



Justices Consider Whether Treasury May Distribute CARES Act Funds for “Indian Tribes” to Alaska Native Corporations

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On April 19, 2021, the Supreme Court heard [oral arguments](#) in [Yellen v. Confederated Tribes of the Chehalis Indian Reservation](#) (*Chehalis*). The case asks whether Alaska Native Corporations (ANCs) are “Indian tribes” eligible to receive approximately [\\$530 million](#) of the \$8 billion allocated to “[Tribal governments](#)” in the Coronavirus Relief Fund provisions of the Coronavirus Aid, Relief, and Economic Security Act ([CARES Act](#)). The 12 [regional](#) and 200 [village](#) ANCs are state-chartered corporations [authorized](#) by the Alaska Native Claims Settlement Act of 1971 ([ANCSA](#)) to receive proceeds of the settlement of Alaska Natives’ aboriginal land claims. Unlike traditional Alaska Native villages, ANCs are not included on the Department of the Interior (DOI) [list](#) of federally recognized tribes. Seventeen of those federally recognized Indian tribes are challenging a Treasury Department [determination](#) that ANCs qualify for the payments under the CARES Act’s [definition](#) of *Indian tribe*, which is from the Indian Self-Determination and Education Assistance Act (ISDEAA) and is a definition [used](#) in roughly 150 other statutes.

The U.S. District Court for the District of Columbia (district court) [upheld](#) Treasury’s original [determination](#) that ANCs qualify for CARES Act payments. On September 25, 2020, a unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reversed, [holding](#) that the ISDEAA definition of *Indian tribe* is a term of art that, while specifically mentioning ANCs, excludes them by separately requiring federal recognition. In general, the D.C. Circuit relied on the text of the ISDEAA definition, while the district court also considered congressional intent and legislative history. Treasury successfully petitioned the Supreme Court to review the D.C. Circuit’s judgment. A decision in the case is expected before the Court’s [summer recess](#).

Background

ANCSA

Congress enacted [ANCSA](#) in 1971 to settle Alaska Natives’ aboriginal land claims. To that end, ANCSA extinguished all aboriginal claims to land in Alaska and [terminated](#) all but one of the existing reservations

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in the state. In exchange, Congress transferred 44 million acres of Alaska land and \$962.5 million to the two types of ANCs established in the statute—Alaska Native Regional Corporations (of which there [now are 12](#) out of an original 13) and Alaska Native Village Corporations (of which there are almost 200). The ANCs are state-chartered, private, for-profit business corporations with Alaska Natives as shareholders. Congress also granted the Alaska Native Regional Corporations statutory [authority](#) to provide “health, education, and welfare benefits” to their Alaska Native shareholders and the shareholders’ family members.

ISDEAA and List Act

Enacted in 1974, the ISDEAA [authorizes](#) the federal government to enter into contracts with Indian tribes under which the government provides funds to an individual tribe to use in providing services to tribal members. Although the ANCs do not exercise tribal sovereignty, DOI [has](#) “consistently adhered to the view that ANCs qualify to be treated as Indian tribes” for purposes of the ISDEAA. The ISDEAA 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.* [Emphasis added.]

The final clause of this definition (the recognition clause) is substantially identical to language that Congress had used to describe the defining elements of a federally recognized Indian tribe in [various federal laws](#) enacted before the ISDEAA. The recognition clause also mirrors language in the 1994 [List Act](#), which requires DOI to publish an annual list of “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.*” [Emphasis added.] As codified in the List Act, [recognition is a](#) “formal political act confirming the tribe’s existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government.” Federal recognition [obligates DOI](#) to provide an array of benefits and services to the recognized tribe and its members. The ANCs are not, and never have been, included on DOI’s [list](#) of federally recognized Indian tribes, and DOI has conceded that the ANCs could not be so recognized due to their corporate status.

The CARES Act directs Treasury to reserve \$8 billion of the Coronavirus Relief Fund for payments to “Tribal governments.” The act [defines Tribal government](#) as “the recognized governing body of an Indian tribe” and *Indian tribe* by reference to the ISDEAA’s [definition](#). Thus, the ANCs’ eligibility for CARES Act funds requires an affirmative answer to each of two questions: (1) whether the ANCs qualify as “Indian tribe[s]” under the ISDEAA’s [definition](#) of that term; and, (2) if so, whether the ANCs boards of directors qualify as “Tribal government[s],” that is, the “recognized governing bod[ies] of an Indian tribe.”

