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Healthcare Self-Governance

Danika Watson

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HEALTHCARE SELF-GOVERNANCE

By Danika Elizabeth Watson¹

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|------|---|----|
| I. | FILLING THE VOID IN ALASKA NATIVE TRIBAL HEALTHCARE.. | 2 |
| II. | ALASKA NATIVE SELF-GOVERNANCE IN HEALTHCARE RIGHTS AND SYSTEMS..... | 6 |
| | A. <i>Alaska Natives’ Right to Healthcare</i> | 6 |
| | B. <i>Three Braided Organizations: ANCs, Healthcare Consortia, and the IHS</i> | 7 |
| | 1. Alaska Native Corporations | 7 |
| | 2. Tribal Healthcare Consortia and Tribal Health Corporations | 9 |
| | 3. The IHS | 11 |
| | C. <i>Braided Approach to Healthcare Self-Governance Applied: Vaccine Rollout</i> | 14 |
| III. | HEALTHCARE SELF-GOVERNANCE APPLIED..... | 16 |
| IV. | CONCLUSION | 20 |

¹ J.D. Candidate, 2022, Fordham University School of Law; M.M., 2017, The Juilliard School; B.M., 2015, Northwestern University. I dedicate this Article to the memories of our loved ones lost this past year, including my grandma Joyce Paskvan and grandpa Robert Mannherz. I thank Professor Wendy Luftig, Professor David Zarrett, and the *American Indian Law Journal* staff and editors for their thoughtful work and guidance.

“I think of the villages that are geographically isolated in Alaska as being incredibly strong. It’s their inter-connectedness that makes them strong.”

Dr. Robert Onders, Medical Director of Community Health Systems and Improvement, Alaska Native Tribal Health Consortium²

I. FILLING THE VOID IN ALASKA NATIVE TRIBAL HEALTHCARE

Sometimes, only sheer numbers can convey the depth of devastation that pandemics have brought to American Indians and Alaska Natives. In the early days of European contact, smallpox decimated Native communities from New England to the Midwest to the Southeast over the course of more than a century, devastating populations like the Mohegan and Pequot whose population dropped from 16,000 to just 3,000 in a single year.³ During the 1918 Spanish flu pandemic, Alaska Natives represented 80% of Alaska’s death toll.⁴ During the 2009 H1N1 “swine flu” influenza pandemic, American Indians and Alaska Natives’ mortality rate was a staggering four times higher than the general population.⁵ The COVID-19 pandemic continues this devastating trend, as Alaska Native communities painfully recognized from the beginning.⁶ From January to June 2020, American Indians and Alaska Natives were three to five times more likely to be diagnosed with the disease than non-Hispanic whites.⁷ Further, the United States Centers for Disease Control and Prevention (CDC) released data on the early months of the pandemic showing that American Indians and Alaska Natives’ mortality rate was higher than any other racial demographic group, almost *two and a half times* the death rate for whites and

² Leah Campbell, *Native Alaskan Villages, Once Devastated by Spanish Flu, Are Taking Action Against Covid-19*, DIRECTRELIEF, (May 6, 2020), <https://www.directrelief.org/2020/05/native-alaskan-villages-once-devastated-by-spanish-flu-are-taking-action-against-covid-19/>.

³ Jeffrey Ostler, *Disease Has Never Been Just Disease for Native Americans*, THE ATLANTIC (Apr. 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/disease-has-never-been-just-disease-native-americans/610852/> (emphasizing social and cultural effects of colonization and systemic racism on Native communities’ susceptibility in epidemics over the standard “virgin-soil-epidemic” biological hypothesis: “The Sauk and Mesquakie [post-relocation epidemic] catastrophe was not an accident. It was a direct and foreseeable consequence of decisions made by the United States and its citizens to dispossess Native people of desirable lands and shove them someplace else.”).

⁴ Talha Burki, *COVID-19 among American Indians and Alaska Natives*, 21 LANCET: INFECTIONS DISEASES 3, 325 (Mar. 1, 2021) [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(21\)00083-9/fulltext#:~:text=COVID%2D19%20has%20continued%20the,Control%20and%20Prevention%20\(CDC\)](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00083-9/fulltext#:~:text=COVID%2D19%20has%20continued%20the,Control%20and%20Prevention%20(CDC))

⁵ *See id.*

⁶ *See* Brief of Alaska Federation of Natives in Support of Defendant-Appellees, Confederated Tribes of the Chehalis Reservation v. Mnuchin, 976 F.3d 15 (D.C. Cir. 2020), (No. 1:20-cv-01002), 2020 WL 4917639 (“Alaska Natives approached Covid-19 with memories of the last pandemic, the 1918 Spanish flu, reverberating in the back of their minds. That pandemic formed a historical trauma still felt by many Native peoples today. The first wave of the Spanish flu largely spared Alaska, but the second wave hit Native peoples with devastating force in 1919. Against this backdrop, [Alaska Federation of Natives], in response to the emerging Pandemic, worked to mobilize the Alaska Native community, including all three components of its membership, as early as January 30, 2020.”)

⁷ *See id.*

Asians,⁸ and incidence rates *three and a half* times higher than white Americans.⁹ As Dr. Victoria O’Keefe (Cherokee Nation/Seminole Nation) and Dr. Melissa Walls (Bois Forte/Couchiching First Nation Anishnaabe) of Johns Hopkins School of Public Health note, these losses are “set against a backdrop of widening health inequalities for American Indians and Alaska Natives rooted in settler colonialism, intergenerational trauma, and continued structural racism—including the federal government’s failure to uphold its trust and treaty responsibilities to tribal nations guaranteeing health.”¹⁰

As the pandemic killed scores of elders—stewards of endangered Native languages, history, knowledge, and traditions who are fundamental to sustaining the bonds between generations that ground Native cultural resiliency and revitalization¹¹—a protracted legal battle over the meaning of just two words blocked \$8 billion in tribal relief funding from reaching Native American communities and tribal health organizations.¹² The conflict arose when Congress earmarked funds in the 2020 Coronavirus Aid, Relief, and Economic Security Act (CARES Act) for allocation to “Indian tribes.”¹³ Congress drew its definition for the term “Indian tribes” from the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA or ISDA),¹⁴ a

⁸ See *id.*; Randal Akee & Sarah Reber, *American Indians and Alaska Natives are dying of COVID-19 at shocking rates*, BROOKINGS (Feb. 18, 2021), <https://www.brookings.edu/research/american-indians-and-alaska-natives-are-dying-of-covid-19-at-shocking-rates/> (presenting CDC data).

⁹ Victoria O’Keefe & Melissa L. Walls, *Indigenous communities demonstrate innovation and strength despite unequal losses during COVID-19*, BROOKINGS (Apr. 2, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/04/02/indigenous-communities-demonstrate-innovation-and-strength-despite-unequal-losses-during-covid-19/> (showing that one in 475 American Indians and Alaska Natives has died from COVID-19, compared to one in 825 white Americans and one in 645 Black Americans).

¹⁰ *Id.*

¹¹ See, e.g., Jack Healy, *Tribal Elders Are Dying From the Pandemic, Causing a Cultural Crisis for American Indians*, NEW YORK TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/tribal-elders-native-americans-coronavirus.html> (“‘It’s like we’re having a cultural book-burning,’ said Jason Salsman, a spokesman for the Muscogee (Creek) Nation in eastern Oklahoma, whose grandparents contracted the virus but survived. ‘We’re losing a historical record, encyclopedias. One day soon, there won’t be anybody to pass this knowledge down . . . We’ll never be able to get that back.’”)

¹² *Alaska Native Village Corporation Association v. Confederated Tribes of the Chehalis Reservation*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/alaska-native-village-corporation-association-v-confederated-tribes-of-the-chehalis-reservation/>.

¹³ CARES Act, S. 3548, 116th Cong. (2020).

