

Nos. 20-543, 20-544

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**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.*

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

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**BRIEF OF *AMICI CURIAE* STATES OF UTAH,  
OKLAHOMA, LOUISIANA, MINNESOTA, MONTANA,  
AND SOUTH DAKOTA, SUPPORTING RESPONDENTS**

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## INTEREST OF AMICI CURIAE

The States of Utah, Oklahoma, Louisiana, Minnesota, Montana, and South Dakota (*Amici* States) file this amicus curiae brief in support of Respondents. *Amici* States have a substantial interest in ensuring that all citizens—including American Indians residing off or on reservations within the territorial confines of their respective states—receive the critical coronavirus relief funds to which they are entitled under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. *Amici* States promote programs to help the tribes within their states find and implement solutions to their community problems and to promote government-to-government relations between the states and tribes. *See, e.g.*, UTAH CODE § 9-9-103 and OKLA. STAT. tit. 74, § 1221.

The D.C. Circuit’s decision correctly concluded that Alaska Native Regional Corporations and Alaska Native Village Corporations (collectively ANCs) are not recognized Indian tribes to which coronavirus relief funds should be distributed under Title V of the CARES Act. Petitioner Janet Yellen’s (the Secretary) interpretation of the CARES Act results in an unlawful payment to the ANCs at the expense of federally recognized tribes across the country. If this Court were to reverse the D.C. Circuit’s decision, federally recognized tribes in the *Amici* States (and others) would be deprived of the full amount of coronavirus relief funds appropriated to them under the CARES Act, requiring those tribes and the states in which

they are located to stretch their allocated funds further than contemplated by the CARES Act.

### SUMMARY OF ARGUMENT

Title V of the CARES Act states that “Tribal governments” are entitled to coronavirus relief funds. *See* 42 U.S.C. § 801(a)(1). It defines “Tribal government” as “the recognized governing body of an Indian Tribe.” *Id.* § 801(g)(5). And it defines “Indian Tribe” as bearing “the meaning given that term” in the Indian Self-Determination and Education Assistance Act (ISDA). The D.C. Circuit held that ANCs are not “recognized” Indian tribes under ISDA, and thus not entitled to Title V funding. Pet. App. 13a, 25a. The D.C. Circuit was correct for three reasons.

First, the holding below is consistent with Title V’s structure, which directs funds solely to sovereign entities and their political subdivisions. Unlike recognized tribes with sovereign responsibilities for the health and welfare of American Indians, ANCs are *for-profit* corporations responsible only to their shareholders. 43 U.S.C. § 1601, *et seq.* And, as the D.C. Circuit observed, excluding ANCs from the CARES Act does not dismantle ISDA’s application to ANCs because ISDA makes funding available to “tribal organizations.” Pet. App. 24a.

Second, the Secretary’s inclusion of ANCs means that segments of Alaska’s population that have already been counted—for calculating Title V funds for the State of Alaska and recognized tribes in Alaska—are being double counted in ANC “populations.” Title

V funding for ANCs not only contravenes the CARES Act, but unfairly funds the ANCs at the expense of recognized tribes across the nation.

Finally, Alaska is correct that it can—and should—provide services to all its citizens from its allocation of coronavirus relief funds. But it is wrong that ANCs would be locked out of the coronavirus relief response if they do not receive direct funding from the Secretary. Alaska Br. 27-30. Like all other states, Alaska may use non-governmental entities, including ANCs, to meet the needs of all its citizens.

#### ARGUMENT

- I. **The Court of Appeals correctly held that ANCs do not meet the definition of “Tribal governments” eligible to receive Title V CARES Act funding, which is consistent with Title V’s structure of funding sovereign entities and their political subdivisions.**

Congress passed the CARES Act to help cover “necessary expenditures incurred due to the public health emergency” of the coronavirus pandemic. 42 U.S.C. § 801(d)(1). Title V of the CARES Act appropriated \$150 billion for “payments to States, Tribal governments, and units of local government.” *Id.* § 801(a)(1). Of the \$150 billion appropriated, Title V reserved \$8 billion for “payments to Tribal governments.” *Id.* § 801(a)(2)(B).



