services" to Indian tribes. *Id.* Throughout the statute, Congress "declare[d] its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes," *id.* § 5302(b), required that any "self-determination contract" between the Secretary of the Interior and an Indian tribe provide that "[n]othing in this contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe[]," *id.* § 5329(c), and prohibited the Secretary of the Interior from "waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes," *id.* § 5363(m)(4).

The same connection between the trust responsibility and Congress's obligation to support Tribal governments with programs and services is reflected in the List Act, which was intended to facilitate the ready and definitive identification of federally recognized Indian tribes. In that statute, as noted, Congress ordered the Secretary of the Interior to publish a list of Indian tribes "which the Secretary

recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.* § 5131(a). And, as in ISDA, Congress declared that "the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes." Pub. L. No. 103-454 § 103(2), 25 U.S.C. § 479a note.

Taken together, ISDA and the List Act underscore the fundamental link between the "recognition" of Indian tribes—with its dual implications of a government-to-government relationship and corresponding trust responsibility—and the United States' provision of programs and services to Indian tribes. Indeed, language similar to that employed by Congress in ISDA and the List Act appears across countless federal statutes that establish special programs or services to support Indian tribes in delivering governmental services to their communities. *See, e.g.*, Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, § 4202(1)-(2), 100 Stat. 3207-137 (codified at 25 U.S.C. §§ 2401 *et seq*.) (recognizing that "the Federal Government has a . . . unique legal and moral responsibility to Indian tribes and their members . . . to assist the Indian tribes in meeting the *health and social needs* of their members") (emphasis added); Tribal Law and Order Act, Pub. L. No. 111-211, § 202(a), 124 Stat. 2258 (2010) (recognizing that "the United States has distinct legal, treaty, and trust obligations to provide for the *public safety* of Indian country") (emphasis added); 25 U.S.C. § 2501(b)

(recognizing "the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the *education* of Indian children") (emphasis added).

Because the trust responsibility reflected in all of these statutes goes hand-in-hand with federal recognition, it is no accident that when Congress has acted to either terminate or confirm the federal recognition of Indian tribes, it has done so by reference to the trust responsibility, using language identical or nearly identical to that in ISDA's recognition clause. Thus, as the D.C. Circuit observed, when Congress acted in the 1950s and 1960s to terminate the federal recognition of many tribes, it stated that those tribes "shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians." Pet. App. 14a-15a & n.1. And, as noted above, when years later Congress enacted the List Act in 1994 to ensure accurate confirmation of federal recognition, it directed the Secretary of the Interior to list those entities that the Secretary recognized as "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5131(a).

* * *

Given this history and context, there can be no doubt that Congress understood its incorporation of the ISDA definition of "Indian tribe" in Title V of the CARES Act to reflect its recognition of its historic trust obligation to support Indian tribes in providing governmental services to their communities. That trust obligation is a direct corollary to the federal

government's recognition of Indian tribes as distinct sovereigns with inherent powers of self-government that enjoy a government-to-government relationship with the United States. And whatever the worthy functions of ANCs, they have not attained that status. ANCs are not sovereign nations; they do not govern, tax, or regulate; they do not have a government-to-government relationship with the United States; and the federal government does not owe them a trust responsibility to provide special programs or services. Congress's deliberate cross-reference to ISDA in Title V of the CARES Act establishes that Congress intended Title V funds to be allocated to those entities, and only those entities, that have governmental responsibilities for their members, and for which the United States has itself assumed a trust responsibility.

II. FEDERAL RECOGNITION REQUIRES A POLITICAL PROCESS TO CONFER A GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH THE UNITED STATES

The ANCs would have this Court endow them with a stature reserved for Tribal governments, essentially bypassing the established processes by which formal federal recognition has traditionally been conferred. The ANCs suggest that they are uniquely privileged among the various Indian groups and organizations that the ISDA definition identifies as having the potential for federal recognition. Notably, they do not assert that any other "Indian tribe, band, nation, or other organized group or community" can satisfy the recognition clause absent formal federal recognition. In effect, the ANCs seek

favored-nation status—but neither they nor the government has provided any explanation for why they should get it. Unless and until the ANCs attain formal federal recognition, they cannot satisfy the recognition clause.

