No. 02-1472

IN THE

Supreme Court of the United States

CHEROKEE NATION and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA;
TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal government can repudiate, without liability, express contractual commitments for which it has received valuable consideration, either by spending down discretionary agency appropriations otherwise available to pay its contracts, or simply by changing the law and the contracts retroactively.

2. Whether government contract payment rights that are contingent on "the availability of appropriations" vest when an agency receives a lump-sum appropriation that is legally available to pay the contracts—as is the law of the Federal Circuit under *Blackhawk Heating*—or is the government's liability calculated only at the end of the year after the agency has spent its appropriations on other activities, as the Tenth Circuit ruled below.

PARTIES TO THE PROCEEDINGS

Petitioners, plaintiffs-appellants below, are the Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada. They brought this action on their own behalf.

Respondents, defendants-appellees below, are the United States, Secretary of Health and Human Services Tommy Thompson, and Interim Director of the U.S. Indian Health Service Charles Grim. (Director Grim has been substituted pursuant to S. Ct. Rule 35.) Individual respondents are sued in their official capacities.

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PETITION FOR A WRIT OF CERTIORARI

The Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of the Duck Valley Reservation in Nevada petition for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit opinion is reported at 311 F.3d 1054 and reprinted in the Appendix hereto ("App.") at 1a. That opinion affirmed the Order of the District Court for the Eastern District of Oklahoma which is reported at 190 F. Supp. 2d 1248 and reprinted at App. 24a.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2002. App. 1a. A timely petition for rehearing *en banc* was denied on January 22, 2003. App. 51a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Indian Self-Determination and Education Assistance Act of 1975, as amended ("ISDA" or "Act"), 25 U.S.C. § 450 *et seq.*, and the fiscal year ("FY") 1996 and 1997 Appropriations Acts are reprinted at App. 53a-77a.

INTRODUCTION

This case presents issues of extraordinary importance to the federal government's reliability as a contracting party, and to the sanctity of government contracts. Three times in recent years this Court has been forced to compel the Federal Government to respect its contracting parties' rights in order to safeguard the government's long-term interest in ensuring a reliable source of providers of goods and services. *See Franconia Assoc. v. United States*, 122 S. Ct. 1993 (2002); *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000); *United States v. Winstar*, 518 U.S. 839 (1996). This case is the next logical step in the sequence begun by those decisions.

At issue here is a dispute thrust upon two Indian tribes that contracted with the United States to operate federal hospitals and clinics at a price fixed by statute and the relevant contracts. In each instance, as with hundreds of other Indian tribes, the United States Indian Health Service initially had sufficient funds to pay the contracts but allocated those appropriations instead to other discretionary agency expenses, including expenses Congress by statute expressly prohibited

the agency from favoring over the contracts. The key issue is whether a federal agency may unilaterally cancel the United States' contract obligations by spending its money elsewhere.

The Tenth Circuit held the United States free of any liability whatsoever for its failure to pay fully on the contracts. In a ruling with profound implications for the sanctity of all government contracts, the Tenth Circuit did so first by seizing upon mere appropriations committee language—what Justice Scalia has called the "entrails of legislative history,"[1]—to permit a government agency to escape altogether its contract obligations. Then, as a backstop, the court below sanctioned Congress' returning years later and retroactively repudiating the United States' contractual commitments with impunity. In so ruling the circuit court has jeopardized the implementation of hundreds of government contracts with Indian tribes throughout the Nation, while also calling into question the nature of the United States' obligation to all other government contractors.

All of this comes as a stunning surprise, for it has long been the law of the Federal Circuit that government contract obligations must be paid out of unrestricted agency appropriations that are legally available for that purpose, even if doing so requires internal agency rebudgeting. *E.g.*, *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980). That court has long held that when the government fails to use unrestricted money, it is liable in damages. *Id.* Thus, even if the government's contract obligations are limited by available appropriations,[2] the United States cannot invoke that limitation without an express congressional limitation in an appropriations act. *Babbitt v. Oglala Sioux Tribal Public Safety Dept.*, 194 F.3d 1374 (Fed.

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[1] *Int'l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984).

[2] There are at least 50 statutes that unambiguously limit an agency's contracting authority to the availability of appropriations. App. 78a-87a.