¹⁴ 25 U.S.C. § 5304 (e). The House Committee for Indigenous Peoples of the United States, which includes Alaska’s U.S. Representative Don Young, guided the decision to use the ISDEAA definition in the CARES Act because of the “long established practice of employing the ISDEAA definition when [Congress] want[s] to include the entire indigenous population of [Alaska], regardless of tribal affiliation.” See Brief of Amici Members of Congress and Brief of Amici Curiae U.S. Senators Lisa Murkowski and Dan Sullivan, and U.S. Congressman Don Young, *Mnuchin v. Confederated Tribes of the Chehalis Reservation*, *cert. sub nom. Alaska Native Vill. Corp. Ass’n, Inc. v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 976 (2021), https://www.supremecourt.gov/DocketPDF/20/20-544/161146/20201118162030395_AMICI%20BRIEF%20FINAL%20-%20PDF-A.pdf

definition Congress originally designed to promote tribal autonomy and self-governance by permitting tribes to operate programs previously operated by the federal government:¹⁵

"Indian tribe" or "Indian Tribe" means 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.¹⁶

This cumbersome, comma-laden definition sparked a challenge between American Indian tribes and Alaska Native Corporations (ANCs); given this ISDEAA definition, are Alaska Native corporations “recognized as eligible” for the CARES Act funding or do ANCs lose the tribal relief funding earmarked for Native communities because they exercise their inherent and recognized right of self-governance in an organizational structure (corporations) that differs from that of American Indians (reservations)?¹⁷ Six American Indian tribes filed suits arguing that the twelve for-profit Alaska Native regional corporations and around 200 Alaska Native village corporations cannot claim funds from the \$8 billion “tribal stabilization fund” in the CARES Act, while the ANCs and Treasury Secretaries Steven Mnuchin and Janet Yellen contend that the

¹⁵ See *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002); see also *The Success And Shortfall Of Self-Governance Under The Indian Self-Determination And Education Assistance Act After Twenty Years*, <https://www.govinfo.gov/content/pkg/CHRG-110shrg42575/html/CHRG-110shrg42575.htm>.

¹⁶ 25 U.S.C. § 5304 (e). Critically, this definition references both federally recognized Indian tribes and Alaska Native corporations. Indian tribes are tribal organizations which the United States recognizes as sovereign, independent, and self-governing, with a government-to-government relationship with the United States. See *Aleman v. Chugach Support Services, Inc.*, 485 F.3d 206, 213 (4th Cir. 2007). On the other hand, Alaska Native Corporations (ANCs), which are Alaska Natives’ primary tribal organizations established pursuant to the Alaska Native Claims Settlement Act (ANCSA), are not sovereign entities. 43 U.S.C. §§ 1601 et seq. In the 60s and 70s, the reservation system considered a failure and a poor fit for Alaska’s massive geography and diverse tribal history. See *generally* DO ALASKA NATIVE PEOPLE GET FREE MEDICAL CARE?, University of Alaska Anchorage & Alaska Pacific University (Libby Roderick, ed.), 2008. Congress and Alaska Native tribes set out an innovative system of tribal governance: ANCs are for-profit corporations run by and for Alaska Native shareholders. See *id.* Instead of tribal governance over Indian reservation lands held in trust, thirteen large regional corporations and more than two hundred smaller village corporations own vast amounts of Alaskan land in fee simple, with corporate directives to maximize profits for shareholders and steward the land’s natural resources. See *id.*

¹⁷ Brief for the Alaska Federation of Natives as Amicus Curiae in Support of Petitioners, 2, Alaska Native Vill. Corp. Ass’n, Inc. v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 976 (2021); see also *Confederated Tribes of the Chehalis Rsrv. v. Mnuchin*, 976 F.3d 15, 26 (D.C. Cir. 2020), cert. granted sub nom. Alaska Native Vill. Corp. Ass’n, Inc. v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 976 (2021), and cert. granted sub nom. Mnuchin v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 976 (2021) (recognizing ANCs as organizations created to exercise Native self-governance: “Moreover, ANCSA charged the new ANCs with a handful of functions that would ordinarily be performed by tribal governments, making potential future recognition of ANCs more plausible . . . And the regional corporations were authorized to ‘promote the health, education, or welfare’ of Alaska Natives . . . performing functions ‘that one would most naturally describe as governmental.’”) (emphasis added).

funds were meant to include ANCs.¹⁸ This question reached the Supreme Court in the consolidated cases *Alaska Native Village Corporation Association v. Confederated Tribes of the Chehalis Reservation*¹⁹ and *Janet Yellen v. Confederated Tribes of the Chehalis Reservation*.²⁰

On January 8, 2021, the Supreme Court granted certiorari to review the Court of Appeals for the D.C. Circuit’s 2020 panel decision.²¹ The three-judge panel held that ANCs do not fit the definition of “Indian tribes” under the CARES Act on strict textual grounds, overruling D.C. District Court Judge Amit Mehta’s initial finding that ANCs were eligible to receive funds.²² In its ruling, the D.C. Circuit raised a novel question of the boundaries of Alaska Native sovereignty in healthcare self-governance when it opined that the State of Alaska could use its own funding allocated to it by the CARES Act to step into the ANCs’ role of filling Alaska Natives’ healthcare needs during the pandemic.²³ This position challenged the structure of self-governance that has shaped Alaskan healthcare policy, potentially even encouraging reversion to state-dominated care of Alaska Natives that works against decades of progress towards Alaska Native independence and self-governance in healthcare. This robust self-governance system was developed through strong tribal organizations like the Alaska Native Tribal Health Consortium and Alaska Native Corporations, in relationship with the federal Indian Health Service (IHS), as Part II.b outlines in detail.²⁴ In response to the D.C. Circuit’s position, the State of Alaska, the Alaska congressional delegation, Alaska Federation of Natives, the ANCs, and other Alaska Native organizations filed a bevy of amicus briefs strongly contesting this opinion.²⁵ These briefs powerfully demonstrate that this matter directly involves the structure of the Alaska Native

¹⁸ See Emma Whitford, *Alaska Native Corps. Make COVID-19 Relief Case to Justices*, LAW360 (Feb. 23, 2021), <https://www.law360.com/articles/1357705/alaska-native-corps-make-covid-19-relief-case-to-justices>.

¹⁹ 141 S. Ct. 976 (2021).

²⁰ No. 20-543, 2021 WL 1432243, at *1 (U.S. Apr. 16, 2021).

²¹ *Alaska Native Vill. Corp. Ass’n, Inc., v. Confederated Tribes of the Chehalis Rsrv., et al.*, No. 20-544 (U.S. Sept. 25, 2020), <https://www.supremecourt.gov/docket/docketfiles/html/public/20-544.html>. The Supreme Court certified the question of whether Alaska Native Corporations are “Indian tribes” under ISDEAA. See No. 20-544, Question Presented, <https://www.supremecourt.gov/docket/docketfiles/html/qp/20-00544qp.pdf> (noting that “[c]onsistent with Congress’ express inclusion of ‘Alaska Native . . . regional [and] village corporation[s]’ (ANCs) in the text, *the Executive has long treated ANCs as ‘Indian tribes’ under ISDEAA and the dozens of statutes that incorporate its definition.* The Ninth Circuit, home to all ANCs, likewise has long held that ANCs are ‘Indian tribes’ under ISDEAA. *Thus, for decades ANCs have played a critical role in distributing federal benefits to Alaska Natives.* Accordingly, when Congress earmarked \$8 billion in Title V of the CARES Act for Indian tribes and incorporated the ISDEAA definition, the Treasury Secretary quite naturally obligated part of those funds to ANCs. Yet in acknowledged conflict with the Ninth Circuit and long-settled agency practice, the decision below holds that ANCs do not satisfy the ISDEAA definition that the CARES Act incorporates.”) (emphasis added).

²² See Andrew Westney, *Justices to Weigh Alaska Native Cos.’ Claim to COVID-19 Aid*, LAW360 (Jan. 8, 2021), <https://www.law360.com/articles/1343233/justices-to-weigh-alaska-native-cos-claim-to-covid-19-aid>.

²³ See *Confederated Tribes of the Chehalis Rsrv. v. Mnuchin*, 976 F.3d 15, 29 (D.C. Cir. 2020), cert. granted sub nom. *Alaska Native Vill. Corp. Ass’n, Inc. v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 976, 208 L. Ed. 2d 510 (2021), and cert. granted sub nom. *Mnuchin v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 976, 208 L. Ed. 2d 510 (2021) (“We are confident that, if there are Alaska Natives uncared for because they are not enrolled in any recognized [tribal] village, *either the State of Alaska or the Department of Health and Human Services will be able to fill the void.*”).

