

Supreme Court, U.S.
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No. 11-83

IN THE
Supreme Court of the United States

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Petitioner,

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

REPLY BRIEF FOR PETITIONER

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The government agrees that the Federal Circuit decision below stands in direct conflict with the decision of the Tenth Circuit in *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054 (10th Cir. 2011), *petition for cert. filed*, No. 11-551 (Oct. 31, 2011), Gov't Br. at 22, and it "agrees that this Court's review of the legal issues is warranted." *Id.* at 23. That is all that needs to be considered to decide how to proceed with this petition. It should be granted.

The government is wrong, however, to urge that action on this Petition be delayed indefinitely until briefing on the government's petition in *Ramah* is concluded.

First, the completion of briefing on the government's just-filed petition in *Ramah* is at least several weeks away, even assuming no extensions are sought

by the *Ramah* respondents. Far more efficient, and routine, would be for the Court to grant the instant Petition now and then hold the petition in *Ramah* and dispose of it in light of the disposition of this case on the merits. See generally E. Gressman et al., *Supreme Court Practice* § 5.9, at 339 (9th ed. 2007). The Government concedes that the issues are identical and thus that the Court's decision in this case will control *Ramah*. This case has been delayed for almost a decade; further delay and the possibility that the case will not be heard this Term are intolerable and justify acting on a fully ripe petition now.

Moreover, taking two cases where the Government is the petitioner in one and the respondent in the other creates a needless procedural complication as to how to brief the case and burdens this Court with multiple 50-plus page briefs. The *Ramah* respondents can file as *amici* in support of the Petitioners here and the briefs will be considerably shorter for the convenience of the Court.

The government asserts that the *Ramah* case is "the better vehicle for the Court's review" because the presence of a class action in *Ramah* "tests the limits of each party's legal theory." Gov't Br. at 24. But that is no reason to delay; the parties can easily brief and argue "the limits of each party's legal theory" within the context of the present case. After all, that is typically what parties do once plenary review is granted.

The government's assertion that something about the payment on the underlying contracts makes *Ramah* "the better vehicle" is equally flawed. While the government may wish to argue, as an alternative defense, that the Petitioner was fully paid all amounts promised in its contracts, there has never

been a ruling on the point. This issue of contract interpretation is therefore not ripe for review. What there is, however, is the government's own admissions in its annual "shortfall" reports, covering the very years at issue here, that the government did *not* pay Petitioner in full on its contracts. Pet. at 5; Cir. J.A. 253-54 (conceding government underpaid petitioner \$1,912,941 on its FY1999 contract and \$489,182 on its FY2000 contract). The government's last ditch attempt to deny what it already conceded is unavailing.

Moreover, the government has raised essentially the same "contract was fully paid" defense in its *Ramah* petition. See *Ramah*, Pet. at 24 (discussing the Oglala Sioux annual funding agreement and contending that "the parties' contractual agreements recognized that funding for all contract support costs was *not* guaranteed"). Thus, even under the government's own terms, *Ramah* is not the "better vehicle."

In short, there is no basis for delaying and complicating the proceedings in this case, and for burdening the Court with more briefs solely to wait an indeterminate period of time for *Ramah* to be ready for action. This case is ready for plenary consideration this Term.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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