Congress has made clear that "'[r]ecognized' is more than a simple adjective"; it is "a formal political act" to "permanently establish[] a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation,' and imposes on the government a fiduciary trust relationship to the tribe and its members." H.R. REP. No. 103-781, 103d Cong. at 2 (1994); *see also Mackinac Tribe v. Jewell,* 829 F.3d 754, 755 (D.C. Cir. 2016) (federal recognition is "a formal political act confirming [a] tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government") (quotations and citation omitted).

Indeed, initially, Tribal governments were recognized by the United States in a process appropriate only for sovereign entities—through treaties made by the President to which the Senate gave its advice and consent. *See* U.S. Const. art. II, § 2; *Mackinac Tribe,* 829 F.3d at 755. Congress abolished treaty-making in 1871, *see id.*, and thereafter, apart from the few instances where federal courts have determined Indian tribes to exist under a federal common law test, *see Montoya v. United States,* 180 U.S. 261, 266 (1901), the United States has established its government-to-government relationship with Indian tribes through Acts of Congress—a course that

ANCs have attempted and may continue to pursue, *see* Chehalis Br. 33—or through an appropriately delegated administrative process overseen by the Secretary of the Interior. *See* Procedures for Federal Acknowledgement of Indian Tribes, 25 C.F.R. pt. 83 (2015). Native groups in Alaska may also seek recognition under the Alaska Amendments to the Indian Reorganization Act. *See* Chehalis Br. 35-36. But the fundamental status of Indian tribes recognized through the modern process is the same: they are sovereign entities with which the United States has a *political* relationship.

Recognition is also inextricably intertwined with eligibility for special programs and services. Department of the Interior regulations governing the administrative process for federal recognition, first promulgated in 1978, state that the purpose of the process is "to determine whether a petitioner is an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 C.F.R. § 83.2 (2015). The regulations further provide that federal recognition is "a prerequisite to the protection, services and benefits of the Federal Government available to those that qualify as Indian tribes and possess a government-to-government relationship with the United States," and confirm not only that "the tribe is entitled to the immunities and privileges available to other federally recognized Indian tribes," but also that it "has the responsibilities, powers, limitations, and obligations of other federally recognized Indian tribes." *Id.*

A holding in favor of Petitioners would permit the ANCs to bypass these established processes leading to federal recognition. And given that this case involves the construction of a term in ISDA, to which Congress has frequently cross-referenced in other federal statutes, *see infra* Part III, the consequences of such a ruling would extend well beyond the CARES Act funds at issue here. Such a result would undermine Congress's careful handiwork in ISDA, which deliberately drew on established principles distinctly applicable to Indian tribes that the federal government has recognized as governmental entities. That surprising result surely is not compelled by the language of ISDA. Instead, the Court should follow its consistent path of deference to Congress in adjusting the established contours of the federal relationship to Indian tribes. *See McGirt v. Oklahoma,* 140 S. Ct. 2452, 2462 (2020); *United States v. Lara,* 541 U.S. 193, 200-03 (2004).

III. STATUTES INCORPORATING THE ISDA DEFINITION OF "INDIAN TRIBE" ARE UNWORKABLE FOR ENTITIES THAT ARE NOT FEDERALLY RECOGNIZED INDIAN TRIBES

Petitioners' approach to ISDA's recognition clause is not only inconsistent with history and present practice; it would also lead to illogical results across a host of federal statutes that employ the clause.[4]

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[4] As Respondents have shown, Petitioners' approach leads to illogical results within the provisions of ISDA itself. *See* Chehalis Br. 45-46 (citing ISDA provisions presupposing application to federally recognized Indian tribes).

Several examples demonstrate that Congress has consistently understood that only entities that are federally recognized Indian tribes may obtain the statutory benefits or protections conferred upon ISDA-defined "Indian tribes."