²⁴ See *id.*

²⁵ Docket No. 20-544, *supra* note 22.

healthcare system and that the heart of this question is Alaska Native healthcare self-governance.²⁶

This paper pursues this question of Alaska Native healthcare, introducing and applying *healthcare self-governance* as a novel approach to the question before the Supreme Court. *Healthcare self-governance* examines questions in Alaska Native healthcare from a functional and systemic approach, based on the right to self-governance in the healthcare context. The paper begins with an overview of the basic structure of Alaska Native tribal health and self-governance rights. Next, this paper describes the method of healthcare self-governance in Alaska, including the braided roles of ANCs, tribal health consortia, and the IHS, providing an illustration of the Alaska Native healthcare system through the story of COVID-19 vaccine distribution among Alaska Natives. Next, this paper draws out the central *healthcare self-governance* arguments at play in the case before the Supreme Court, highlighting their crucial role in the amicus briefs filed by the Alaska Federation of Natives, the State of Alaska, and the Alaska Congressional Delegation, and in oral arguments before the Supreme Court, focusing on impacts on the existing frameworks for responding to Alaska Natives' health care needs during pandemic. As applied in *Alaska Native Village Corporation Association v. Confederated Tribes of the Chehalis Reservation*, the principle of healthcare self-governance highlights the functional and systemic practical impacts of ANCs' critical role for providing healthcare for Alaska Natives in the state of Alaska.

II. ALASKA NATIVE SELF-GOVERNANCE IN HEALTHCARE RIGHTS AND SYSTEMS

This section provides an overview of Alaska Native Corporations' role in healthcare self-governance, beginning with the legal basis for Alaska Natives' right to healthcare. It describes the three key interrelated or "braided" organizations leading healthcare delivery and infrastructure: ANCs, tribal health consortia, and the IHS. It concludes with a brief illustration of this system at work, telling the story of the COVID-19 vaccine rollout to demonstrate how this healthcare system by and for Alaska Natives functions across Alaska.

A. *Alaska Natives' Right to Healthcare*

Alaska Natives and American Indians have a legal birthright to federal healthcare services through the United States' federal trust responsibility to uphold treaty obligations with Indian tribes, in addition to their eligibility as United States citizens for all public, private, and state health programs available to the general public.²⁷ The provision of health services to tribal members originated from the special government-to-government relationship between the federal government and American Indian tribes established in 1787, drawing from congressional powers

²⁶ See *id.*; *supra* note 14 and accompanying text.

²⁷ *Basis for Health Services*, INDIAN HEALTH SERVICE, <https://www.ihs.gov/newsroom/factsheets/basisforhealthservices/> (last accessed May 8, 2021).

articulated in article I, section 8 of the United States Constitution.²⁸ Building on these powers, Congress has created and exercised its specific legislative authority to allocate funds for Indian communities' health care through legislation like the Snyder Act of 1921²⁹ and the Indian Health Care Improvement Act of 1976³⁰ (permanently enacted via the Patient Protection and Affordable Care Act of 2010).³¹ The Indian Health Care Improvement Act acknowledged that “[f]ederal health services to maintain and improve the health of the Indians are consonant with and *required by* the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people” and that the United States holds a duty to ensure American Indians the “highest possible” health status and to encourage “maximum participation of Indians in the planning and management of those services.”³²

B. *Three Braided Organizations: ANCs, Healthcare Consortia, and the IHS*

In Alaska, three organizations play interwoven and critical roles, “braided” together to fulfill the United States’ duty to both provide Alaska Natives with healthcare and maximize Alaska Native participation in healthcare self-governance: Alaska Native Corporations, Tribal Health Consortia and Tribal Health Corporations, and the Indian Health Service.

1. Alaska Native Corporations

The first strand in Alaska’s braided approach to Alaska Native healthcare is the Alaska Native Corporation. In 1971, Congress and Alaska Natives extinguished the reservation system in Alaska, except for the Metlakatla Reservation, and created ANCs through the Alaska Native Claims Settlement Act (ANCSA) as a unique, tailor-made solution for 80,000 original Alaska Native ANC shareholders to participate in a new mode of Native self-governance in Alaska.³³ Before ANCSA, the United States’ official (though frequently dishonored) policy for dealing with indigenous lands included creating reservations, or lands held in trust by indigenous people, and paying fair value for any land title extinguished.³⁴ Soon after Alaska’s statehood in 1959, Alaska Natives convened to form the Alaska Federation of Natives (AFN) to create and advocate

²⁸ U.S. CONST. art. I, § 8 (the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

²⁹ 25 U.S.C. 13. The Snyder Act of 1921 first authorized federal funding for health services for Native people, defining the U.S. government’s relationship with tribes as including funding allocations for “the relief of distress and conservation of health” of Native communities. *See id.*

³⁰ Indian Health Care Improvement Act of 1975, Pub. L. No. 111–48. The Indian Health Care Improvement Act of 1975, reauthorized four times before its permanent enactment in 2010, affirmed the United States’ trust responsibility and legal obligation towards the health of Native people and to “to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy.” *See id.*

³¹ *See* Indian Health Services, *supra* note 28.

³² Indian Health Care Improvement Act, 25 U.S.C. § 1601 (1976) (emphasis added).

³³ *See* DO ALASKA NATIVES GET FREE MEDICAL CARE?, University of Alaska Anchorage & Alaska Pacific University 19–24 (2008).

³⁴ *See id.* at 21.

for a different and completely novel model of self-governance: giving title in fee simple to forty million acres of Alaskan land to its original people, forming twelve large regional and around 200 smaller village for-profit Alaska Native corporations to hold title and manage the resources, and giving the enormous responsibilities of self-governance over land and people directly to the Alaska Native Corporations.³⁵

Alaska Native Corporations' many self-governance responsibilities include the provision of healthcare for Alaska Natives.³⁶ As the Alaska Native Village Corporation Association, the Association of ANCA Regional Corporations Presidents and CEOs, and several regional ANCs wrote in a joint amicus brief, "ANCs' direct role in furnishing basic services and coordinating efforts to address the unique challenges Alaska Natives face in light of the pandemic is not a random act of corporate generosity. By statute, the ANCs' prime directive is to further 'the real economic and social needs of [Alaska] Natives' and facilitate 'maximum participation by Natives in decisions affecting their rights and property.'"³⁷

Pursuant to ANCSA's self-governance directive, ANCs have entered into numerous contracts, compacts, and agreements to provide Alaska Native healthcare services, most prominently including the formation of the Alaska Tribal Health Compact in 1994.³⁸ The Alaska Tribal Health Compact is a broad umbrella self-governance agreement with the IHS that sets out the government-to-government relationship between Alaska Native tribes and tribal organizations and the United States government, joined by Native health organizations to organize health-related programs throughout the state and manage IHS services.³⁹ Unique in structure and scope, the Alaska Tribal Health Compact was and is the *only* multi-party healthcare self-governance compact in the United States, broadly covering multiple tribal organizations and facilitating twenty-five individual funding agreements for each tribal organization.⁴⁰ In fact, thanks to the Alaska Tribal Health Compact, Alaska is the only state in which over ninety-nine

³⁵ See *id.* at 22.

³⁶ *Confederated Tribes of the Chehalis Rsrv. v. Mnuchin*, 976 F.3d 15, 26 (D.C. Cir. 2020), cert. granted sub nom. *Alaska Native Vill. Corp. Ass'n, Inc. v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 976 (2021), and cert. granted sub nom. *Mnuchin v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 976 (2021).

³⁷ Brief for Intervenor-Defendant-Appellees at 35, *Confederated Tribes of the Chehalis Rsrv. v. Mnuchin*, 976 F.3d 15 (D.C. Cir. 2020), No. 1:20-cv-01002, 2020 WL 4815095 (citing Alaska Native Claims Settlement Act, 43 U.S.C. § 1601(b)).

³⁸ See *Alaska Tribal Health Compact*, ALASKA NATIVE HEALTH BOARD, <http://www.anhb.org/tribal-resources/alaska-tribal-health-compact/> (insert last visited).