Cir. 1999); *accord Shoshone-Bannock Tribes v. Secretary*, 279 F.3d 660 (9th Cir. 2002). Such a congressional limitation was notably absent here with respect to ongoing ISDA contracts with the Indian Health Service. Indeed, in recognition of those very rules, the United States has already settled virtually *identical* breach of contract claims against IHS's sister agency, the Bureau of Indian Affairs ("BIA"), on a class basis.[3] The Tenth Circuit's decision contravenes these well-established rules, converting government contracts into discretionary grants dependent on the whim of government agencies to spend or not to spend unrestricted appropriations on non-contractual obligations first. Accordingly, this Court should grant the petition and reaffirm the sanctity of government contracts and the responsibilities incumbent upon the government when it agrees to become a contracting party.

STATEMENT OF THE CASE

1a. There are 329 Indian tribes and inter-tribal organizations in the United States that annually contract with the U.S. Indian Health Service ("IHS") under the ISDA to administer its diverse health care programs. Most of these programs are operated on economically depressed rural Indian reservations situated in 35 states. Each summer IHS enters into these contracts in advance of appropriations for the coming fiscal year, typically to administer a remote IHS hospital, clinic or community health care program.

b. In 1975 Congress enacted the Indian Self-Determination Act, committing this Nation to "the establishment of a meaningful Indian self-determination policy which will permit an

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[3] *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D. NM 1999) (first partial settlement); *Ramah Navajo Chapter v. Norton*, __ F. Supp. 2d __, 2002 WL 32005254, *3 (D. NM Dec. 6, 2002) (second partial settlement) (approving settlement of contract damage claims arising in years when (as here) Congress did not limit agency contract payments to "not to exceed" a given sum, and thus did not "cap" such payments).

orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b).

To implement this change in federal Indian policy, Congress "directed" the Secretary, "upon the request of any Indian tribe . . . to enter into a self-determination contract." *Id.* § 450f(a)(1) (emph. added). Under an ISDA contract the Secretary is then required to divest himself both of the authority to operate the contracted programs, and of all funding associated with those programs. *Id.* §§ 450f(a)(1), 450j-1(a)(1). In the event of a dispute, the Contract Disputes Act provides a remedy in damages. *Id.* §§ 450m-1(a),(d) (referencing 41 U.S.C. § 601 *et seq.*).

c. Congress in the ISDA required that "[u]pon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [§ 450j-1(a)]," *id.* § 450j-1(g) (emph. added), and it mandated that the contract amount "shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)]." *Id.* § 450*l*(c), sec. 1(b)(4) (emph. added). Section 450j-1(a), in turn, requires in paragraph (1) that "[t]he amount of funds provided under the terms of self-determination contracts . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract," and in paragraph (2) that "[t]here shall be added to the amount required by paragraph (1) contract support costs." (Emph. added.) *See also id.* §§ 450j-1(a)(2), (3) & (5) (describing the required "contract support costs" that "shall be added" to the contract). These contract support costs include:

> (1) pooled "indirect costs" to administer all tribal operations (§§ 450b(f), 450j-1(a)(3)(A)(ii)); and

> (2) certain unpooled "direct" costs such as workers compensation insurance that specifically support the ISDA contract (§ 450j-1(a)(3)(A)(i)).

The described "contract support costs" cover the "fixed" overhead costs tribal contractors must incur to carry out these federal contracts[4]—costs which, when unreimbursed, must be absorbed through program reductions. Congress in 1988 added these contract support cost payment provisions because IHS's historic underpayment of those costs had become "the single most serious problem with implementation of the Indian self-determination policy," S. Rep. 100-274, at 8 (1987). *See also Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996) ("[IHS and BIA] . . . 'systematically violat[ed]' the Tribes' rights in the area of indirect costs"), quoting S. Rep. 100-274, at 37. The Senate Committee added pointedly:

> Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.

S. Rep. 100-274, at 13. These measures were enacted to make clear that "[IHS] must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services." *Id.* at 12. *See also* 25 U.S.C. §§ 450j-1(b)(1), (3) & (4) (all prohibiting IHS underpayments of ISDA contracts to fund other agency operations).

Consistent with its retention of authority to make final decisions concerning appropriations, Congress also provided that IHS could spend funds only to the extent Congress appropriates to IHS funds that are legally "availab[le]" to carry out the ISDA:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to

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[4] *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (describing these as "fixed" costs).

> the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

Id. § 450j-1(b). Finally, in 1994 Congress added a special mandatory rule of statutory construction to protect tribal contractors:

> (2) Purpose.—Each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor * * *.

