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.

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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

CARTER G. PHILLIPS
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RIYAZ KANJI
KANJI & KATZEN, PLLC
201 South Main St.
Ann Arbor, MI 48104
(734) 769-5400

LLOYD BENTON MILLER *
HARRY R. SACHSE
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
NACOLE D. HESLEP
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1424 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Petitioners

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
CONCLUSION	7
SUPPLEMENTAL APPENDIX	
Opinion of the Court of Appeals for the Federal Circuit in *Thompson v. Cherokee Nation*, __ F.3d ___, 2003 WL 21511710 (Fed. Cir. July 3, 2003)	1a

TABLE OF AUTHORITIES

CASES — Page

Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539 (Ct. Cl. 1980) 4, 5

Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969) 5

Shoshone-Bannock Tribes v. Secretary, 279 F.3d 660 (9th Cir. 2002) 3

Thompson v. Cherokee Nation, ___ F.3d ___, 2003 WL 21511710 (Fed. Cir. July 3, 2003) ..... *passim*

STATUTES

25 U.S.C. § 450 *et seq.* 2

25 U.S.C. § 450j-1(b) .....

25 U.S.C. § 450m-1(a) 2

25 U.S.C. § 450m-1(d) 2

41 U.S.C. § 601 *et seq.* ("Contract Disputes Act") 2

41 U.S.C. § 606 2

41 U.S.C. § 609 2

Pub. L. 105-277, § 314, 112 Stat. 2681-288 (1998) ("Section 314") 5

RULES

S. Ct. Rule 15.8 1

IN THE

Supreme Court of the United States

No. 02-1472

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.

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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.8, the Cherokee Nation and Shoshone-Paiute Tribes bring to this Court's attention the recent decision of the United States Court of Appeals for the Federal Circuit—the court of appeals most expert in government contracting matters—in *Thompson v. Cherokee Nation*, __ F.3d ___, 2003 WL 21511710 (Fed. Cir. July 3, 2003), holding the government liable for failing to pay Petitioners' unreimbursed contract support costs. Pet. Supp. App. 1a-31a. In its new decision the Federal Circuit expressly and repeatedly "disagree[s]" with the reasoning and holding of the Tenth Circuit in this case, and thus makes it crystal clear that the Petition should be granted. Express conflicts exist among

the Circuits on issues of extraordinary importance to 329 tribal contractors and many more government contractors doing business with federal agencies under similar contracting statutes.[1]

ARGUMENT

Thompson v. Cherokee Nation is a parallel action to the case here on review, although it arose from the Interior Board of Contract Appeals rather than from a federal district court.[2] In *Thompson* the Federal Circuit considered the government's liability to the Cherokee Nation under the Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.* ("ISDA") for failing to pay out of the relevant FY1994, FY1995 and FY1996 Indian Health Service appropriations the full contract support costs associated with the Cherokee Nation's ISDA contracts in those years. Pet. Supp. App. 10a-11a.

Similarly in the case here on review, the Tenth Circuit considered the government's liability to the Cherokee Nation for failing to pay out of the subsequent FY1997 IHS appropriation the full contract support costs associated with the Cherokee Nation's ISDA contract that year (together with the government's liability to the Shoshone-Paiute Tribes for

---

[1] In its Opposition the government sought to portray the opinion below as well within the mainstream of government contracting and appropriations law. But as the Tribes' Petition and Reply demonstrated, and as the new Federal Circuit decision now conclusively confirms, that contention is simply untenable.

[2] The Contract Disputes Act, 41 U.S.C. § 601 *et seq.* ("CDA") affords all government contractors the option of either appealing a contracting officer's denial of an administrative claim to a contract appeals board (as occurred in *Thompson*), or instituting an original action in the Court of Claims. 41 U.S.C. §§ 606, 609. Under 25 U.S.C. §§ 450m-1(a) and (d) of the ISDA, the district courts are vested with jurisdiction "concurrent with the United States Court of Claims" to hear such actions involving self-determination contracts with Indian Tribes (which is the election pursued in the case at bar).

failing to pay those Tribes in FY1996 and FY1997). Pet. 7-9. The two cases thus involve the precise same issues under the ISDA; one of the very same appropriations acts; and, all told, four appropriations acts whose pertinent terms are identical. *See also* Pet. Supp. App. 15a-16a n.6 (noting common issues raised among the cases), 19a-20a (noting the appropriations acts' identical language).

In a lengthy and carefully considered opinion, the unanimous Federal Circuit panel in *Thompson* expressly and repeatedly disagrees with the Tenth Circuit (and, where relevant, a Ninth Circuit decision relied upon by the court below, *Shoshone- Bannock Tribes v. Secretary*, 279 F.3d 660 (9th Cir. 2002)). *E.g.*, Pet. Supp. App. 15a ("We find none of the Secretary's arguments persuasive, and disagree with the approaches of the Ninth and Tenth Circuit cases."). The Federal Circuit's adherence to this Court's jurisprudence and well-settled precedent both within and outside that Circuit, and its corresponding rejection of the approach taken by the Tenth Circuit below, is directly pertinent to every issue presented for review in the Tribes' petition.