³⁹ Trudy Anderson (Yup'ik, Inupiaq), *Alaska Native Health Care: A Profile of Successful Self-Determination*, CULTURAL SURVIVAL QUARTERLY MAGAZINE 27-3: MODELS OF SOVEREIGNTY AND SURVIVAL IN ALASKA (Sep. 2003), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/alaska-native-health-care-profile-successful-self>.

⁴⁰ See *Alaska Tribal Health Compact*, ALASKA NATIVE HEALTH BOARD, <http://www.anhb.org/tribal-resources/alaska-tribal-health-compact/>. Further, the Alaska Tribal Health Compact is built on important fundamental principles which have been supported and preserved: government-to-government relationship; respect for all tribal participants and tribal representatives; formal consensus process in the tribal caucus; transparency; unity to the maximum extent possible; access to information including open negotiations and funding agreement sharing; and uniqueness and recognition of the individual sovereignty of each compact member.

percent of health programs are managed by tribes and Native organizations, delivering health services to Alaska Natives across 586,412 square miles of predominantly roadless land.⁴¹ The ANCs' predominant organizational structure for managing this system enabled by the Alaska Tribal Health Compact has been the Tribal Health Consortium.

2. Tribal Healthcare Consortia and Tribal Health Corporations

The second strand in the braided approach to Alaska Native healthcare includes tribal health consortia and tribal health corporations. These include non-profit tribally-operated regional health corporations like the Yukon-Kuskokwim Health Corporation,⁴² Bristol Bay Area Health Corporation,⁴³ and Norton Sound Health Corporation,⁴⁴ small regional tribal health consortia, and the large statewide umbrella non-profit tribal organization Alaska Tribal Health Consortium.

In December 1997, after years of intense planning, Alaska Native Corporations convened with the Indian Health Service and existing Alaska Native tribal health programs to form the statewide Alaska Native Tribal Health Consortium (ANTHC).⁴⁵ Beginning in October 1998, ANTHC signed on to the Alaska Tribal Health Compact and entered into a self-governance agreement with the IHS that assigned ANTHC full responsibility for the roles previously covered by the IHS Alaska Area Office, including community health services, personnel and recruiting of tribal health professionals, business office services, regional service supply centers, administrative services, and environmental health and engineering including the division of health facilities and division of sanitation facilities.⁴⁶

At its inception, ANTHC had only 180 employees, most of whom were federal employees assigned through federal-tribal employment agreements, and a suite of ambitious plans for developing programs, establishing annual meetings with tribal governments, negotiating with

⁴¹ *See id.*

⁴² *See Our Story*, YUKON-KUSKOKWIM HEALTH CORPORATION, <http://www.ykhc.org/story/> (last visited May 8, 2021).

⁴³ *See About Us*, BRISTOL BAY AREA HEALTH CORPORATION, <https://www.bbahc.org/index.asp?SEC=113CF545-F9E0-469E-93F2-77359C9A4C38> (insert last visited) (delivering health care operations to more than 25 villages and the Bristol Bay region for nearly 50 years).

⁴⁴ *See About Us*, NORTON SOUND HEALTH CORPORATION, <https://www.nortonsoundhealth.org/about-us/> (insert last visited). (serving Inupiat, Siberian Yup'ik, and Yup'ik people of the Bering Strait region, a 44,000-square-mile section of northwest Alaska, through the Norton Sound Regional Hospital and fifteen village clinics, with around 700 employees, over 70% of whom are Alaska Native).

⁴⁵ *1998 Annual Report*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM (Dec. 1, 1998) at 3, <https://anthc.org/wp-content/uploads/2016/01/ANTHC-1998-Annual-report-cover.pdf> (providing an activity timeline from 1997-98 including achieving congressional authorizing legislation; establishing articles, bylaws, board members, and officers; achieving initial contracts and tribal management grants; proposing the Alaska Native Medical Center; attaining the Title III self-governance compact; and holding the first annual ANTHC meeting). ANTHC's first slate of board members represented tribal health organizations like Norton Sound Health Corporation and Southcentral Foundation, village corporations, and the Metlakatla Indian Community (Alaska's only Indian reservation). *Id.* at 4.

⁴⁶ *Id.* at 6-7.

IHS, developing healthcare facilities, and assuming the management of the newly built Alaska Native Medical Center, a \$160 million full-service healthcare facility opened in Anchorage in 1997 by the non-profit Native health organization Southcentral Foundation with a \$130 million budget.⁴⁷ Now, ANTHC is a non-profit tribal health organization that partners with the Alaska Tribal Health System to serve more than 180,000 Alaska Native and American Indian people⁴⁸ (among Alaska's population of around 700,000⁴⁹).⁵⁰ ANTHC is the nation's largest, most comprehensive tribal health organization and Alaska's second-largest employer.⁵¹ In fiscal year 2019, it reported \$747.5 million in revenue, and now represents over 229 tribes and seventeen regional health consortia across 586,412 square miles.⁵² More than 3,000 ANTHC employees serve Alaska Native patients around the state. They operate in rural clinics, disease research, rural provider training, rural water and sanitation systems construction, and the Alaska Native Medical Center, now jointly operating the comprehensive 173-bed hospital in Anchorage along with Southcentral Foundation.⁵³

ANTHC also serves as a powerful advocate for Native health interests in health research, policy, and advocacy through programs like the Alaska Native Epidemiology Center.⁵⁴ During the early months of COVID-19 pandemic, the nation saw an outcry that reached mainstream media when more than eighty percent of state health departments reported racial demographic data on the impact and spread of coronavirus, nearly half of which failed to recognize both

⁴⁷ *Id.* at 7–8.

⁴⁸ ANTHC's hospital, Alaska Native Medical Center, administers direct health services to Alaska Native persons listed on the original Alaska Native Claims Settlement Act (ANCSA) roll; lineal descendants of a person listed on the original ANCSA roll; persons holding a Certificate of Indian Blood (CIB) issued by the Bureau of Indian Affairs (BIA) or a federally recognized tribe; persons recognized as an official member of a federally recognized Indian tribe (excluding honorary or other non-constitutional or non-customary forms of membership.); and children of the above eligible groups. *See Eligibility*, ALASKA NATIVE MEDICAL CENTER, <https://anmc.org/patients-visitors/eligibility/> (insert last visited).

⁴⁹ *See 2020 Population Estimates by Borough, Census Area, and Economic Region*, ALASKA DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, <https://live.laborstats.alaska.gov/pop/> (last visited May 8, 2021).

⁵⁰ *See Overview*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, <https://anthc.org/who-we-are/overview/> (last visited May 8, 2021).

⁵¹ *Id.*

⁵² 2019 ANTHC Annual Report: Health Within Reach, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM at 20, <https://anthc.org/wp-content/uploads/2019/12/2019-ANTHC-Annual-Report-web-1.pdf>.

⁵³ *See Overview*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, <https://anthc.org/who-we-are/overview/> (last visited May 8, 2021).; *see also* Alaska Native Medical Center, anmc.org (last visited May 8, 2021). Among ANTHC's many achievements as an employer and as a healthcare facility: *Forbes* named ANTHC Alaska's 2019 Best-In-State Employer and the facility maintains verification as Alaska's first Level II Trauma Center and as a Level II Pediatric Trauma Center. *See 2019 ANTHC Annual Report: Health Within Reach*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM at 4, 11, <https://anthc.org/wp-content/uploads/2019/12/2019-ANTHC-Annual-Report-web-1.pdf>.

⁵⁴ *See, e.g., Alaska Native Epidemiology Center: Using Data to Improve Health*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, <http://anthctoday.org/epicenter/> (insert last visited) (describing the Alaska Native Epidemiology Center as one of twelve tribal epidemiology centers established by IHS within ANTHC to collect, report, and publish information on the health of Alaska Native People); *Health Advocacy: Tribally-Sponsored Health Insurance Program*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, <https://anthc.org/what-we-do/tribally-sponsored-health-insurance-program/> (last visited May 8, 2021).