Id. § 450*l*(c), sec. 1(a)(2) (emph. added).

d. In FY1996 and FY1997 Congress appropriated to IHS lump-sum amounts of $1.75 billion and $1.81 billion, respectively, "to carry out . . . the Indian Self-Determination Act," including the payment of contract support costs to contractors under that Act. Pub. L. 104-134, 110 Stat. 1321-189 (1996) (FY1996); Pub. L. 104-208, 110 Stat. 3009-212 (1996) (FY1997). Neither appropriations act limited the payment of contract support costs for ongoing ISDA contracts, and thus (with the exception of four earmarks) the full appropriation was legally available to pay such costs. At the end of each year IHS recorded substantial unobligated balances of $76,000,000 (FY1996) and $98,000,000 (FY1997). (*See* PRESIDENT'S BUDGET FOR FISCAL YEAR 1998 (Jan. 1997), Budget Appendix at 500 (ident. code 24.40) (reporting $76,000,000 as the FY1996 "actual" "end of year" "unobligated balance available"); PRESIDENT'S BUDGET FOR FISCAL YEAR 1999 (Jan. 1998), Budget Appendix at 404 (reporting $98,000,000 as the FY1997 "actual" "end of year" "unobligated balance available").)

e. IHS has long operated the Owyhee Community Hospital on the remote Shoshone-Paiute Duck Valley Reservation in northern Nevada, along with a variety of community health programs. Similarly, in northeastern Oklahoma, IHS owns

the Stilwell and Sallisaw clinics and also funds "contract health care" ("CHC") physician referral programs and various community health programs, all within the Cherokee Nation's 7,000 square mile jurisdictional area.

As FY1996 approached, the Shoshone-Paiute Tribes entered into an ISDA funding agreement for the coming year under which the Tribes agreed to take over the administration of the Owyhee Hospital on the government's behalf, with the agency to pay for this undertaking in a single amount at the beginning of the year "[s]ubject only to the appropriation of funds by the Congress." App. 5a.[5] As subsequently adjusted to reflect actual Hospital appropriations, the parties' compact and funding agreement required IHS to pay the Tribes' fixed contract support costs totaling $2,035,066 associated with this portion of the contract. App. 8a-9a, 31a-32a. IHS never paid this sum. *Id.* In advance of FY1997, the Tribes once again contracted under the Act to be paid fully at the beginning of the year, and once again IHS failed to pay any of the Tribes' fixed contract support costs associated with the ongoing operation of the Hospital. *Id.* As a consequence, the Tribes were compelled to reduce patient care to cover the shortfall. App. 9a.

As FY1997 approached, the Cherokee Nation similarly contracted to operate the Stilwell and Sallisaw clinics, two CHC physician referral programs, and various other IHS programs. All but one of the two CHC programs had been

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[5] *See also* Appellants' App. (10th Cir.) at 302 (Shoshone-Paiute Compact requiring an "advance lump sum" payment, "unless otherwise provided in a[n]. . . Annual Funding Agreement," "on or before ten calendar days after the date on which the [OMB] apportions the appropriations for that fiscal year"), 340 (Shoshone-Paiute FY1996 AFA requiring "[o]ne annual payment in lump sum to be made annually in advance (on October 1, 1995)"), 372 (Shoshone-Paiute FY1997 AFA requiring "[o]ne annual payment in lump sum to be made. . . within 20 working days of apportionment [by OMB]").

part of the Cherokee's ongoing contracted operations for several years. Like the Shoshone-Paiute Tribes, although the funding agreement and associated compact required that IHS fully pay the Cherokee's fixed contract support costs at the beginning of the year "[s]ubject only to the appropriation of funds by the Congress," App. 5a, 33a-34a,[6] IHS paid no contract support costs at all associated with the clinics and CHC programs, and it did not fully pay the Cherokee's fixed costs associated with other ongoing IHS programs also administered under the funding agreement.

2a. After exhausting their remedies under the Contract Disputes Act (41 U.S.C. § 601 *et seq.*) and 25 U.S.C. § 450m-1(d), the petitioners filed this breach of contract action against the United States for damages pursuant to § 450m-1(a). In the meantime, and on the heels of a contemporaneous defeat in the lower courts (*infra* at 14 n.9), IHS in 1998 secured from Congress "Section 314," an appropriations act rider purporting retroactively to declare that IHS appropriations in FY1996 and FY1997 had all along been legally unavailable to pay petitioners and other tribal contractors their full contract support costs due under their ISDA contracts:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the [BIA and IHS] by [the FY1994 through FY1998 appropriations acts] for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts . . . with

[6] *See also* Appellants' App. (10th Cir.) at 435 (Cherokee Nation FY1996 AFA requiring that "IHS request apportionment of 100% of total FY96 AFA funding in the first quarter [and] . . . within 21 days [to] process and make available . . . the apportioned amount").