For instance, several statutes that incorporate ISDA's definition of "Indian tribe" are inconsistent with Petitioners' reading because their provision of support to Indian tribes is expressly premised on the unique trust responsibility owed to federally recognized tribes. The American Indian Agricultural Resource Management Act, for example, provides federal support to "Indian tribes" (defined as they are in ISDA, *see id*. §3703(10)) for the development of land-management plans. In explaining its action, Congress pointed to the "government to government relationship" between the United States and Indian tribes and explained that "the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes." *Id.* § 3701. Congress further explained that a purpose of the Act was to "carry out the trust responsibility of the United States and promote the self-determination of Indian tribes." *Id.* § 3702(1). Congress plainly did not intend the statute to benefit non-recognized entities to which it owes no trust responsibility, like the ANCs.

The American Indian Trust Fund Management Reform Act, which also employs ISDA's definition of "Indian tribe," *see* 25 U.S.C. § 4001(2), is nonsensical under Petitioners' reading for the same reason. Congress explained that the purpose of that Act was to

facilitate tribal management of trust funds in a manner "consistent with the trust responsibility of the United States." *Id.* § 4021. Similarly, a subchapter of the Act is designed to facilitate "the proper discharge of the [Interior] Secretary's trust responsibilities to Indian tribes and individual Indians." *Id.* § 4041. Again, the United States owes no trust responsibility to unrecognized entities, like the ANCs.

Other statutes employing the ISDA definition of "Indian tribe" are intended to effectuate the governmental authorities of Indian tribes and are thus inoperable for entities that are not federally recognized Indian tribes. For example, the Highway Routing of Hazardous Materials Act, which incorporates the ISDA definition of "Indian tribe" by reference, 49 U.S.C. § 5102(6), authorizes "Indian tribes" to "establish, maintain and enforce" certain highway regulations, *id.* § 5112(a)(2). Similarly, a statute addressing hemp production by Indian tribes, which also incorporates the ISDA definition, *see* 7 U.S.C. § 1639o(2), provides that an "Indian tribe desiring to have primary regulatory authority over the production of hemp" may submit regulatory plans to the Secretary of Agriculture for approval, *id.* § 1639p(a)(1). These statutes cannot work for any entity that is not endowed with a government-to-government relationship with the United States and that does not exercise governmental authority.

The government argues that such statutes establish no pattern. *See* Gov't Br. 33-34. That is incorrect; Congress's use of ISDA's language to refer to entities endowed with governmental powers is pervasive. *See, e.g.*, 34 U.S.C. § 20101(g)(3) (providing

funds to ISDA-defined "Indian tribes" for "the investigation and prosecution of cases of child abuse"); 21 U.S.C. § 387 (providing that FDA regulations shall not limit the authority of an ISDA-defined "Indian tribe" "to enact . . . and enforce any law . . . with respect to tobacco products" which is more stringent than federal law requirements or "affect any State, tribal, or local taxation of tobacco products").[5] As these and other examples show, including non-governmental entities such as ANCs within ISDA's definition of "Indian tribes" would distort federal programs designed to benefit governmental entities, states, local governments, and federally recognized Indian tribes.[6]

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[5] The assertion of Amicus Federation of Alaska Natives that Congress carves the ANCs out of statutes that otherwise employ ISDA's definition of "Indian tribe" when such statutes implicate the assertion of sovereign prerogatives, *see* FAN Br. 18-20, is belied by the examples just cited.

[6] *See, e.g.*, 21 U.S.C. § 1532 (providing for grants intended to curb substance abuse to coalitions that include "State, local, or tribal governmental agencies" and that, "[i]f feasible," include an "elected official" from the relevant state government or from "the governing body o[f] an [ISDA-defined] Indian tribe"); 25 U.S.C. § 5701 (seeking to "empower Tribal governments with the resources and information necessary to effectively respond to cases of missing or murdered [members of ISDA-defined Indian tribes]"); 34 U.S.C. § 10531(a) (providing for grants to "States, units of local government, and [ISDA-defined] Indian tribes to purchase armor vests for use by State, local, and tribal law enforcement officers"); 34 U.S.C. § 12623 note (clarifying that, for purposes of the Missing Americans Alert Program Act, "[t]he term 'law enforcement agency' means an agency of a State, unit of local government, or [ISDA-defined] Indian tribe that is authorized by law or by a government agency to engage in or supervise the