American Indians and Alaska Natives as a distinct group, instead categorizing them under the label “other” and obscuring a clearer picture of disproportionate outcomes.⁵⁵ This research blind spot exists and persists in Alaska’s non-Native organizations; given that Alaska Native communities have faced distinct and particular health challenges throughout the pandemic, this blind spot demonstrates the continuing need for strong healthcare organizations led by and for Alaska Natives.⁵⁶

The key to ANTHC’s continued strength in healthcare delivery, policy, and advocacy is its role in bringing together ANCs, tribal health organizations (including smaller tribal health corporations and tribal health consortia) and the IHS.

3. The IHS

The third strand in Alaska’s braided healthcare delivery system is the IHS. The IHS is the primary vehicle through which the federal government fulfills its responsibility to provide healthcare for tribal members, offering a comprehensive health service delivery system to both urban and rural American Indian and Alaska Natives directly through tribally operated health programs and through services offered from private providers.⁵⁷ Before the Indian Self-Determination and Education Assistance Act passed in 1976, IHS directly provided care for Alaska Natives,⁵⁸ and IHS still holds the responsibility to resume management over the Alaska

⁵⁵ See, e.g., Rebecca Nagle, *Native Americans being left out of US coronavirus data and labelled as ‘other,’* THE GUARDIAN (Apr. 24, 2020), <https://www.theguardian.com/us-news/2020/apr/24/us-native-americans-left-out-coronavirus-data>; Lizzie Wade, *COVID-19 data on Native Americans is ‘a national disgrace,’* SCIENCE (Sep. 24, 2020), <https://www.sciencemag.org/news/2020/09/covid-19-data-native-americans-national-disgrace-scientist-fighting-be-counted>; Sahir Doshi et al., *Report: The COVID-19 Response in Indian Country*, CENTER FOR AMERICAN PROGRESS (Jun. 18, 2020) <https://www.americanprogress.org/issues/green/reports/2020/06/18/486480/covid-19-response-indian-country/> (“In all likelihood, this has obscured a clearer picture of disproportionate outcomes. For example, New Mexico—a state that released comprehensive racial data—found AI/ANs to have a five times higher infection rate than the state’s general population. The failure of all states to produce comprehensive data collection hurts the national response by limiting data-informed policymaking and prioritized resource distribution to tribes.”).

⁵⁶ In May 2021, Alaska produced a leading report on statewide vaccination from the State of Alaska Section of Epidemiology, Department of Health and Human Services, Division of Public Health, and University of Alaska Anchorage. See *Statewide COVID-19 Vaccine Survey – Alaska, March 2021*, STATE OF ALASKA EPIDEMIOLOGY BULLETIN (May 6, 2021), <http://epibulletins.dhss.alaska.gov/Document/Display?DocumentId=2072>. The report delivers data on vaccination status and vaccine attitudes that distinguished between gender identity, education, race/ethnicity, age, marital status, employment, annual household income, size of household, and political ideology, yet failed to report *any* distinctions between Native and non-Native populations or urban and rural populations. See *id.* The “Race/Ethnicity” variable was divided between “Non-Hispanic Whites” and “Racial/Ethnic Minorities.” See *id.* In fact, the report does not mention Alaska Natives whatsoever, even as a blind spot in the data collection and analysis. See *id.*

⁵⁷ See *Disparities Fact Sheet*, INDIAN HEALTH SERVICE, <https://www.ihs.gov/newsroom/factsheets/disparities/> (last accessed May 8, 2021); see also Latoya Hill and Smantha Artiga, *COVID-19 Vaccination among American Indian and Alaska Native People*, KFF (Apr. 9, 2021), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/covid-19-vaccination-american-indian-alaska-native-people/>.

⁵⁸ See Erik Bruce Smith, *Dental Therapists in Alaska: Addressing Unmet Needs and Reviving Competition in Dental Care*, 24 ALASKA L. REV. 105, 112 (2007).

Area should the tribal organizations ever forgo or fail in their governance and management role in the future.⁵⁹ Now, IHS supports tribes and tribal organizations in self-governance with funding through the ISDEAA, which allowed Alaska Natives to establish and coordinate their own healthcare system via funding contracts and compacts with IHS, and with health policy measures through the Office of Tribal Self-Governance⁶⁰ and the Tribal Self-Governance Program.⁶¹

Virtually all Alaska Native Corporations contract or compact with the Bureau of Indian Affairs and Indian Health Service, either directly or through tribal consortia, to provide services to their members under ISDEAA.⁶² These IHS programs consistently demonstrate the close—and often indistinguishable—relationship between Alaska Native organizations and sovereign Indian tribes for purposes of healthcare self-governance. For example, the IHS Tribal Self-Governance Program (permanently authorized in the 2000 Tribal Self-Governance Amendments to the ISDEAA⁶³) is a tribally-driven IHS program that expresses the nation-to-nation relationship between the United States and each Indian Tribe, giving tribes the option to assume and autonomously manage IHS program funds to best fit their Tribal communities’ health needs.⁶⁴ Participating tribes negotiate with the IHS to form contracts, compacts, or direct service agreements with IHS, assuming full funding, control, and accountability for their tribal health services and programs.⁶⁵ Alaska Native tribal health consortia and corporations are among the program’s earliest and most numerous so-called “Self-Governance Tribes”: the 25 current participating tribal organizations include major organizations like Alaska Native Tribal Health Consortium, SouthEast Alaska Regional Health Consortium, and Southcentral Foundation and several smaller regional tribal health organizations like Bristol Bay Area Health Corporation,

⁵⁹ See 25 U.S.C. § 5330, Recission of contract or grand and assumption of control of program, etc.

⁶⁰ See *Office of Tribal Self Governance*, INDIAN HEALTH SERVICE, <https://www.ihs.gov/selfgovernance/> (last accessed May 8, 2021) The Office of Tribal Self-Governance is a division of IHS and the US Department of Health and Human Services and “is responsible for a wide range of Agency functions that are critical to IHS’ relationship with Tribal leaders, Tribal Organizations, and other American Indian and Alaska Native groups. [The Office of Tribal Self-Governance] develops and oversees the implementation of Tribal Self-Governance legislation and authorities within the IHS under Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA).” *Id.*

⁶¹ See *Tribal Self-Governance Program*, INDIAN HEALTH SERVICE, <https://www.ihs.gov/selfgovernance/aboutus/> (last accessed May 8, 2021).

⁶² Geoffrey D. Strommer & Stephen D. Osborne, “*Indian Country*” and the Nature and Scope of Tribal Self-Government in Alaska, 22 ALASKA L. REV. 1, 34 (2005). According to the National Congress of American Indians (NCAI), as of January 2004, funding obligated to tribal governments and consortia in the form of self-determination contracts or self-governance compacts comprised approximately \$412 million from the IHS and \$93 million from the BIA. *Id.* (citing NCAI Fact Sheet, Federal Funding to Alaska Native Tribes at 1 (Jan. 2004)).

⁶³ See *Tribal Self-Governance Program*, INDIAN HEALTH SERVICE, <https://www.ihs.gov/selfgovernance/aboutus/> (last accessed May 8, 2021) (“In 2000, Congress enacted permanent authority for the IHS Tribal Self-Governance Program under Pub. L. No. 106-260, the Tribal Self-Governance Amendments of 2000 (Title V).”). Note that this statute—the primary vehicle through which Alaska Native Corporations and the health organizations they formed fund their self-governed healthcare system, just like the sovereign Indian tribes—is the exact statute whose definition of “Indian tribes” at issue in the cases before the Supreme Court.

