No. 11-551

IN THE

Supreme Court of the United States

KENNETH L. SALAZAR,
SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

RAMAH NAVAJO CHAPTER, *et al.*,
Respondents.

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

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QUESTION PRESENTED

Whether the United States breaches a contract when it agrees to pay a government contractor's full contract support costs but subsequently refuses to pay them solely on the ground that Congress placed a cap on the aggregate amount that could be spent for such costs for all contractors, although the United States did not include a specific cap on costs in any individual contract and Congress's appropriation was more than adequate to pay the costs of each individual contractor.

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STATUTORY PROVISIONS INVOLVED

Section 450j-1(g) of Title 25 provides:

> Upon 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 subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

Additional statutory provisions are reproduced in the appendix to Petitioners' Brief.

STATEMENT

After receiving the benefit of the bargain, the Secretary of the Interior declined to pay Respondents in full because the Secretary had over-committed himself to pay other contractors. For 120 years, it has been settled law that, when the government signs too many contracts and consequently runs out of money, it must nevertheless fulfill its contractual promises, just like any other contracting party. The risk of over-commitment falls on the government, which over-extended itself, and not on the contractors, which abided by the terms of their contracts. This is the *Ferris* doctrine, which has endured for well over a century, which Congress has never statutorily modified, and which this Court recently reaffirmed in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005). There is no reason to chart a different course now.

Indeed, this venerable rule makes perfect sense and has given contractors the necessary confidence that they will be paid by the agency or made whole in court. After all, a contractor cannot be expected to know the condition of an appropriation on the agency's books or what the agency plans to do with its money. Without this rule, it would be madness to contract with the government, which would have unfettered discretion to over-commit and then breach with impunity, paying whomever it wants and short-changing the rest, all without judicial recourse.

The Court should reject the government's imprudent effort to overturn the *Ferris* doctrine and shift the risk of nonpayment to the contractor. There is no serious dispute that the government promised to pay the contracts in full, as this Court already held. *Id.* at 643. Nor is there a dispute that the tribal contractors fully performed. All that is left is whether the government must uphold its end of the bargain. Because the Tenth Circuit correctly held that the government is liable, the decision below should be affirmed.

I. THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT.

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450 *et seq.* (ISDA), directs the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) to enter into contracts with Indian Tribes and tribal organizations. §450f(a)(1). Under these "self-determination contract[s]," the agencies provide funds in exchange for the Tribes' agreement to administer federal programs, such as health care or law enforcement. *Id.* The underlying purpose of these contracts is to promote "greater tribal self-reliance," *Cherokee*, 543 U.S. at 639, by allowing Tribes to provide services to their members, thereby eliminating the "Federal domination of Indian service programs [that] has served to retard ... the realization of [tribal] self-government." §450(a)(1).

Despite this undeniably laudable goal, for decades the BIA and IHS have underpaid tribal contractors. In response, Congress twice amended the ISDA, limiting the agencies' discretion and clarifying the terms of the contracts. Because this history bears on the question presented, and because the government has once again asserted that the tribal contracts are not real contracts, contrary to this Court's holding in *Cherokee*, we describe the history below.

A. The Enforceable Nature Of ISDA Contracts.

After enactment of the ISDA in 1975, lower courts held that agreements entered into under the statute were not enforceable contracts. See Pub. L. 93-638, 88 Stat. 2203 (1975); *Busby Sch. of the N. Cheyenne Tribe* v. *United States*, 8 Cl. Ct. 596 (1985). Accordingly, Congress amended the Act in 1988, and then again in 1994, to make clear that ISDA contracts are true "contracts." Pub. L. 103-413, 108 Stat. 4250 (1994); Pub. L. 100-472, 102 Stat. 2286 (1988). The Act now "uses the word 'contract' 426 times to describe the nature of the Government's promise," and as this Court recognized in *Cherokee*, "the word 'contract' normally refers to 'a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.'" 543 U.S. at 639; see S. Rep. 100-274, at 34-35 (1987) (intent to overrule *Busby*).

Congress also made clear that ISDA contracts are fully enforceable under the Contract Disputes Act, 41 U.S.C. §§7101-7109. 25 U.S.C. §450m-1(d). Congress thus "afford[ed] self-determination contractors the procedural protections now given other federal contractors by that Act." S. Rep. 100-274, at 35. Contractors may recover "monetary awards" against the government on contract claims, 41 U.S.C. §§7107, 7108, and such awards must "be paid promptly" from the Judgment Fund, 31 U.S.C. §1304. 41 U.S.C. §7108(a).