It is clear that Congress has consistently used the recognition clause in ISDA, or materially similar language, to refer to the distinctly government-to-government relationship between the United States and federally recognized Indian tribes. The statutes simply do not make sense otherwise. Title V of the CARES Act employs the very same clause, and it should be read in the same way. Title V is intended to provide direct relief to Tribal governments for extraordinary expenses incurred in response to COVID-19, *see* 42 U.S.C. § 801(d), such as unemployment relief payments to tribal citizens, costs associated with the provision of food and other emergency resources to tribal communities, increased telecommunications costs and shipment fees, and costs associated with other critical governmental functions. Many of these expenses reflect the governmental responsibilities of Indian tribes, which ANCs, absent federal recognition, do not share. In this light, the CARES Act closely tracks the statutes identified above, which employ ISDA's definition of "Indian tribe" and which provide benefits that are inapplicable to ANCs.

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prevention, detection, investigation, or prosecution of any violation of criminal law").

IV. TRIBAL GOVERNMENTS ARE USING LIMITED TITLE V FUNDS TO PROVIDE CRITICAL GOVERNMENTAL SERVICES TO THEIR COMMUNITIES

In Title V of the CARES Act, Congress allocated funds to help state, local, and Tribal governments cover "necessary expenditures incurred due to the public health emergency" caused by COVID-19. 42 U.S.C. § 801(d). Federally recognized tribes (including 229 Indian tribes in Alaska)—not the ANCs—have incurred and continue to incur such expenses. And they do so pursuant to their *governmental* responsibility to their citizens, recognized in Title V—a responsibility that ANCs do not share.

1. The ANCs assert that they meet the "eligibility" criterion of the recognition clause because they are "eligible for the benefits" of the ANCSA. ANCs Br. 28. But, as noted, that assertion is directly at odds with the 1976 BIA memorandum upon which the Government heavily relies in this case. *See* J.A. 45 (noting that the benefits to which Indian tribes are entitled pursuant to the recognition clause "are not provided for by the terms of the [Alaska Native Claims] Settlement Act"). Moreover, the pertinent language of the CARES Act—referring to "[a] State, Tribal government, or unit of local government," 42 U.S.C. § 801(d)—shows that Congress had *governmental* entities in mind when allocating Title V funds. *See* Chehalis Br. 48-49. As unrecognized entities, the ANCs presently have no governmental obligation to ensure that the health, education, and

welfare needs of any particular Alaska Native community (or individual Alaska Native) are met.

Federally recognized Indian tribes, on the other hand, exercise governmental authority over their members and territories. *Bay Mills*, 572 U.S. at 788. They exercise police powers to protect and preserve the safety and welfare of Native communities; they pass and enforce legislation; and they provide governmental services, including medical care, law enforcement, and public benefits. In Alaska, it is the 229 federally recognized Indian tribes—not the ANCs—that have enrolled citizens (or "members") for whom they exercise governmental authority. *See, e.g.*, *State v. Native Vill. of Tanana*, 249 P.3d 734, 750 (Alaska 2011); *In re C.R.H.*, 29 P.3d 849, 854 (Alaska 2001); *John v. Baker*, 982 P.2d 738, 751-59 (Alaska 1999). These citizens elect government officials, *see, e.g.*, Cent. Council of the Tlingit & Haida Indian Tribes of Alaska, Rules for the Election of Delegates (Apr. 20, 2018), *available at* https://bit.ly/3cywr55, who are empowered to negotiate with state and local governments on their citizens' behalf, and to enact ordinances to preserve the safety and welfare of the tribe and its members, *see*, *e.g.*, Angoon Cmty. Assoc. Alaska, Constitution and By-Laws (Nov. 15, 1939), *available at* https://bit.ly/3ddgMr4. These elected Tribal government officials are duty bound to protect and preserve the rights of their citizens. *See, e.g.*, *id.* And Alaska tribes exercise tax authority to generate revenues needed to support self-determination. *See, e.g.*, Native Vill. of Georgetown, Tribal Election Ordinance (Dec. 10, 2016), *available at* https://bit.ly/3u1CvZV.