> the [BIA or IHS] as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, ...

Pub. L. 105-277, § 314, 112 Stat. 2681-288 (1998) ("Section 314").

Pursuant to a pretrial plan temporarily deferring all discovery, the Tribes moved for partial summary judgment to establish as a matter of law that appropriations were legally available at the time to pay fully the Tribes' contracts, and that under *Winstar* Congress could not later retroactively alter the Tribes' contract rights by enacting Section 314. The Secretary cross-moved for summary judgment. With respect to the "ongoing" portions of the petitioners' annual contracts, the district court concluded that: (1) notwithstanding the utter silence in the appropriations acts, FY1996 and FY1997 appropriations for ongoing contract support costs had actually been "earmarked in appropriation committee reports," App. 46a, and (2) such appropriations were in any event "insufficient" because the agency eventually "spent" its appropriations on other things. *Id.*

b. Employing somewhat different reasoning, the Tenth Circuit affirmed. As an initial matter, the court concluded that under § 450j-1(b) the United States has no underlying obligation to a tribal contractor if appropriations are not legally available to the agency to pay the contractor. App. 12a-13a. Next, with respect to "ongoing" contracts the Circuit viewed the issue presented as one of fact, not law, to be determined in light of an agency affidavit the court read as asserting that "all of the money appropriated for fiscal years 1996 and 1997 was in fact spent, leaving a zero balance at the end of the year," and further "declar[ing] that 'reprogramming additional funds for contract support costs would have required IHS to use money otherwise dedicated to other purposes supporting health services delivery to tribes.'" *Id.* 14a-15a. (The court did not address the President's later

budgets to Congress reporting between $76,000,000 and $98,000,000 in unspent FY1996 and FY1997 IHS appropriations. *Supra* at 7.) As for the absence of any limiting earmarks in the two lump-sum appropriations acts, *supra* at 7,[7] the Tenth Circuit simply stated that "while the Tribes correctly argue that the earmark recommendations of a committee are not typically legally binding, the IHS is likewise not obligated to completely ignore them." App. 16a (footnote omitted). The court below also concluded that "[Section] 314 retroactively gave those committee earmarks binding authority," *id.* 16a n.8, adding later that "[Section 314] indicated that the earmarked amounts in the committee reports for ongoing CSCs were intended to be legally binding." *Id.* 21a.

REASONS FOR GRANTING THE PETITION

There are several compelling reasons for granting the petition, reflecting both the enormous national impact of this case on the United States' reliability as a contracting party, and the multiple conflicts the decision below creates with decisions of this Court and other courts of appeals.

I. THE QUESTIONS PRESENTED CONCERNING GOVERNMENT CONTRACTS ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

1. It is difficult to overstate the importance of this case. It directly affects over 300 tribal contractors operating federal hospitals and other health facilities from Oklahoma to Alaska. Yet the stakes are even higher than that, for if, as the Tenth Circuit has held, a government agency can simply decide for itself when it has legally available appropriations to pay a

[7] *See also* App. 8a ("neither Act on its face restricted or limited the amount of funds, out of the lump-sum appropriation, available for [contract support costs] for ongoing programs") (emph. in original).

government contractor, then the whole concept of a government contract obligation has been eviscerated with disturbing consequences for thousands of federal contractors.

Such a sweeping ruling is "at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies," *Winstar*, 518 U.S. at 883, and alone is a compelling reason to grant the petition. Borrowing from *Winstar*, "[i]njecting the opportunity for . . . litigation [over agency spending decisions] into every common contract action would . . . produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be 'of the essence of sovereignty' itself." *Id.* at 884, citing *United States v. Bekins*, 304 U.S. 27, 51-52 (1938). Permitting government agencies to avoid paying their just contract debts simply by choosing to spend their moneys elsewhere and then claiming poverty, frustrates the "[p]unctilious fulfillment of contractual obligations [which] is essential to the maintenance of the credit of public as well as private debtors." *Id.* at 884-85, quoting Justice Brandeis in *Lynch v. United States*, 292 U.S. 571, 580 (1934). And, it completely undermines the bedrock principle that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Franconia*, 122 S. Ct. at 2001, quoting *Mobil Oil*, 530 U.S. at 607 (internal quotations omitted).