The CARES Act defines “Tribal government” as “the recognized governing body of an Indian Tribe.” *Id.* § 801(g)(5). And it defines “Indian Tribe” as bearing “the meaning given that term” in ISDA. *Id.* § 801(g)(1). ISDA, in turn, defines “Indian tribe” as:

any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act [], ***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). Recognition is a legal term of art in federal Indian law; it confirms a “tribe’s existence as a distinct *political* society.” *See Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (emphasis added).

The D.C. Circuit correctly determined here—and Respondents correctly argue—that “[b]ecause no ANC has been federally ‘recognized’ as an Indian tribe, as the [ISDA’s] recognition clause requires, no ANC satisfies the ISDA definition.” Pet. App. 13a.

The D.C. Circuit’s holding that ANCs are not eligible for Title V funding is consistent with the CARES Act’s overall text and structure differentiating between governments and corporations. Titles I, II, and IV of the CARES Act appropriated hundreds of

billions of dollars of relief for corporations. Pub. L. No. 116-136, 134 Stat. 281, 286-359, 469-501 (2020). But Title V funding is expressly directed solely to governments: “States, Tribal governments, and units of local government.” 42 U.S.C. § 801(a)(1).

When Congress determined how to distribute Title V funding, it chose the term “tribal governments” and *not* “tribal organizations.” This is an important distinction between the CARES Act and ISDA: the CARES Act directs funds, and repeatedly refers, to “Tribal *governments*,” while ISDA authorizes federal contracting with “tribal *organizations*,” *see* 25 U.S.C. §§ 5304(l) & 5321(a)(1) (emphasis added).

The term “tribal organization” has a much broader meaning than “tribal government” under ISDA. The former term includes not only recognized tribal governments, but also corporations representing tribal communities. *See, e.g., N.L.R.B. v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 999-1000 (9th Cir. 2003) (involving tribal organization that was state-chartered healthcare corporation). Excluding ANCs from the CARES Act would not, as Petitioners argue, deprive ANCs of funding under ISDA. Fed. Br. 35; Pet. App. 24a. Thus, while Congress could have incorporated the broader ISDA term “tribal organization” in the CARES Act (to include corporations), it instead chose to distribute Title V funding to “tribal governments.”

Congress has defined the powers of tribal self-government in the Indian Civil Rights Act to include

“all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed.” 25 U.S.C. § 1301(2). While not explicitly incorporated in the CARES Act, this definition is consistent with how courts have defined tribal self-government for decades. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (“Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government . . . [including] regulating their internal and social relations.”) (citations omitted); *see also Montana v. United States*, 450 U.S. 544, 564 (1981) (same).

By directing Title V funds to tribal *governments*, Congress deliberately chose to work with sovereign entities to jointly address a serious public health and safety crisis that affects all people.

ANCs are not tribal governments in any sense of the word—they do not exercise executive, legislative, and judicial power over any citizens or members, and they are not distinct, independent political communities. Rather, ANCs are private corporations created “to conduct business for profit.” 43 U.S.C. § 1606(d). “The management of the . . . Corporation[s] [are] vested in a board of directors” who are stockholders in the corporation. *Id.* § 1606(f). ANCs were authorized, at their creation, to issue 100 shares of stock to each Native Alaskan who was or later became enrolled in the geographic region for which the ANC has

jurisdiction. *Id.* § 1606(g). Although shareholders were initially restricted from transferring their shares, *id.* § 1606(h)(1)(B), such restrictions on alienability could be lifted by the corporation after 1991. *Id.* § 1629c. Unlike the governments of sovereign tribes—who have responsibility for the health, safety, and welfare of all tribal members, *see Montana*, 450 U.S. at 565-66—the ANCs’ only responsibility is to maximize profit for shareholders.

It is not surprising that Congress chose to deliver Title V coronavirus relief funding to sovereign entities responsible for more than just generating a return on investment.

**II. The Secretary’s interpretation of the CARES Act results in double counting segments of Alaska’s population, unfairly directing funds to the ANCs at the expense of federally recognized tribes.**

The funds distributed to each of the fifty states under Title V are calculated by each State’s population as a percentage of the nation’s total population, with a baseline amount of \$1.25 billion. 42 U.S.C. § 801(c)(1)-(2)(A). To determine the population of each state, the Secretary consults census data. *Id.* § 801(c)(8).