2. Tribal governments provide critical, life-saving services and functions to their citizens—including and especially during this historic COVID-19 pandemic. At the outset of the pandemic, federally recognized Indian tribes acted immediately to protect their communities. They exercised their police powers to declare states of emergency,[7] implement emergency management plans,[8] and issue stay-at-home orders.[9]

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[7] *See, e.g.*, Decl. Amos Philemonoff, Sr. ¶ 6, *Chehalis v. Mnuchin*, No. 01:20-cv-01002-APM (D.D.C. Apr. 20, 2020), ECF No. 3-2; Decl. James C. Landlord ¶ 6, *Chehalis v. Mnuchin*, No. 01:20-cv-01002-APM (D.D.C. Apr. 20, 2020), ECF No. 3-3; Morongo Band of Mission Indians Res. 031720-02, Tribal Emergency Declaration for COVID-19 Virus Pursuant to the Morongo Multi-Hazard Mitigation Plan and the Stafford Act (Mar. 17, 2020), *available at* https://bit.ly/2O7lK04.

[8] *See, e.g.*, E. Band of Cherokee Indians, Declaration of a State of Emergency to Coordinate Response and Protective Actions to Prevent the Spread of the COVID-19 Virus (Mar. 13, 2020), *available at* https://bit.ly/2QLfL1P (declaring state of emergency and directing the implementation of the Tribe's Emergency Management Plan); *Prairie Island Indian Community declares state of emergency, cancels all events*, RiverTown Newsroom (Mar. 18, 2020, 10:55 AM), https://bit.ly/2PasfzS.

[9] Bay Mills Indian Cmty. Res. No. 20-03-23E, Resolution for Shelter at Home Executive Order in Response to Declaration for State of Emergency in Bay Mills Indian Community due to COVID-19 Pandemic (Mar. 23, 2020), *available at* https://bit.ly/3w7edzs; Decl. Tiffany Yatlin ¶¶ 7-8, *Chehalis v. Mnuchin*, No. 01:20-cv-01002-APM (D.D.C. May 29, 2020), ECF No. 76-19 (describing the closure of tribal facilities, establishment of strict social distancing guidelines, and imposition of travel restrictions and strict quarantine procedures for new arrivals that the Arctic Village Council enacted in response to the COVID-19 pandemic).

The Hopi Tribe, for example, implemented a COVID-19 Emergency Response and Preparedness Plan, which included the establishment of an Emergency Operations Center to support the Hopi Health Care Center and coordinate resources across the Reservation.[10]

In the days and weeks that followed, tribes worked to ensure continuity of government operations and the provision of essential services. Tribal courts drastically reduced operations, but continued to provide access for critical matters including orders of protection, temporary restraining orders, and child-custody matters.[11] The Akiak Native Community provided water and sewer services to tribal citizens.[12] And as the magnitude of the coronavirus pandemic became clear, Tribal governments issued mask

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[10] *COVID-19 Hopi Emergency Response Protocols*, The Hopi Tribe, https://bit.ly/3u5CjsB (last visited Mar. 29, 2021).

[11] *See, e.g.*, Standing Order 20-002, *In Re: Court Operations Under the Exigent Circumstances Created by COVID-19 and Related Novel Coronavirus*, The Crow Nation, Crow Tribal Ct. (Bear Don't Walk, C.J.) (Mar. 16, 2020), *available at* https://bit.ly/2O5rg3l; Order, E. Band of Cherokee Indians, Cherokee Sup. Ct. (Saunooke, C.J.) (Mar. 13, 2020), *available at* https://bit.ly/3sudh61.

[12] Decl. Mike Williams, Sr., *Chehalis v. Mnuchin*, No. 01:20-cv-01002-APM (D.D.C. Apr. 22, 2020), ECF No. 10-1.

mandates,[13] imposed travel restrictions,[14] and enacted or updated laws and regulations around health codes and quarantine procedures.[15]

Immediately after Congress allocated emergency funds to "Tribal governments" in Title V, federally recognized Indian tribes put them to use in providing food and grocery vouchers,[16] low-income and financial hardship assistance,[17] and utility, rent, and

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[13] *See, e.g.*, Pueblo of Pojoaque Tribal Council Res. 2020-062, Public Health Order Requiring Mask Use During COVID-19 Emergency (June 19, 2020), *available at* https://bit.ly/3u2nMOk.