The untold damage the Circuit's ruling may engender for all government contractors cannot be overemphasized. Now, each time a contractor signs a contract saying that payments are 'subject to the availability of appropriations' (as is the case in at least 50 other statutory schemes, App. 78a-87a), it will not be enough that Congress appropriates monies the agency can lawfully spend to pay the contractor (in terms of the familiar time-purpose-amount test governing the legal

availability of an appropriation[8]). Now, the contractor must also monitor the agency's daily expenditures and implore the agency to honor its contract before spending its monies elsewhere. Even then, there is no assurance the contractor will not be left holding the bag at the end of the year if all the money is gone. This proposition is not only ludicrous; it also defies the whole concept of a contract, for "'[a] [government's] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.'" *Winstar,* 518 U.S. at 913 (Breyer, J. concurring), quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1877). It is the penultimate "illusory promise." *Winstar*, 518 U.S. at 921 (Scalia, Kennedy & Thomas, JJ. concurring). And, it would be "madness" for contractors ever to enter into such agreements in the future. *Id.* at 864.

The magnitude of these implications alone is a compelling reason to grant the petition. *See Winstar*, 518 U.S. at 860 ("We took this case to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here.").

2. An equally compelling reason to grant the petition is to review the Tenth Circuit's remarkable conclusion that Congress can immunize the government from liability for a class of contract costs it has come to regret simply by enacting a retroactive rider years after performance. Thus, in the midst of litigation, Congress can conveniently declare that the appropriations that were legally available at the time to pay those costs disappeared by fiat.

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[8] U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ("APPROPRIATIONS LAW") at 4-2 (1991) (on Westlaw under "GAO REDBOOK"); OMB Cir. A-34 at 11.5 (2000) (answering: **"How can I tell whether appropriations are legally available?"**) (emph. in original).

The enactment of Section 314, a rider whose sole purpose is "self-relief"—strictly to save the government money on fully performed contracts it later found too expensive—crosses the sharp "line" this Court has drawn "between regulatory legislation that is relatively free of Government self-interest . . . and, on the other hand, statutes tainted by a governmental object of self-relief." *Winstar*, 518 U.S. at 896. It is precisely for this reason that this Court has held the government liable when "a substantial part of the impact"—here, indeed, all of the impact—"of the Government's action rendering performance impossible falls on its own contractual obligations." *Id.* at 898.

No ordinary contractor can simply choose one day not to pay its contracts, and correspondingly "this Court has previously rejected the argument that Congress has 'the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money.'" *Id.* at 917-18 (Breyer, J. concurring), citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986), *Perry v. United States*, 294 U.S. 330, 350-51 (1935), and *Lynch*, 292 U.S. at 576-77. Here, too, the suggestion that Congress can step in with impunity in the middle of litigation and cancel its own contract debts years after the fact, simply to save the government money and undo government defeats in the lower courts,[9] knows no limits. By "expanding the Government's opportunities for contractual abrogation," the decision below produces "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Id.* at 884. The

[9] Section 314 was enacted in the wake of *Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306 (D. Or. 1997), *modified* 999 F. Supp. 1395 (D. Or. 1998) (holding government liable for underpaying contract support costs). The case was subsequently reversed in part *sub nom.*, *Shoshone-Bannock Tribes v. Secretary*, 279 F.3d 660 (9th Cir. 2002), based largely on § 314.

wholesale disruption of existing doctrine and settled expectations embodied in the holding below compels this Court's review.

II. THE TENTH CIRCUIT DECISION CREATES A DESTABILIZING INTER-CIRCUIT CONFLICT REGARDING AN AGENCY'S DUTY TO MEET CONTRACT OBLIGATIONS OUT OF AVAILABLE APPROPRIATIONS, AND THE FORCE OF MERE APPROPRIATIONS COMMITTEE RECOMMENDATIONS IN GOVERNMENT CONTRACTING MATTERS.

1. The Tenth Circuit decision also creates a sharp conflict with the Federal Circuit regarding an agency's duty to honor its contractual commitments out of available appropriations. In *Blackhawk* (binding precedent within the Federal Circuit[10]), the then-Court of Claims held that once a legally available appropriation is enacted from which a contract payment is due, at that moment the contractor's right to be paid becomes "a vested right," 622 F.2d at 553, adding:

> Administrative barriers [regarding internal agency budgets and reprogrammings] of the sort which the Government's argument raises are purely of an in-house accounting nature and, as such are irrelevant to any determination respecting the availability of appropriated funds.