⁶⁴ See *id.*

⁶⁵ See *id.*

Norton Sound Health Corporation, and Yukon-Kuskokwim Health Corporation.⁶⁶ Alaska Native Corporations’ participation as “Self-Governance Tribes” in the Tribal Self-Governance Program, alongside sovereign Indian tribes, is consistent with Alaska Native Corporations’ express role in providing Alaska Native healthcare.⁶⁷

Each year, the IHS works with Alaska Native tribes and tribal organizations to provide comprehensive health services to 174,990 Alaska Natives in the Alaska Area.⁶⁸ As noted above, Alaska’s health budget arrangement between tribal organizations and the IHS is unique in the nation. Around ninety-nine percent of the IHS Area Alaska budget is not controlled directly by IHS, but rather distributed among tribes and tribal organizations—namely, the ANCs and tribal health consortia—using the Indian Self-Determination and Education Assistance Act’s “contracting” and “compacting” functions.⁶⁹ Individual ANCs and tribal health consortia maintain eleven contracts with IHS (under ISDEAA Title I), and the Alaska Tribal Health Compact negotiates one compact with twenty five separate tribal funding agreements (under ISDEAA Title V).⁷⁰ These form a comprehensive system of health care that serves all 228 federally recognized tribes in Alaska.⁷¹ These contracts and compacts create Alaska Native healthcare facilities that are IHS-funded and tribally managed:⁷² seven hospitals located in hub communities of Anchorage, Barrow, Bethel, Dillingham, Kotzebue, Nome, and Sitka; fifty eight tribal health centers; 160 tribal community health aide clinics and five residential substance abuse treatment centers.⁷³ In addition to the IHS-funded and tribally managed facilities, IHS still manages and holds title to six tribally operated hospitals and three tribally operated health centers in Alaska.⁷⁴

⁶⁶ *See id.* With 25 participating organizations, Alaska has the second-highest number of participating self-governance tribes; the Portland area has 26. *See id.*

⁶⁷ *See* *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, 976 F.3d 15, 26–27 (D.C. Cir. 2020) (“ANCSA charged the new ANCs with a handful of functions that would ordinarily be performed by tribal governments . . . [T]he regional corporations were authorized to “promote the health, education, or welfare” of Alaska Natives. *Id.* § 1606(r). That function is currently performed by two large cabinet agencies, the Department of Health and Human Services and the Department of Education, which at the time of ANCSA were constituted as a single Department of Health, Education, and Welfare. The intervenors themselves characterize ANCs as performing functions ‘that one would most naturally describe as governmental.’”).

⁶⁸ *See* Alaska Area, INDIAN HEALTH SERVICE, <https://www.ihs.gov/alaska/> (last accessed May 6, 2021).

⁶⁹ *See id.*; P.L. 93-638, as amended.

⁷⁰ *See* Alaska Area, INDIAN HEALTH SERVICE, <https://www.ihs.gov/alaska/> (last accessed May 6, 2021); *see supra* notes 36–39 and accompanying text (describing the Alaska Tribal Health Compact and its 25 tribal health organization co-signers).

⁷¹ *See id.*

⁷² *See supra* note 44 and accompanying text (detailing the healthcare system management roles that the tribal organizations took on from IHS beginning in 1997, including staffing, training, facilities management, development, and more). Accordingly, IHS also frequently deals directly with both ANTHC and the Alaska Native Medical Center in Anchorage. *See* Alaska Area, INDIAN HEALTH SERVICE, <https://www.ihs.gov/alaska/> (last accessed May 6, 2021).

⁷³ *See* Alaska Area, *supra* note 69.

⁷⁴ *See id.*

C. Braided Approach to Healthcare Self-Governance Applied: Vaccine Rollout

This section introduces Alaska Native healthcare’s braided approach, which interweaves the workings of ANCs, tribal health organizations, and the IHS through the principles of healthcare self-governance. Next, it illustrates how the braided approach allowed Alaska Natives to have some of the highest early vaccine eligibility, access, vaccination rates in the United States. This approach led to a healthcare self-governance success story, despite the immense logistical challenges of delivering cold-storage vaccines to tiny villages thousands of miles off the road system and in the middle of Alaskan winter.

By early April 2021, Alaska had risen to the top of the ranks of U.S. states for rapidly getting its population vaccinated against COVID-19, largely due to the aggressive advocacy of Alaska Native tribal health organizations.⁷⁵ Alaska Native tribal health organizations had the option to receive vaccine doses through the State or through IHS, and they chose the IHS.⁷⁶ Getting the vaccine through IHS instead of the State allowed tribal health organizations to take advantage of their existing tribal healthcare infrastructure since the healthcare needs of the vast geographical majority of Alaska is served by the tribal health organizations, not by the State or by corporate entities like pharmacies that supported vaccine rollout elsewhere in the United States.⁷⁷ Choosing the IHS also allowed them to provide specialized allotments of vaccines that took into account the villages’ remote locations and unique access issues, the varying rates of infection among tribes with different levels of contact with the vaccine, and the strong relationships with trusted providers.⁷⁸

Confounding all logistical expectations, Alaska’s highest vaccination rates were consistently in some of its remotest, hardest-to-access rural Alaska Native communities.⁷⁹ In fact, White Mountain, a 200-person Igaluiniuit Inupiat village east of Nome accessible only by air and boat or snow machine, reported over 90% of eligible residents received vaccines by mid-April.⁸⁰ Villages around the state saw similar rates, despite opting for delivering the more logistically challenging two-dose vaccines from Pfizer and Moderna while the Johnson &

⁷⁵ Yereth Rosen, *Native health providers drive Alaska’s vaccination success story*, REUTERS (Apr. 12, 2021), <https://www.reuters.com/article/us-health-coronavirus-vaccines-alaska/native-health-providers-drive-alaskas-vaccination-success-story-idUSKBN2BZ114>.

⁷⁶ See Scottie Andrew, *Rural Alaska is getting Covid-19 vaccinations right. Here’s what the rest of the US can learn*, CNN (Mar. 9, 2021), <https://www.cnn.com/2021/03/09/us/alaska-covid-19-vaccine-success-trnd/index.html>.

⁷⁷ See *id.*; see P.L. 93-638m *supra* note 70 and accompanying text (noting IHS healthcare facilities across rural Alaska); see also *supra* notes 40–42 and accompanying text (providing some examples of tribal health organizations offering services and facilities across rural Alaska).

⁷⁸ See Andrew, *supra* note 77.

⁷⁹ Associated Press, *Alaska tribal vaccine eligibility policy causes frustration*, U.S. NEWS, (Feb. 1, 2021), <https://www.usnews.com/news/best-states/alaska/articles/2021-02-01/alaska-tribal-vaccine-eligibility-policy-causes-frustration>.

⁸⁰ See *id.*

Johnson one-dose vaccine was not yet available and then paused.⁸¹ Further, ANTHC had so successfully negotiated early vaccine access that it was able to vaccinate employees of its affiliated ANCs and other tribal health organizations without regard to race, age, or vulnerability, with same-day access for elders *by the end of January 2021*. This frustrated many urbanites, given the broad access for tens of thousands of Alaska Natives before the State of Alaska had even finished its wave of rollout for frontline workers like teachers or people with underlying conditions.⁸²

Though the policy caused frustration among urban and non-Native Alaskans, tribal health organizations emphasized that rapid vaccine rollout helped alleviate the disproportionately high risk of severe COVID-19 infection among Alaska Natives.⁸³ One report from the Kaiser Family Foundation showed that while Alaska Natives make up 15% of the population, they represented more than 25% of COVID-19 cases; in contrast, white Alaskans make up more than 68% of the population yet only 38% of cases.⁸⁴ Additionally, Alaska Native communities present living circumstances with higher risk factors. Many Alaska Natives live in multigenerational housing, threatening the health of elders, and 25% of rural Alaska does not have running water or sewage, making infection risk mitigation strategies like handwashing impracticable.⁸⁵

Additionally, American Indians and Alaska Natives throughout the United States demonstrate low levels of vaccine hesitancy.⁸⁶ As Abigail Echo-Hawk (Pawnee Nation), chief research officer of the Seattle Indian Health Board and director of the Urban Indian Health Institute, noted, “[s]eventy-four percent of Native people surveyed were willing to get vaccinated because of their cultural responsibility to protect elders and next generation. These are the teachings the elders instilled in us — our responsibility is to our community.”⁸⁷ Echo-Hawk attributes Natives’ increased adherence to Covid-19 safety measures and low levels of vaccine

⁸¹ See Rosen, *supra* note 76.

⁸² See Associated Press, *supra* note 80.

⁸³ See Andrew, *supra* note 77.

⁸⁴ See *COVID-19 Cases by Race/Ethnicity*, KAISER FAMILY FOUNDATION, <https://www.kff.org/other/state-indicator/covid-19-cases-by-race-ethnicity/?currentTimeframe=0&selectedDistributions=white-percent-of-cases--white-percent-of-total-population--american-indian-or-alaska-native-percent-of-cases--american-indian-or-alaska-native-percent-of-total-population&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (insert last visited date) (continuously updated; reported data current as of March 2021).