Moreover, Congress gave ISDA contractors even greater rights to enforce their contracts than are held by other government contractors. ISDA contractors may file actions for "money damages arising under contracts" and "injunctive relief" directly in district courts. 25 U.S.C. §450m-1(a).

B. The ISDA's Contract Support Cost Provisions.

Under the original Act, the agency was required to pay a contractor no less than the amount the agency would have spent on the direct costs of running the contracted program (the "secretarial" amount). Pub. L. 93-638, §106(h), 88 Stat. at 2211-12. But the Act did not address indirect costs that contractors incurred in administering the contracted programs. See 25 U.S.C. §450b(c), (f) (defining "direct costs" and "indirect costs"). Indirect costs include fixed overhead expenses, such as utilities, rent, audits, and salaries of administrative staff. See Cibinic & Nash, *Formation of Government Contracts* 1343 (3d ed. 1998).

The reimbursement of indirect costs is a standard feature of government contracts. *E.g., Rumsfeld* v. *United Techs., Corp.*, 315 F.3d 1361, 1363-64 (Fed. Cir. 2003). The Office of Management and Budget (OMB) has established uniform standards that agencies use in determining the indirect costs reimbursable under contracts performed by States, localities, and Tribes. OMB Circular A-87, 2 C.F.R. pt. 225. These standards, cited in the ISDA regulations, 25 C.F.R. §900.45, generally require determining an "indirect cost rate," which is multiplied against the secretarial amount to yield the indirect costs. *Id.*; *Cherokee*, 543 U.S. at 635.

Because of the 1975 Act's silence regarding indirect costs, the agencies routinely under-reimbursed contractors in the early years following the ISDA's enactment. This forced "tribal contractors to absorb all or part of such indirect costs" using the contract funds intended to pay for the direct program costs, "thus reducing the amount available to provide services to Indians as a direct consequence of contracting." S. Rep. 100-274, at 33. Following years of hearings, Congress concluded that "the single most serious problem with implementation of the Indian self-determination policy has been the failure of the [BIA] and the [IHS] to provide funding for the indirect costs associated with self-determination contracts." *Id.* at 8.

Congress therefore amended the ISDA in 1988 to require payment of indirect costs as part of an amount referred to as "contract support costs." Pub. L. 100-472, §205, 102 Stat. 2285, 2292-94 (1988). Congress mandated that "[u]pon the approval of a self-determination contract ... the Secretary shall add the indirect cost funding amount awarded for a self-determination contract to the amount awarded for direct program funding." *Id.*, §205(g), 102 Stat. at 2294 (enacting §450j-1(g) (1988)). Congress adopted these changes to "insure that ... the tribal contractor will realize the *full amount* of direct program costs and indirect costs to which the contractor is entitled." S. Rep. 100-274, at 31 (emphasis added).

Nonetheless, the agencies continued to underpay contract support costs, which led Congress in 1994 to clarify yet again the government's obligation to pay these costs. Pub. L. 103-413, 108 Stat. 4250 (1994). The Act now provides that "there shall be added to the [secretarial] amount ... contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on ... to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. §450j-1(a)(2). These contract support costs "shall include" certain direct costs not already included in the secretarial amount, together with "any additional" indirect costs incurred by the contractor. §450j-1(a)(3)(A)(i), (ii). The amount of funds that the contractor "is entitled to receive" in any given year is determined through annual funding agreements, which incorporate indirect cost rates negotiated in accordance with OMB's standards. §450j-1(a)(3)(B); see §450j(c)(2) (providing for annual renegotiations); §450b(g) (defining "indirect cost rate"); §450*l*(c), sec. 1(f)(2) (incorporating annual funding agreements into Model Contract).

Congress also rewrote subsection §450j-1(g) of the ISDA to emphasize 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)]." §450j-1(g) (emphasis added). To drive the point home, Congress provided that regardless of any "shortfall [that] is the result of lack of full indirect cost funding," the agencies may not "fund less than the full amount of need for indirect costs associated with a self-determination contract." §450j-1(d).