Both Utah and Alaska received \$1.25 billion dollars.<sup>1</sup> Alaska, with a population of about 731,158,<sup>2</sup> received approximately \$1,710 per capita, including members of federally recognized tribes and non-enrolled people of American Indian descent. Utah, with a population of about 3,249,879,<sup>3</sup> received approximately \$385 per capita, including members of federally recognized tribes and non-enrolled people of American Indian descent.

The Secretary is also authorized to issue direct payments to units of local government. *Id.* § 801(b)(2). But these payments are deducted from the amount paid to the state in which the local unit of government is located. *Id.* For example, Utah’s total allocation of \$1.25 billion included \$315.2 million to eligible local governments and \$934.8 million directly to the state.<sup>4</sup>

Alaska asserts that ANCs perform services that its political subdivisions cannot. *See* Alaska Br. 29 (“Cutting off funding to the ANCs, which provide services to tens of thousands of Alaska Natives, will

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<sup>1</sup> U.S. Treasury, Payments to States and Eligible Units of Local Government (May 2020) at 1, 7, <https://home.treasury.gov/system/files/136/Payments-to-States-and-Units-of-Local-Government.pdf> (“Payments to States”) (accessed Mar. 30, 2021).

<sup>2</sup> U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, and the District of Columbia: April 1, 2010 to July 1, 2020 (Dec. 2020), <https://www2.census.gov/programs-surveys/popest/tables/2010-2020/state/totals/nst-est2020.xlsx> (accessed Mar. 30, 2021).

<sup>3</sup> *Id.*

<sup>4</sup> Payments to States, *supra* note 1, at 7.

create a chasm that the State simply cannot fill.”). There is no corresponding provision, however, that reduces the amounts paid to the State of Alaska by the \$533 million earmarked for ANCs, even if ANCs perform services benefitting that state’s citizens in the same way that units of local government in other states do.

Title V directs \$8 billion to the “Tribal governments.” 42 U.S.C. § 801(a)(2)(B). The Secretary decided to allocate 60 percent of the \$8 billion based on population and to allocate the remainder based on “employment and expenditures data” of the tribes.<sup>5</sup> The Secretary chose to rely on data from the Indian Housing Block Grant program developed by HUD to determine tribal population based on each Tribe’s “formula area” which “corresponds broadly with the area of a Tribal government’s jurisdiction.”<sup>6</sup>

The Secretary interprets the Act to direct a portion of the \$8 billion allocated for “Tribal governments” to be distributed to ANCs. But the Secretary’s interpretation double counts segments of Alaska’s population (and other states) and then directs those funds to ANCs at the expense of the recognized tribes. This is because shareholders of ANCs include both

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<sup>5</sup> U.S. Treasury, Coronavirus Relief Fund: Allocations to Tribal Governments (May 2020) at 2, <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf> (accessed Mar. 30, 2021).

<sup>6</sup> *Id.*

Native and non-Native Alaskans; shareholders need not reside in Alaska. *See, e.g.*, Ahtna Shareholders, <https://www.ahtna.com/shareholders/> (explaining that majority of shareholders are Native Alaskan and shareholders reside inside and outside of Alaska). And shareholders may hold stakes in multiple ANCs.

The Secretary’s atextual interpretation that ANCs are tribal governments is unworkable. As an initial matter, the formula for determining how much money to appropriate to each tribal government under the CARES Act—based on population, employment and expenditure data—is nonsensical as applied to a corporation. ANCs are *not* sovereign entities and do *not* have jurisdictions with enrolled members or citizens. It is unclear how the Secretary calculated ANC “populations.” Mnuchin Br. at 7 n.3, *Shawnee Tribe v. Mnuchin*, 984 F.3d 94 (D.C. Cir. 2021) (No. 20-5286).

But even if a corporation had a “population” based on its shareholders, the patchwork nature of ANC ownership and jurisdictions where ANC shareholders reside inevitably leads to double counting portions of the population of Alaska (and other states) and unfairly directing funds based on those counts to ANCs at the expense of federally recognized tribes.