⁸⁵ See *id.*

⁸⁶ See Harmeet Kaur, *Tribal health providers have figured out the key to COVID-19 vaccine success. Here’s their secret*, CNN (Feb. 9, 2021), <https://www.cbs58.com/news/tribal-health-providers-have-figured-out-the-key-to-covid-19-vaccine-success-heres-their-secret> (noting an Urban Indian Health Institute survey of Alaska Natives and American Indians showing that 75% of participants were willing to get a vaccine; attributing this high percentage to successful culturally relevant public health messaging on cultural and community preservation that overcame many tribal members’ mistrust in the federal government’s public health history of unethical research and medical abuses committed against Native people).

⁸⁷ Abigail Echo-Hawk (Pawnee Nation), *COVID-19 is killing indigenous elders and indigenous knowledge*, THE HILL (Feb. 15, 2021), <https://thehill.com/opinion/civil-rights/538848-covid-19-is-killing-indigenous-elders-and-indigenous-knowledge>,

hesitancy to this community-oriented cultural understanding of public health. Further, some ANCs took early steps to mandate vaccination, including Bering Strait Native Corporation, which said that its decision to mandate vaccines was informed by the traumatic experience of shareholders' ancestors during the 1918 flu pandemic.⁸⁸

Rapid vaccine distribution allowed some tribal health organizations to offer vaccinations to all Alaska Natives aged 16 and over.⁸⁹ As this success gained national media attention, tribal health organization Southcentral Foundation President and CEO April Kyle noted that the smooth rollout was due to a community-owned and community-focused healthcare model.⁹⁰ Further, similar vaccine success stories emerged from other tribal health systems like the Cherokee Nation, Navajo Nation, and Seattle Indian Health Board that worked with the IHS to exercise autonomy and self-governance, using built-in community trust in their existing healthcare frameworks to encourage speedy vaccine distribution and protect their vulnerable communities and culture-bearers.⁹¹ The Alaska Native community's early success with vaccine rollout is a success story of the braided healthcare approach that brings the ANCs, tribal health organizations, and IHS into a unique system of healthcare self-governance designed by and for Alaska natives.

III. HEALTHCARE SELF-GOVERNANCE APPLIED

This section returns to the consolidated cases before the Supreme Court. It applies the unique framework outlined in Part II to create a novel analysis for recognizing ANCs (and their affiliated tribal health organizations) as Indian tribes for the purposes of ISDEAA on the principles of healthcare self-governance. When the question rose to the Supreme Court, ANCs, the Alaska congressional delegation, and the State of Alaska filed amicus briefs urging the Supreme Court to interpret the CARES Act's tribal relief funding to include ANCs and their affiliated tribal health organizations. While the briefs delved into the textual arguments and statutory history supporting an inclusive interpretation of the term "Indian tribes," they also spent significant time outlining principles of healthcare self-governance that underlie Alaska's healthcare system. This section highlights the principles of healthcare self-governance in the issues raised.

⁸⁸ See Nathaniel Herz, *Alaska executives, employers wrestle with whether to mandate, incentivize or encourage COVID-19 shots*, ALASKA PUBLIC MEDIA (Apr. 13, 2021), <https://www.alaskapublic.org/2021/04/13/alaska-executives-employers-wrestle-with-whether-to-mandate-incentivize-or-encourage-covid-19-shots/>.

⁸⁹ See, e.g., Harmeet Kaur, *Tribal health providers have figured out the key to Covid-19 vaccine success. Here's their secret*, CNN (Feb. 9, 2021), <https://www.cbs58.com/news/tribal-health-providers-have-figured-out-the-key-to-covid-19-vaccine-success-heres-their-secret>.

⁹⁰ See *id.* (describing Southcentral Foundation's vaccination strategy that allowed the tribal health organization to begin vaccinating Alaska Native people 16 and older since January 22, 2021, including an interview with interim president and CEO April Kyle).

⁹¹ See *id.*

On April 19, 2021, the day of oral arguments before the Supreme Court, the ANCSA Regional Association and Alaska Native Village issued a short statement that demonstrates how this issue is firmly rooted in healthcare self-governance, not merely the text alone:

Our position is simple and clear. Language in the CARES Act should be executed to include Alaska Native corporations (ANCs), which serve Alaska Native people, including tens of thousands who are not members of a federally recognized tribe. *Doing so would be consistent with the actions of many federal programs from federal agencies in previous administrations – from both political parties – and as Congress intended when Alaska’s unique service model of distinct Alaska Native organizations was established through the Alaska Native Claims Settlement Act.*

For decades now, *Alaska Native people have relied on ANCs to provide access to education, health, housing, and economic support. This misguided case puts these critical services at risk. If ANCs are no longer eligible to provide these services, there is no other organization or entity that can fill this need.*⁹²

In a joint amicus brief, the three members of Alaska’s Congressional Delegation (Senators Lisa Murkowski and Dan Sullivan and Congressman Don Young) urged a reading of the CARES Act that includes ANCs.⁹³ They began with compellingly clear, personal indications of congressional intent in both the CARES Act language and in the original ISDEAA definition of “Indian tribes” itself.⁹⁴ First, they noted that Alaska Congressman Don Young, the longest-serving member of Congress and a member of the House Subcommittee for Indigenous Peoples of the United States, actually participated in the passage of ISDEAA and its amendments, including the amendment that included ANCs.⁹⁵ Further, the Congressional Delegation indicated that it considered the ISDEAA definition the “gold standard” for legislation over the past several decades because the definition includes *all* indigenous people of Alaska, whether enrolled in a sovereign Indian tribe, an ANC, neither, or both, urging that inclusion was their intent in using the ISDEAA definition in the CARES Act.⁹⁶ The Delegation also included significant discussion of healthcare self-governance, including the far-reaching ramifications of denying ANCs the

⁹² See *ARA and ANVCA Fight for Alaska Native People at the Nation’s Highest Court*, ANCSA REGIONAL ASSOCIATION (Apr. 19, 2021), <https://ancsaregional.com/ara-and-anvca-fight-for-alaska-native-people-at-the-nations-highest-court/> (emphasis added).

⁹³ See Brief of Amici Members of Congress and Brief of Amici Curiae U.S. Senators Lisa Murkowski and Dan Sullivan, and U.S. Congressman Don Young, *Mnuchin v. Confederated Tribes of the Chehalis Reservation*, *cert. sub nom.* Alaska Native Vill. Corp. Ass’n, Inc. v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 976 (2021), https://www.supremecourt.gov/DocketPDF/20/20-544/161146/20201118162030395_AMICI%20BRIEF%20FINAL%20-%20PDF-A.pdf.

⁹⁴ See *id.* at 1–2.

⁹⁵ See *id.* at 1–2, 15.

⁹⁶ *Id.* at 2–3.

tribal relief funding for the entire Alaska Native healthcare system.⁹⁷ Recalling that a chilling 90% of deaths in Alaska in the 1918 flu pandemic occurred in villages, the Delegation noted that “[w]hile a global pandemic spreads to the remote villages of Alaska, the system that delivers health care has been called into question and critical funding withheld.”⁹⁸

The Alaska Federation of Natives’s brief also brought forth arguments on healthcare self-governance to paint a clearer picture of Alaska’s interrelated system of Alaska Native healthcare delivery that depends on both ANCs and tribal health consortia.⁹⁹ The brief noted that just as the sovereign Indian tribes of the Lower 48 states typically carry out the self-governance functions described in the IDSEAA, so too do Alaska Native tribes carry out the same self-governance functions through the ANCs and tribal health consortia like ANTHC.¹⁰⁰ The Alaska Federation of Natives also underscored the factual reality that ANCs, not the State, provide Alaska Natives around the state with infrastructure and capability to “obtain resources and supply chains, . . . facilitate the distribution of a vaccine, and leverage public-private partnerships to stretch resources to help Alaska Natives combat the coronavirus health pandemic.”¹⁰¹ Critically, the Alaska Federation of Natives emphasized the importance of including ANCs in the CARES Act tribal relief funding *because* of their relationship with the tribal health consortia, which form much of the budgets and employee counts in Alaska’s tribal health “ecosystem” and provide the vast majority of Alaska Native health services.¹⁰² Alaska Federation of Natives thus foregrounded the interconnectedness of the tribal health consortia and the ANCs: without funding ANCs, the CARES Act would provide no budget allocation for tribal health consortia that handle such a critical role in providing Alaska Native health services throughout the state.¹⁰³

Finally, the State of Alaska provided a powerful rebuttal to the D.C. Circuit’s “confident” assertion that the State could step in and “fill the void” for Alaska Natives left behind by its refusal to fund the ANCs.¹⁰⁴ The State’s perspective acknowledged the textual debate, but its

⁹⁷ *See id.*

⁹⁸ *See id.* at 6–7.