Because ISDA contracts, like many other government contracts, are to be entered into prior to the start of the fiscal year, the statute provides that payments are "subject to the availability of appropriations." §450j-1(b). This language, common in government contracts, "makes clear" that if the contract is negotiated before a fiscal year begins, it "will not become binding unless and until Congress appropriates funds for that year." *Cherokee*, 543 U.S. at 643. Once Congress makes appropriations sufficient to cover the contract, however, the availability-of-appropriations condition is fulfilled, *id.*, and the agency "shall make available to the Contractor the total amount specified in the annual funding agreement," §450*l*(c), sec. 1(b)(4); see *id.*, sec. 1(b)(6)(B)(i) (same).

C. The 1994 Regulatory Limitation And Model Contract.

In adopting the 1994 amendments, Congress also expressed frustration that it took the BIA and IHS "[n]early six years" to propose regulations that "were … intended to permit both departments to … eliminate deficiencies or problem areas which inhibited contracting." S. Rep. 103-374, at 3 (1994). Worse, the proposed regulations "'raise[d] new obstacles and burdens for Indian tribes.'" *Id.* Congress therefore prohibited the agencies from issuing any regulations concerning contract support costs and other matters, 25 U.S.C. §450k(a)(1), and from imposing on contractors any nonregulatory "guidelines, manuals or policy directives" concerning contract funding, §450*l*(c), sec. 1(b)(11).

Further curtailing the Secretary's discretion, Congress set forth a Model Contract in the statute and instructed the Secretary to use that contract verbatim. The contract may be supplemented, but it cannot be supplanted, by annual funding agreements. §450*l*(c), sec. 1(f)(2). It incorporates by reference the entirety of the ISDA, §450*l*(c), sec. 1(a)(1), and each contract must be "liberally construed for the benefit of the Contractor." §450*l*(c), sec. 1(a)(2).

Most relevant here, the Model Contract directs that contractors are to receive full funding of their contract support costs. It provides in section 1(b)(4) that "the Secretary *shall make available* ... the total amount specified in the annual funding agreement," and "[s]uch amount *shall not be less than* the applicable amount determined pursuant to [§450j-1(a)]" for the secretarial amount and contract support costs. §450*l*(c), sec. 1(b)(4) (emphases added); see *Cherokee*, 543 U.S. at 639.

II. THE APPROPRIATIONS ACTS.

This case concerns the BIA's failure to pay full contract support costs for contracts spanning fiscal years ("FY") 1994 to 2001. For FY 1994, Congress appropriated roughly $1.5 billion for all BIA activities, including activities administered by tribal contractors. Pub. L. 103-138, 107 Stat. 1390, 1390-91 (1993). Of this gross amount, Congress provided that "not to exceed $91,223,000 ... shall be available" to pay "indirect costs associated with contracts" under the ISDA. *Id.* Every year since, Congress included similar "not to exceed" language in BIA appropriations with regard to "contract support costs." Pet. Br. 8-9 (citing Acts). Congress also included such language in IHS appropriations starting in FY 1998. *E.g.*, Pub. L. 105-83, 111 Stat. 1543, 1582-83 (1997). Beginning with FY 1999, Congress added before the statutory cap, "notwithstanding any other provision of law, including but not limited to the [ISDA]." *E.g.*, Pub. L. 105-277, 112 Stat. 2681, 2681-245 (1998).

III. FACTUAL BACKGROUND.

A. The Bureau Of Indian Affairs' Contract Payment Practices.

Between 1994 and 2006, the BIA published annual Federal Register notices, addressed to BIA personnel, three to seven months *after* the fiscal year began and *after* work on the contracts commenced, addressing possible shortfalls. *E.g.*, 62 Fed. Reg. 1468 (Jan. 10, 1997). The notices stated that some percentage of each contractor's previous year's contract support costs—typically 75%—would be paid to that contractor shortly, and that final payment would await further calculations. *Id.* at 1469. The notices also stated that *if* the appropriation proved insufficient, BIA personnel would endeavor to distribute the remaining funding *pro rata* across all contractors. *Id.* Around the last month of the fiscal year—or even after its close—the BIA made a second payment of contract support costs. Pet. 13a. In each year at issue, most contractors were not paid in full. Pet. 8a.