[14] *See, e.g.*, Havasupai Tribal Council Res. 10-20, Resolution Temporarily Suspending Visitation by Tourists to the Havasupai Reservation During the Coronavirus Pandemic as a Public Health and Safety Measure (Mar. 16, 2020), *available at* https://bit.ly/31vGKkc.

[15] *See e.g.*, Limited Operations Plan and Updated Administrative Standing Order, Tulalip Tribal Court (Apr. 4, 2020), *available at* https://bit.ly/39ocaNE.

[16] Henry Leasia, *Chilkoot Indian Association assists local tribal members using CARES Act funds*, KHNS FM (July 13, 2020), https://bit.ly/31tfkLG.

[17] Ketchikan Indian Cmty., KIC Special Needs COVID-19 Assistance Application, *available at* https://bit.ly/3cvkZr3 (last visited Mar. 28, 2021); Sun'aq Tribe of Kodiak, Emergency Treasury Coronavirus Relief Fund Application, *available at* https://bit.ly/3svltTG (last visited Mar. 28, 2021); Native Vill. of Koyuk IRA Council, Native Village of Koyuk Emergency COVID-19 Financial Assistance Application, *available at* https://bit.ly/3ssonbE (last visited Mar. 28, 2021); Public Notice, Honnah Indian Assoc., Cares Funded Needs-Based Financial Assistance Available, *available at* https://bit.ly/3m0MLP5 (last visited Mar. 28, 2021); Chinik Eskimo Cmty., Chinik Eskimo Community COVID-19 Financial Assistance Application,

mortgage assistance.[18] Indian tribes purchased personal protective equipment and plastic barriers for use in public buildings,[19] and some even began manufacturing their own gowns, facemasks, and gloves.[20] The Chickasaw Nation used CARES Act funds to construct or expand three health facilities, including a COVID-19 Emergency Operations Facility providing drive-through testing, vaccinations, and PPE storage and distribution.[21] Similarly, the Kiowa Tribe of Oklahoma opened a Continuity of Operations Center, the "sole purpose [of which] is to provide uninterrupted essential services amid a crisis."[22]

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available at https://bit.ly/3rtL0va (last visited Mar. 28, 2021);Curyung Tribal Council, COVID-19 Public Health Emergency Assistance & Disaster Relief Program – Round 2, *available at* https://bit.ly/3rrg9PT (last visited Mar. 28, 2021).

[18] Brian Bull, *Deadline to spend COVID-19 relief funds has tribal nations on edge,* High Country News (Dec. 10, 2020), *available at* https://bit.ly/2PzXfJd

[19] *Id.*

[20] Jenna Kunze, *The Cherokee Response to Covid-19: Face Masks, Made in the Cherokee Nation*, Native News Online (Feb. 10, 2021), *available at* https://bit.ly/2QLBve6.

[21] Press Release, The Chickasaw Nation, Chickasaw Caring Cottages to Provide Housing for Covid-19 Patients to Isolate (Dec. 22, 2020), *available at* https://bit.ly/3u5yQdk; Press Release, The Chickasaw Nation, Chickasaw Nat. Converts Former K-Mart Building as Part of Covid-19 Response (Oct. 7, 2020), *available at* https://bit.ly/2PzPQd4.

[22] Scott Rains, *Kiowa COOP center to provide essential services*, The Lawton Constitution (Nov. 18, 2020), *available at* https://bit.ly/3fqjigi.

Tribal governments addressed other significant consequences of the pandemic as well. The Muscogee (Creek) Nation, the Cherokee Nation, and the Choctaw Nation, for example, provided grants to equip their collective students attending local public schools with the resources required for virtual learning.[23] And in some communities where remote learning was impossible due to lack of internet access, Tribal governments created their own high-speed wireless network.[24]

Federally recognized Indian tribes also used Title V funds to ensure that essential governmental operations could continue.[25] The Saint Regis Mohawk

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[23] Tony Russell, *Muscogee (Creek) Nation uses CARES Act funds to help students with technology*, KJRH News Online (Nov. 6, 2020, 12:01 AM), https://bit.ly/3rrq6fX; Alyssa Jawor, *Lac Vieux Desert Tribe donates funds for new technology to Watersmeet School District*, WLUC/TV6 (Sept. 24, 2021), https://bit.ly/2PDB0SQ.