⁹⁹ *See* Amicus Curiae Brief of Alaska Federation of Natives in Support of Petitioners at 4–5, *Mnuchin v. Confederated Tribes of the Chehalis Reservation*, *cert. sub nom.* Alaska Native Vill. Corp. Ass’n, Inc. v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 976 (2021), https://www.supremecourt.gov/DocketPDF/20/20-544/161514/20201123115122001_00180495.PDF.

¹⁰⁰ *See id.*

¹⁰¹ *See id.* at 4.

¹⁰² *See id.* at 7.

¹⁰³ *See id.*

¹⁰⁴ *See generally* Brief of Amicus Curiae State of Alaska in Support of Petitions for Writ of Certiorari, at 20–25, *Mnuchin v. Confederated Tribes of the Chehalis Reservation*, *cert. sub nom.* Alaska Native Vill. Corp. Ass’n, Inc. v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 976 (2021), https://www.supremecourt.gov/DocketPDF/20/20-543/159685/20201104175627623_Amicus%20Brief.pdf. *See also* *Confederated Tribes of the Chehalis Rsrv. v. Mnuchin*, 976 F.3d 15, 29 (D.C. Cir. 2020), *cert. granted sub nom.* Alaska Native Vill. Corp. Ass’n, Inc. v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 976, 208 L. Ed. 2d 510 (2021), and *cert. granted sub nom.* *Mnuchin v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 976, 208 L. Ed. 2d 510 (2021) (“We are confident that, if there are Alaska Natives uncared for because they are not enrolled in any recognized [tribal] village, either the State of Alaska or the Department of Health and Human Services will be able to fill the void.”).

strongest arguments are grounded in the policy of Alaska Native healthcare self-governance.¹⁰⁵ First, the State described the “patchwork of entities provid[ing] health and social services to Alaskans” and the “unique, significant trust responsibilities to Alaska Natives—responsibilities that ANCs have assisted the government in meeting for years.”¹⁰⁶ Then, the State dived into the on-the-ground realities of healthcare for Alaska Natives, pointing towards Alaska’s unique geography and the fact that many Alaska Natives live in remote and isolated villages inaccessible except by air or snow machine. Many rural Alaska Natives who live on their original ancestral lands are served only by the ANCs’ tribal health infrastructure, built to meet the challenging access issues presented by the vast state’s unique geographies. Meanwhile, other Alaska Natives live in urban centers like Anchorage and Fairbanks, which highlights another blind spot in the D.C. Circuit’s understanding of Alaska Native communities and the unique access issues they may face in relation to their tribal lands: urban dwellers may live thousands of roadless miles from the tribes who would purportedly deliver their vaccines and healthcare under the D.C. Circuit’s plan.¹⁰⁷ The State drew heavily on the practical realities of delivering healthcare to Alaska Natives across the entire state, detailing ANCs’ critical role in administering services and programs for Alaska Natives.¹⁰⁸ The State further argued that it had already fully allocated *all* of its own federal CARES Act funds to other needs areas, including municipal assistance, small business relief, homeless assistance, nonprofit relief, and general health response to the pandemic.¹⁰⁹ It emphasized that it simply could not pick up the slack created by the D.C. Circuit’s ruling, and that “[c]utting off funding to the ANCs, which provide services to tens of thousands of Alaska Natives, will create a chasm that the State simply will be unable to fill—especially given the immediacy of the needs presented by the ongoing pandemic.”¹¹⁰

On April 19, 2021, the Supreme Court heard nearly two hours of oral arguments on the consolidated cases.¹¹¹ While textual arguments predominated, the pressing needs of Alaska Natives during the pandemic and the principles of healthcare self-governance inevitably surfaced in questioning.¹¹² Justice Stephen Breyer asked whether ANCs make COVID-related expenditures, expressly raising whether ANCs are responsible for healthcare and the pandemic response intended in the CARES Act.¹¹³ Indeed, Justices Breyer, Sotomayor, and Kavanaugh incorporated questioning that directed both sides’ advocates to speak on the destabilization of

¹⁰⁵ *See id.*

¹⁰⁶ *Id.* at 21.

¹⁰⁷ *See id.* at 21.

¹⁰⁸ *Id.* at 22.

¹⁰⁹ *Id.* at 24.

¹¹⁰ *See id.*

¹¹¹ Oral Argument, *Yellen v. Confederated Tribes of the Chehalis Reservation* (2021), OYEZ, (Apr. 19, 2021), <https://www.oyez.org/cases/2020/20-543>.

¹¹² *See id.*

¹¹³ *Id.* at 7:11.

tribal health and social services should the Supreme Court rule against ANCs' eligibility.¹¹⁴ From a healthcare self-governance approach, this line of questioning is vitally important: ISDEAA's definition of "Indian tribes" is at the center of Alaska Natives' entire healthcare system. It is the statutory vehicle by which ANCs and tribal health consortia assumed management responsibilities for IHS-funded healthcare facilities and entered into compacts and contracts with IHS.¹¹⁵

IV. CONCLUSION

In a concurring opinion to the D.C. Circuit decision rejecting ANCs' eligibility, Judge Karen Henderson demonstrated the current stronghold of textualism, even in cases that involve clear and recent congressional intent and strong policy to the contrary.¹¹⁶ Judge Henderson first acknowledged the depth of the healthcare self-governance issues at stake for Alaska Natives and ANCs' critical role in Congress's emergency tribal stabilization funding allocation, writing that "[i]t is indisputable that the services ANCs provide to Alaska Native communities—including healthcare [and] elder care . . . —have been made *only more vital* due to the pandemic. *I can think of no reason that the Congress would exclude ANCs (and thus exclude many remote and vulnerable Alaska Natives) from receiving and expending much-needed Title V funds.*"¹¹⁷ Nevertheless, Judge Henderson concluded that ANCs were not eligible, holding that Congress clearly intended to include ANCs but erred in selecting their language for the CARES Act: "a harsh result" of "an unfortunate and unintended consequence of high-stakes, time-sensitive legislative drafting."¹¹⁸ Judge Henderson's concurrence perfectly illustrates the challenge of this case and the questions of power and sovereignty it raises. Two words (and their shifting definitions over centuries of complex tribal relations with the U.S. government) are set against the entire system of tribal healthcare self-governance created by Alaska Natives, for Alaska Natives.¹¹⁹ However the Court decides, the long-term effects of its decision will reverberate throughout the Alaska Native tribal health system as Alaska Native people continue to fight for self-governance and their own voice and leadership in healthcare.

¹¹⁴ See *id.*; see also Gregory Ablavsky, *Justices mull textualism and Alaskan exceptionalism in classifying Alaska Native corporations*, SCOTUSBLOG (Apr. 20, 2021), <https://www.scotusblog.com/2021/04/justices-mull-textualism-and-alaskan-exceptionalism-in-classifying-alaska-native-corporations/>.

¹¹⁵ See *supra* Parts II.b.ii; II.b.iii.

¹¹⁶ See *Confederated Tribes of the Chehalis Rsrv. v. Mnuchin*, 976 F.3d 15, 29 (D.C. Cir. 2020), cert. granted sub nom. Alaska Native Vill. Corp. Ass'n, Inc. v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 976 (2021), and cert. granted sub nom. Mnuchin v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 976 (2021) (Henderson, J., concurring).

¹¹⁷ See *id.* (emphasis added).

¹¹⁸ See *id.*

¹¹⁹ See *id.*