D. C. District Court Decision

On April 17, 2020, a small group of tribes from Alaska and the lower 48 states [sued](#) to enjoin Treasury from implementing its [determination](#) that the ANCs are eligible for CARES Act payments. The district court [rejected](#) that challenge on June 20, 2020, reasoning that Congress could not have intended the ANCs’ eligibility for CARES Act payments to turn on their ability to satisfy the recognition clause. The court identified three bases for its conclusion. [First](#), the court reasoned that Congress’s inclusion of ANCs in the ISDEAA’s definition of *Indian tribe* would not make sense if the recognition clause applied to them, because Congress knew that ANCs could not satisfy the standard for federal recognition. [Second](#), the court opined that the legislative history of the ISDEAA shows “that Congress took pains to include

ANCs in the ISDEAA definition.” **Third**, the court concluded that, “to the extent that the ... definition of ‘Indian tribe’ contains any ambiguity,” the court should defer to DOI’s interpretation that ANCs qualify as Indian tribes under that definition.

D. C. Circuit Decision

The D.C. Circuit reversed the district court’s judgment, holding that the plain text of the ISDEAA’s definition unambiguously precludes finding that ANCs are Indian tribes for purposes of that statute or the CARES Act. The court **concluded** that the only way to “constru[e] the statute to make grammatical sense” is to read the recognition clause to “modify all the nouns in the definition,” including the ANCs. According to the court’s **reasoning**, “it is not grammatically possible for the recognition clause to modify” every noun in the definition *except* “the one noun ... that is its most immediate antecedent (‘corporation’).”

The D.C. Circuit also **reviewed** the long history of uncertainty about the existence of tribal sovereignty in Alaska until the 1993 **decision of the Bureau of Indian Affairs** to include only Alaska Native villages as federally recognized tribes. The court reasoned that because Congress enacted the ISDEAA during this period when tribal sovereignty in Alaska remained uncertain, it made sense that Congress would have phrased the definition of *Indian tribe* to include “whatever Native entities ultimately were recognized—even though, as things later turned out, no ANCs were recognized.”

Supreme Court Oral Arguments

At **oral argument**, multiple Justices, including Chief Justice **Roberts** and Justice Thomas, expressed skepticism of Treasury’s interpretation that the recognition clause of the ISDEAA’s definition of *Indian tribe* does not apply to the ANCs. Some of the Justices, including Justice Kavanaugh, expressed concern that affirming the D.C. Circuit’s judgment could have “ramifications” that might be “**staggering**” for other programs using the ISDEAA definition. Justice Alito explored the “**absurdity**” and “**blatant contradiction**” of concluding that Congress used statutory language that expressly includes ANCs among the Indian groups that are eligible for a one-time distribution of CARES Act funds—while at the same time making those distributions contingent on federal recognition—given that Congress is fully cognizant that the ANCs have not been so recognized. Justice Barrett **inquired** about interpreting the recognition clause in its “ordinary meaning”—referring to “an entity that contracts with the federal government for services that are designed to go to Indians because of their status as Indians”—rather than as a term of art meaning federally recognized tribes.

The Justices also seemed aware of possible pandemic-related economic hardship to Alaska Natives in the absence of CARES Act payments to the ANCs. For instance, Justice Sotomayor **showed interest** in the possibility of a “CARES Act-specific decision” to avoid jeopardizing other programs using the ISDEAA definition. Two Justices seemed to identify the CARES Act **definition** of *Tribal government* as undercutting the notion that “recognized” is not a term of art, at least for CARES Act purposes. Justice Gorsuch **questioned** how ANC boards of directors could qualify as “governing bodies” of “Tribal governments,” and Justice Sotomayor **called** the “governing body definition” the strongest argument for why the ANCs do not qualify for CARES Act funds.

Considerations for Congress

This case is likely to have significant financial and legal effects. If the plaintiff tribes prevail in obtaining an injunction against Treasury’s decision that ANCs are entitled to CARES Act funds, **\$162.3** million in such funds will become available for distribution among other tribes throughout the United States. In that circumstance, the ANCs and the Alaska Native population may turn to Congress to provide substitute funding. No matter what the outcome, the case has highlighted ambiguity between a plain, grammatical

reading of the ISDEAA’s definition of *Indian tribe* and the DOI’s long and consistent interpretation that this definition includes ANCs. The courts’ struggle to construe the ISDEAA definition incorporated in the CARES Act may also spur Congress to consider legislation clarifying whether and how the definition should apply to ANCs for purposes of the ISDEAA and the approximately 150 other statutes that use that same definition. And when defining *Indian tribe* in future legislation, Congress may seek to avoid referencing the ISDEAA definition without specifying whether ANCs are included or excluded. For example, one recent enactment—Section 501(k)(2)(C), Division N, Title V (the Coronavirus Response and Relief title) of the Consolidated Appropriations Act, 2021, P.L. 116-260—defines *Indian tribe* in language mirroring the ISDEAA definition but includes the following qualifying phrase: “For the avoidance of doubt, the term Indian tribe shall include Alaska native corporations established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, et seq.).”

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