Id. at 552 n.9.[11] The Tenth Circuit's contrary holding—that the availability of an appropriation to pay a contract

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[10] *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (*en banc*) ("adopt[ing] [as] an established body of law as precedent" "[t]hat body of law represented by the holdings of the Court of Claims and the Court of Customs and Patent Appeals announced before the close of business on September 30, 1982").

[11] *Blackhawk* is but an expression of standard appropriations law, *see, e.g.*, APPROPRIATIONS LAW at 2-25 - 26 (discussing *Blackhawk*). *See also*

obligation depends on how the agency chooses to spend that appropriation—is diametrically opposed to the standard appropriations rule applied in *Blackhawk*.[12] It is also contrary to the Court of Claims' holding that the government cannot claim poverty as a defense when the "agency simply did not make an adequate [appropriations] request" to cover its contract obligations and other agency expenditures in the first place. *S.A. Healy Co. v. United States*, 576 F.2d 299, 305 (Ct. Cl. 1978).[13] These are serious decisional conflicts

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id. at 6-17 ("Where a contractor is but one party out of several to be paid from a general appropriation, the contractor is under no obligation to know the status or condition of the appropriation account on the government's books"); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) ("A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects.").

[12] The ISDA's provisions give special force here to the *Blackhawk* rule, because the Act commands that an ISDA contract must include "the full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)]," *see* § 450j-1(g), and directs that the amount of the contract "shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)]," *see* § 450*l*(c), sec. 1(b)(4) (emph. added). These measures establish a binding earmark that controls the agency's subsequent expenditure of its lump sum appropriation. This is so because "when an authorization establishes a minimum earmark ('not less than,' 'shall be available only'), and the related appropriation is a lump-sum appropriation which does not expressly mention the earmark . . . the agency must observe the earmark [set forth in the authorizing statute]." APPROPRIATIONS LAW at 2-42 - 43, citing 64 Comp. Gen. 388 (1985) (emph. added). *See also Int'l Union*, 746 F.2d at 861 n.5 ("An agency may, of course, be constrained to expend a certain portion of a lump sum appropriation . . . aris[ing]. . . from the terms of the substantive statute for which the appropriation was usable.")

[13] The situation is particularly absurd here when the President informs Congress that the agency actually has leftover and unobligated

between the court below and the Circuit invested with exclusive jurisdiction over virtually all other government contracts. This conflict gravely upsets the stability of government contracts, warranting review by this Court.

2. Similarly, the Tenth Circuit's reliance on appropriations committee recommendations[14] to excuse IHS from paying these ongoing contracts conflicts with the law of other circuits and this Court.

As noted in *Blackhawk*,

> the amounts requested or earmarked for the individual items that comprise the budget estimates presented to the Congress, and on the basis of which a lump-sum appropriation is subsequently enacted, *are not binding on the administrative officers* unless those items (and their amounts) are carried into the language of the appropriations act itself, see 17 Comp. Gen. 147, 150 (1937).

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appropriations available. *Supra* at 7. In any event, the agency's subsequent exhaustion of its appropriation is no bar to an award of damages under 41 U.S.C. § 612(a) of the Contract Disputes Act. *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (describing the Judgment Fund established under 31 U.S.C. § 1304 to pay contract damage awards as "a central, government-wide judgment fund from which judicial tribunals administering or ordering judgments, awards, or settlements may order payments without being constrained by concerns of whether adequate funds existed at the agency level to satisfy the judgment"); *Lopez v. A.C.&S., Inc.*, 858 F.2d 712, 716 (Fed. Cir. 1988) ("courts and boards, in rendering judgment, are not required to investigate whether program funds are available" "to pay court judgments and appeal board awards").

[14] *E.g.* S. Rep. 104-125, at 94 (1995) (FY1996) ("The Committee recommends $153,040,000 for contract support, the same as the House") (emph. added); S. Rep. 104-319, at 90 (1996) (FY1997) ("The Committee recommends $160,660,000 for contract support") (emph. added).