For instance, the Federal Circuit—disagreeing with the Tenth Circuit below—invokes the time-worn principle that "in the absence of a statutory cap or other explicit statutory restriction, an agency is *required* to reprogram if doing so is necessary to meet debts or obligations," Pet. Supp. App. 14a (emph. in original). On this basis the *Thompson* court rejects the Tenth Circuit's contrary notion that the Secretary had "discretion" not to pay the Cherokee Nation's contract support costs associated with the "ongoing" portions of its contracts:

> We cannot agree [with the Tenth Circuit] that the Secretary had discretion to refuse to reprogram to meet his contractual obligations. As we have discussed above, it is well recognized that if the Secretary has the authority to reprogram and there are funds available in a

> lump-sum appropriation, there are "available funds." Our predecessor court in *Blackhawk* rejected the Secretary's contention to the contrary. 622 F.2d at 547. * * * .
>
> * * *
>
> In short, non-binding recommendations of Congress do not excuse the Secretary from fulfilling his duty under the contracts at issue here to pay full contract support costs. The Secretary did not have the discretion to breach his contracts with the [Cherokee Nation].

Id. 18a-19a (footnotes omitted).

Next, the Federal Circuit reads the words "shall remain available" (the portion of all four Appropriations Acts addressing contract support costs associated with "initial or expanded" ISDA contracts) as a "term of art" that is "not ambiguous" and "is commonly understood as a carryover provision, not a statutory cap," *id.* 22a, explaining:

> The phrase "shall remain available" is a term of art in appropriations legislation that our sister circuits have consistently interpreted, not as a statutory cap on funding to a particular source, but as an authorization of "carryover authority," indicating that unexpended funds "shall remain available" for the same purpose during the succeeding fiscal year. [Case citations omitted] In the present case, there is no indication that the "shall remain available" language constituted anything other than a typical "carryover" provision. It certainly did not constitute a statutory cap excusing the Secretary from fulfilling his obligations under the availability clause of section 450j-1(b).

Id. 22a-23a. Here, again, the Federal Circuit "conclude[s] that the Ninth and Tenth Circuit decisions were incorrect in this respect." *Id.* 22a.

Just as importantly in connection with the lynchpin to the Tenth Circuit decision—the Section 314 rider—the Federal Circuit once again disagrees with the court below, holding that under the Federal Circuit's precedent in *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980), Section 314 could not possibly impair contract rights that had "vested long before the passage of [Section 314]." Pet. Supp. App. 24a. The Federal Circuit also "disagree[s]" that Section 314 merely "clarifies" the earlier Appropriations Acts (as the Tenth Circuit below had reasoned), *id.* 24a-25a, because the earlier Appropriations Acts were perfectly clear and there was thus nothing ambiguous to be clarified:

> [A] later statute cannot be read as clarifying the meaning of an earlier statute where the earlier statute is unambiguous and the later statute is ambiguous. [Case citations omitted] As we have already discussed, in the present case the relevant appropriations acts were not ambiguous and were not in need of clarification. They imposed no cap on available appropriations, either as to ongoing contracts, or as to initial and expanded contracts.

Id. 25a-26a. *See also id.* 25a n.18 (discussing *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367 (1969) and its progeny). Parting company once again with the Tenth Circuit, the new Federal Circuit decision concludes that, "[i]n view of the well-established presumption against retroactivity," *id.* 23a, Section 314 is best read as having prospective effect only. Pet. Supp. App. 26a.

Finally, the Federal Circuit decision sharply contradicts the Tenth Circuit in concluding that the ISDA's "reduction clause" did not excuse the Secretary's failure to pay, noting that the Secretary "admits" that tens of millions of dollars were available annually in fiscal years 1994 through 1996 to be reprogrammed from "'inherently federal functions'" or

from "left-over and unexpended" appropriations remaining "at the end of the relevant fiscal years," *id.* 28a:

> Taken together, the appropriations reserved for "inherently federal functions" and the left-over appropriations were more than sufficient to pay the tribe its full contract support costs. . . . . The funds reserved for "inherently federal functions" and the left-over appropriations were not funds devoted to programs serving other tribes, and the Secretary could have drawn from those funds to meet his obligations without reducing funding for programs serving other tribes.

Id. 29a. *See also* Pet. Reply 7 n.4 (noting similar Secretarial concessions below).

In short, in every possible respect, the Federal Circuit's new decision confirms that the Tenth Circuit decision below is in grave conflict with the law of this Court, the Federal Circuit, and other sister circuits. This, from the Nation's appellate court most familiar with and expert in government contracting matters. The current state of affairs is thus untenable: the very same authorizing act and appropriations acts have now received diametrically opposing interpretations, with deeply disturbing consequences for the stability of government contracts. The destabilizing impact engendered by the decision below affects not only 329 tribal contractors throughout the country—reason enough to grant the writ—but also other government contractors who, in the absence of plenary review and reversal, cannot be assured that the Federal Circuit's approach in *Thompson* is indeed the correct assessment of the government's contracting responsibilities under similar authorizing statutes.

CONCLUSION

For the reasons set forth in the Petition and Reply, and for the additional reasons set forth in this Supplemental Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Of Counsel:

CARTER G. PHILLIPS
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RIYAZ KANJI
KANJI & KATZEN, PLLC
201 South Main St.
Ann Arbor, MI 48104
(734) 769-5400

* Counsel of Record

LLOYD BENTON MILLER *
HARRY R. SACHSE
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
NACOLE D. HESLEP
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1424 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for petitioners