**III. The State of Alaska may distribute its Title V CARES Act funding to ANCs to deliver relief to its citizens.**

Lacking a textual leg to stand on, Alaska leans instead on policy, asserting that it “cannot simply step in and provide services to Alaska Natives . . . in the same way as . . . ANCs,” even with the \$1.25 billion funds appropriated to the State as part of the CARES Act. Alaska Br. 23. According to Alaska, ANCs provide better “on-the-ground health and social services” for many of its citizens, and Alaska is unable to “pick up the tab” for those citizens. *Id.* at 25, 30. In effect, Alaska argues that ANCs are performing the work that would otherwise be performed, though not as well, by various units of local government in Alaska, such as borough and municipal health departments. *Amici* States do not question Alaska’s determination that some non-governmental entities can provide better services for its citizens than its own state apparatus. Indeed, the same is often true in *Amici* States.

But Alaska presents a false dichotomy. The question is not whether the law permits or forbids Alaska using ANCs to deliver relief; the question is how it can use them consistent with the law. Alaska is not restricted from using ANCs in delivering relief. The CARES Act provides that the state, local, and tribal governments may use the Coronavirus Relief Funds for necessary expenditures related to the COVID-19 public health emergencies. 42 U.S.C. § 801(d). The Act does not limit those governments from using



governmental and non-governmental service providers to deliver relief in their respective sovereignties. The CARES Act gives state and tribal governments the authority and flexibility to determine the best means for delivering COVID-19 related services to meet the needs of their citizens and tribal members.

Utah, for example, not only distributed CARES Act funding directly to citizens, businesses, and governmental agencies,<sup>7</sup> but also indirectly through grants and contracts to non-governmental entities (hospitals, nonprofits, etc.).<sup>8</sup> These indirect means enabled Utah to more efficiently provide everything from testing, treatment facilities, informational and technological services, to housing, behavioral health, and domestic violence prevention and treatment.<sup>9</sup>

In fact, recognizing that existing non-governmental entities have a unique ability to reach specific groups using culturally appropriate methods, Utah works with community-based organizations to serve racial/ethnic minorities, underserved populations, and communities in rural areas where access to

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<sup>7</sup> Utah State Legislature Executive Appropriations Committee, COVID-19 State Funds and CARES Act CRF (Dec. 2020) at 1-3, <https://le.utah.gov/interim/2020/pdf/00004741.pdf> (“Funding Report”) (accessed Mar. 30, 2021).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

resources may be limited by technological, language, and geographic barriers.<sup>10</sup>

Just as Utah and other *Amici* States work with these community-based organizations, Alaska has paid at least \$37 million to nonprofits, including tribal organizations.<sup>11</sup> Nothing is stopping Alaska from directing its CARES Act funding to the ANCs to deliver services to Native Alaskans.

Moreover, because distributing CARES Act funding for tribal governments is a zero-sum enterprise, giving funding to the ANCs means taking away funds from the governments of federally recognized tribes. So whatever the policy merits of spending CARES Act funds on ANCs, that comes with the policy drawbacks of depriving funds to tribes across the country that are doing vital pandemic relief work. For example, in Oklahoma, the Cherokee Nation has used CARES Act funding to serve its citizens in Oklahoma by providing individual assistance, economic relief, PPE, food,

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<sup>10</sup> Utah Department of Health, COVID Community Partnership Pilot Project: Integrating Community Health Workers (CHWs) into COVID-19 Response Efforts (Nov. 2020) at 2, 27, <https://www.health.utah.gov/disparities/data/ohd/CCPPilotProjectNov2020.pdf> (accessed Mar. 30, 2021). The CCP program was funded through Utah's CARES Act funding. See Funding Report, *supra* note 7, at 1 (\$2.26 million allocated to At-Risk - Community Partnerships Expansion).

<sup>11</sup> See The Alaska Community Foundation, Coronavirus Non-profit Relief Fund, <https://alaskacf.org/cnrf/>; The Alaska Community Foundation, Coronavirus Nonprofit Relief Fund Grantees, <https://alaskacf.org/wp-content/uploads/2020/11/Rounds-1-and-2-Hospitals.pdf> (accessed Mar. 30, 2021).

housing, and healthcare.<sup>12</sup> It has also helped make payroll for the 4,800 employees of Cherokee Nation Businesses and Cherokee Nation Entertainment—tribally owned corporations that did not receive CARES Act funds directly but instead through their tribal *governments*.<sup>13</sup>

Alaska also points to the number of its non-enrolled citizens of native descent as well as the number of enrolled members of tribes living away from their tribal villages as (1) making it distinct from the lower 48 and (2) a reason to distribute services through ANCs instead of through recognized tribes. Alaska Br. 23-27. There are at least two problems with that argument.