622 F.2d at 547 n.6 (emph. added). Or, as Justice Scalia for the D.C. Circuit put it in *International Union*:

> Lump-sum appropriations are a common feature of the legislative landscape, and we are not prepared to approach their interpretation by assuming that they are inherently ambiguous, capable of meaning either that no funds *need* be spent on any particular included program, or (as the Secretary seems to assert here) that no funds *could* be spent on a particular one, or that the funds *must* be distributed among all included programs in a given fashion--all as the committee reports and other entrails of legislative history might suggest.

746 F.2d at 861 (emph. in original). Indeed, in this Court it was the IHS itself which successfully argued in *Lincoln v. Vigil* that:

> [W]here "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on" the agency.

508 U.S. 182, 192 (1993) (emph. added), quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975). This is but hornbook appropriations law, APPROPRIATIONS LAW at 6-159, and the Tenth Circuit's creation of a destabilizing new rule—that committee reports establish new binding guidelines on the rights of government contractors to be paid out of available lump-sum appropriations—compels review by this Court.

In sum, the Tenth Circuit's conclusion that IHS could escape its contract obligations by relying on appropriations committee recommendations is doubly in conflict with decisions of this Court and other circuits: (1) it conflicts with the

lump-sum rule governing when a contractor's rights vest, and (2) it conflicts with the lump-sum rule that committee reports establish no limitation on an agency's use of its lump-sum appropriation. This Court should grant the petition to bring the Tenth Circuit into conformity with the decisions of this Court, the Federal Circuit and the D.C. Circuit on a matter of extraordinary importance to all government contractors.

III. THE TENTH CIRCUIT DECISION REPRESENTS AN UNPRECEDENTED EXPANSION OF CONGRESS' POWER TO CLARIFY PRIOR AMBIGUOUS LAW INTO AN UNREVIEWABLE POWER UNILATERALLY TO ABROGATE CONTRACT RIGHTS.

The Tenth Circuit's conclusion that Congress can enact retroactive legislation that alters pre-existing law and contract terms in the guise of a "clarification"—though here it is the court of appeals, not Congress, that so characterized Section 314—is directly at odds with the law of other Circuits and this Court. To be sure, Congress can enact retroactive legislation, *INS v. St. Cyr*, 533 U.S. 289, 315-17 (2001), though the standard for doing so is appropriately high, *id.*, considering both the constitutional and contractual lines Congress may not cross.[15] And as *Winstar* instructs, Congress' power to impair vested contract rights is decidedly limited, for the United States is bound to its contracts as much as a private party, and no party to a contract can unilaterally declare what the contract means, including its ambiguous terms. Rather, well-settled contract rules are available to the courts for resolving such matters. *E.g.*, *Javierre v. Central Altagracia*, 217 U.S. 502, 507 (1910) (burden on those

[15] *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 856 (1990) (Scalia, J. concurring) (noting the Constitution "proscribes all retroactive application of punitive law . . . and prohibits (or requires compensation for) all retroactive laws that destroy vested rights").

"seeking to escape from the contract made by them on the ground of a condition subsequent, embodied in a proviso"); *Massachusetts Bay Trans. Auth. v. United States*, 254 F.3d 1367, 1373 (Fed. Cir. 2001) (party asserting impossibility has burden of proving it explored and exhausted alternatives); *New Valley Corp. v. United States*, 119 F.3d 1576, 1584 (Fed. Cir. 1997) ("exculpatory provision . . . must [be] construe[d] narrowly and strictly"); *United Pacific Ins. Co. v. United States*, 497 F.2d 1402, 1407 (Ct. Cl. 1974) (contractor's reasonable interpretation of ambiguous provision controls where government drafted the contract); *The Padbloc Company, Inc. v. United States*, 161 Ct. Cl. 369, 376-77 (1963) ("'We are not to suppose that one party was to be placed at the mercy of the other'" so as to "[give] the United States carte blanche."); *see also* 25 U.S.C. § 450*l*(c), sec. 1(a)(2) (ISDA contracts "shall be liberally construed for the benefit of the Contractor").