[24] Nick Lowrey, *How one Native American tribe in S.D. created its own wireless education network*, South Dakota News Watch (Oct. 7, 2020), *available at* https://bit.ly/3u8n2HD; Colton Shone, *Relief funding helps Jemez Pueblo to bring broadband to hundreds of homes*, KOB4 (Feb. 25, 2021), *available at* https://bit.ly/3u6UxKn; *Navajo Nation also positioned buses equipped with WiFi around the reservation*, KTAR.com (Nov. 14, 2020), *available at* https://bit.ly/2PhNgsj; Anthony J. Wallace, *'It's creating a new normal': A Navajo school district and its students fight to overcome amid COVID-19*, Cronkite News (Nov. 24, 2020), *available at* https://bit.ly/2QLzVca.

[25] *See, e.g., Cherokee Nation Invests $1.3M to upgrade water, sewer lines serving more than 18,000 people in 10 Counties*, Anadisgoi (Feb. 24, 2021), https://bit.ly/2QNzbmQ; Chez Oxendine, *Chickasaw Nation Launches Virtual Resources for Tribal Citizens*

Tribe established facilities to allow court personnel and law enforcement to operate in a safe and socially distant manner.[26] The Little Shell Tribe of Chippewa Indians in Montana is using its CARES Act funds to build a pharmacy, a lab, and a health clinic to provide medical, dental, vision, and behavioral care, alongside traditional medicine.[27]

As vaccines became available, Tribal governments developed strategic plans to ensure fast and efficient distribution to their citizenries. The Citizen Potawatomi Nation ("CPN"), for example, used a portion of its Title V funds to purchase "three full-sized and one portable ultra-cold freezers in order to be among the first in the state to receive the Pfizer vaccine."[28] In doing so, CPN acquired enough freezer capacity to store not only its own vaccine supply, but also those of the Indian Health Service's Oklahoma City Service Area and the Pottawatomie County Health Department.[29] The Gila River Indian

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in Response to COVID-19, Native News Online (Aug. 25, 2020), https://bit.ly/3m7fyBJ.

[26] News Release, Saint Regis Mohawk Tribe, CARES Act provides new Family Advocate and Tribal Court facilities for Saint Regis Mohawk Tribe (Dec. 17, 2020), *available at* https://bit.ly/39qcBqG.

[27] Katheryn Houghton, *Montana tribe fast-tracks its health service debut*, Kaiser Health News (Mar. 1, 2021), https://bit.ly/3svmACQ.

[28] CPN Pub. Info. Off., *Keeping it ultra-cold: CPNHS rolls out COVID-19* vaccines, Citizen Potawatomi Nation (Feb. 4, 2021), https://bit.ly/2PDkTon. *See also* Bull, *supra* n.18.

[29] *Id.*

Community, for its part, has been regularly hosting drive-through vaccination events for its members.[30] Through its efforts, the Community has administered over 7,000 doses as of February 18, 2021.[31]

These are just a few examples of federally recognized Indian tribes exercising their sovereign authorities as Tribal governments to protect and preserve the health and well-being of the communities they serve.[32] Title V funds are critical to enable such efforts, especially because "[t]ribes face a number of barriers to raising revenue in traditional ways," *Bay Mills*, 572 U.S. at 807 (Sotomayor, J., concurring). Those funds are limited, and, in recognition of the United States' trust responsibility, were intended to assist Tribal governments in fulfilling their governmental duties. This Court should ensure that the funds are reserved for that purpose.

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[30] BrieAnna J. Frank, *'Change is going to come': Arizona tribe offers COVID-19 vaccinations at drive-thru events*, Arizona Republic (Feb. 20, 2021, 5:03 PM), https://bit.ly/3fjbTzr.

[31] *Id.*

[32] *COVID-19 Tribal Documents,* Turtle Talk, https://turtletalk.blog/covid-19-tribal-documents (last visited Mar. 28, 2021).

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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March 31, 2021