First, Alaska incorrectly assumes that non-enrolled citizens of native descent as well as enrolled members of recognized tribes would be deprived of coronavirus relief services if such services are not provided by the ANCs. Alaska Br. 30. As Alaska acknowledges, it has a responsibility as a sovereign state to care for all its citizens. Enrolled members living in urban areas are eligible to receive services from Alaska if travel to their tribal village is too far or

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<sup>12</sup> See Cherokee Nation, *Respond, Recover, Rebuild*, <https://www.respondrecoverrebuild.com/> (accessed Mar. 30, 2021).

<sup>13</sup> See Lindsey Bark, *Cherokee Nation Releases Coronavirus Relief Fund Spending Report*, CHEROKEE PHOENIX (Feb. 10, 2021), [https://www.cherokeephoenix.org/news/cherokee-nation-releases-coronavirus-relief-fund-spending-report/article\\_2b88acd1-9276-5a6c-b2a6-525971ddb8d.html](https://www.cherokeephoenix.org/news/cherokee-nation-releases-coronavirus-relief-fund-spending-report/article_2b88acd1-9276-5a6c-b2a6-525971ddb8d.html) (accessed Mar. 30, 2021).

difficult. Non-enrolled citizens of native descent are also eligible to receive services from the state. And, as previously argued, Alaska can develop partnerships with private enterprises to meet the needs of its citizens.

Alaska argues it cannot “step into the shoes of the federal government . . . [and] fulfill the federal government’s unique trust responsibilities to Alaska Natives.” Alaska Br. 30. But that argument incorrectly presumes that distribution of CARES funding is part of the federal government’s unique trust responsibility to American Indians. It is not. Unlike the services contemplated by ISDA contracts, distribution of CARES funding is to benefit *all* people within the United States. Thus, it is not unique to American Indians, and the State of Alaska has an independent sovereign responsibility to ensure the health and safety of all its citizens.

Second, Alaska, though unique in some ways, is not the only state with non-enrolled citizens and enrolled members living away from their tribal reservations or villages. For example, the Cherokee Nation has 380,000 citizens, but only 141,000 live within that tribe’s historic boundaries in Northeastern Oklahoma.<sup>14</sup> To put this in perspective, the 239,000 Cherokees that live outside their homelands is about double the *total* Alaska American Indian and Alaska

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<sup>14</sup> See Cherokee Nation, *Osiyo!*, <https://www.cherokee.org/> (accessed Mar. 30, 2021).

Native population. Nationwide, 22 percent of Indians live within tribal statistical areas.<sup>15</sup> In Alaska, over 50 percent live within their tribal statistical area (78,141 out of 138,312).<sup>16</sup> Should American Indians be unable to access services provided by their tribe or native village, they have access provided by the states and their private independent contractors.

Alaska, like every other state, has sovereign responsibility for all its citizens, including enrolled and non-enrolled Native Alaskans. Alaska has received CARES Act funds for the benefit of all its citizens, and Alaska should use those funds for American Indians like the other states have.

### CONCLUSION

*Amici* States and the recognized tribes within their borders are striving, through their CARES Act Title V funding allocation, to serve the needs of all their citizens and members. And they are doing so with an allocation of funds based upon their populations. The Secretary's interpretation of the CARES Act and ISDA is incorrect as a matter of statutory construction, and it deprives the recognized tribes of the full amount of funds to which they are entitled to serve their members.

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<sup>15</sup> U.S. Census Bureau, The American Indian and Alaska Native Population: 2010 (Jan. 2012) at 13 tbl. 2, <https://www2.census.gov/library/publications/cen2010/briefs/c2010br-10.pdf> (accessed Mar. 30, 2021).

<sup>16</sup> *Id.* at 7 tbl. 2, 13 tbl. 5.

This Court should affirm the D.C. Circuit and hold that ANC's are not entitled to funding under Title V.

Respectfully submitted.

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