Although the Tenth Circuit cited no authority in support of Congress' apparent power to "clarify" whether IHS had a contractual duty to pay three years earlier, the nearest authority confirms only Congress' recognized power retroactively to clarify a genuine ambiguity in a prior regulatory enactment. *E.g.*, *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 380-81 (1969) (regulation of broadcasters under the Communications Act); *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (regulation of labor relations under the Taft-Hartley Act). To extend *Red Lion* to the interpretation of government contracts—here, to permit the government years after performance and in the middle of litigation unilaterally and retroactively to declare what the contract means—would cut the heart out of this Court's government contracting jurisprudence and undo the bedrock principle that the government is to be treated just like any other private party in its contracting relations. The other Circuits have never taken *Red Lion* into this domain, and the Tenth Circuit's establishment of a more liberal *Red Lion* rule when

it comes to government contracts—an area where, if anything, the rules should be stricter—produces a serious inter-circuit split warranting review by this Court.[16]

Even retroactive amendments to purely regulatory regimes can be problematic, and in considering *Red Lion* other Circuits have therefore recognized that "retroactive application" of a non-clarifying amendment "would pose a series of potential constitutional problems," *Beverly Comm. Hosp. v. Belshe*, 132 F.3d 1259, 1265 (9th Cir. 1997). Thus, even in the regulatory arena, care must be taken to draw a distinction between situations where Congress merely clarifies an earlier ambiguity (as in *Beverly*) and situations where Congress actually enacts a retroactive change impacting vested rights. After all, it is one thing to clarify an earlier law and quite another to change it, for no matter how a "clarification" may be cast, "WHITE cannot retrospectively be made to assert BLACK." *United States v. Montgomery Co. Md.*, 761 F.2d 998, 1003 (4th Cir. 1985). The other Circuits thus take care to confine *Red Lion* and its progeny to situations involving genuine clarifications. *E.g.*, *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887 (1st Cir. 1992); *NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1500-01 (5th Cir. 1990); *Brown v. Marquette Sav. and Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982); *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984). The Eleventh Circuit put it well:

> Several factors are relevant when determining if an amendment clarifies, rather than effects a substantive change to, prior law. A significant factor is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment

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[16] *See Winstar*, 518 U.S. at 897 n.41 (where there is a "concern with governmental self-interest . . . 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate'") & 898 ("The greater the Government's self-interest, however, the more suspect becomes the [Government's] claim").

> was enacted. If such an ambiguity existed, courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law. Second, courts may rely upon a declaration by the enacting body that its intent is to clarify the prior enactment.

Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1283-84 (11th Cir. 1999) (citations omitted). *See also Beverly*, 132 F.3d at 1265-66 (subsequent statute, entitled "Clarification," was enacted in the wake of a "split of authority" regarding the admittedly inscrutable Social Security Act); *Paramount Health Systems, Inc. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998) (criticizing notion that "a disappointed litigant in a statutory case in a federal district court could scurry to Congress while the case was on appeal and request a 'clarifying' amendment that would reverse the interpretation that the district judge had given to the statute, even if that meaning was crystal clear").

The Tenth Circuit has changed all this, turning upside-down the narrow jurisprudence regarding retroactive clarifications. Under its formulation, the fact that contract rights are at issue is immaterial; the legislation at issue need not be cast as a clarification at all; there is no need for a history of judicial struggles with the earlier law's interpretation; and there is no need for any other indicia that something was ambiguous or confusing in the first place. Under the Tenth Circuit's view of it, even a law like Section 314 which has a telling "notwithstanding" clause—conveying Congress's intent plainly to change what would otherwise be the law and the government's contracting obligations under it—can judicially be reinterpreted to be a mere clarification. The actual clarity of the earlier law is unimportant. Nor does it matter that the only objective evidence suggests quite the contrary: that in the weeks following a defeat in other ISDA litigation finding IHS liable for underpaying contract support costs, *supra* at 14 n.9, IHS ran to Congress and secured

Section 314 in what the Tenth Circuit now announces was a successful effort to "clarify" the law retroactively and thus foreclose further liabilities. The Tenth Circuit's reformulation of the law governing retroactive clarifications shows no limits and sanctions precisely such profoundly unfair results.

Unless reversed, there will be no end to government agencies that suffer defeats in the lower courts turning to Congress for retroactive "notwithstanding" amendments to undo vested contractual and statutory rights. With the stroke of a pen appropriations that years earlier indisputably were legally available can now be made to disappear retroactively, along with the contract payment rights that had long ago vested upon enactment of those appropriations. Such an enormous and unprecedented expansion of Congress' power seriously erodes both this Court's careful protection of contract rights reflected in *Winstar*, *Mobil* and *Franconia*, and this Court's narrow retroactivity jurisprudence reflected in *St. Cyr*. Both the extreme consequences of such a proposition for all contractors dealing with the government, and the more limiting views from other Circuits concerning retroactive clarifications of regulatory measures, warrant granting certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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