In May 2006, the notices ceased, and the BIA announced that it would no longer make *pro rata* payments. BIA, National Policy Memorandum, NPM-SELFD-1, *Contract Support Costs* 13-17 (May 8, 2006). Instead, the BIA would first pay contractors the same amount of contract support costs (if any) that they were paid in the preceding year. *Id.* at 13. Then, the BIA would attempt to allocate any increased appropriation to the most severely underfunded contractors. *Id.* However, the BIA's implementation of the new system was inconsistent, and since FY 2007 BIA payments to contractors have varied widely, with many contractors underpaid, some fully paid, and others even *over*paid. See, *e.g.*, U.S. Dep't of Interior, *Report to Congress on Funding Requirements for Contract Support Costs of Self-Determination Awards for Fiscal Year 2009* (2010) (contractor payments ranging from no contract support costs at all ("0.00%") (*id.* at 4, 18) to overpayments as high as "249.63%" (*id.* at 13)).[1] The BIA approach mirrors the approach employed by the IHS for many years, with similar variations. See IHS, *Indian Health Manual* pt. 6, ch. 3 (2007) (IHS contract support policy); IHS, *Fiscal Year 2010 CSC Funding Data* (2009) (contractor payments ranging from "0.00%" (*id.* at 4, 10) to "7.68%" and "30.30%" (*id.* at 10) to overpayments as high as "197.57%" (*id.* at 13) and even "352.00%" (*id.* at 10)).[2]

Although the Act requires the Secretary during each fiscal year to report to Congress on any contract support funding shortfalls, 25 U.S.C. §450j-1(c), the BIA's annual reports were never timely submitted during the fiscal year. Many were never submitted at all. Cir. J.A. 240-56. Nor did the BIA ever ask Congress for the full amount required to pay all contract support costs. *E.g.*, J.A. 208-21.

B. Underpayments To Respondents.

During the years at issue, Respondents contracted with the United States to administer programs that the BIA would otherwise have administered. Pet. 10a, 13a. These programs included law enforcement, courts, education assistance, land management, probate assistance, natural resource services, employment assistance, child welfare assistance, emergency youth shelters, and juvenile detention services. *E.g.*, J.A. 89-95; Cir. J.A. 891-927.

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[1] http://www.ncai.org/fileadmin/contract_support/2012/BIA_FY_2009_CSC_Shortfall_Report_to_Congress_-_2009_data__11-18-2010_.pdf.

[2] http://www.ncai.org/fileadmin/contract_support/2012/IHS_FY_2010_CSC_Shortfall_Report_-_FINAL_2009_data.pdf.

Each contractor entered into the ISDA's Model Contract, supplemented by annual funding agreements. Pet. 11a; see, *e.g.*, J.A. 87, 102, 120. Like all self-determination contracts, these contracts incorporate the ISDA and provide that the contracts should be "'liberally construed for the benefit of the contractor.'" Pet. 15a; *e.g.*, J.A. 103.

The accompanying annual funding agreements obligated the agency to pay a mathematically determinable amount of contract support funds. *E.g.*, J.A. 97, 120-23; *infra* 20-21. The BIA never paid these amounts. For fiscal years 1994 to 1999, for example, Oglala was underpaid a total of $1,928,983 in contract support funds. Cir. J.A. 258. During this same period, Ramah was underpaid a total of $1,040,918. Cir. J.A. 272.[3] The inadequate payments of contract support funds have greatly impaired the contractors' abilities to provide governmental services. See J.A. 197-98.

IV. PROCEEDINGS BELOW.

A. District Court Proceedings.

In 1990, Respondent Ramah Navajo Chapter (a political subdivision of the Navajo Nation) filed a class action to challenge the BIA's process for setting indirect cost rates. J.A. 9, 48-56. After certifying the class, the district court granted defendants summary judgment, but the Tenth Circuit reversed, holding that the BIA's indirect cost rate process was flawed. *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997). The parties subsequently settled the gov-

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[3] Respondent Pueblo of Zuni's contract and related documents are not of record because the Pueblo intervened after discovery closed. J.A. 139.

ernment's liability for these claims for 1989 to 1993. *Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999).

In 1999, the district court permitted Ramah to amend its class complaint to add the breach of contract claim at issue. J.A. 68-74. At that time, the court also allowed Respondent Oglala Sioux to intervene. J.A. 75-80. (The Pueblo of Zuni intervened in 2002. J.A. 139.) Respondents alleged that the government "failed to pay additional required amount[s]" of contract support costs, J.A. 75-76, and sought "money damages for breach," J.A. 75.

In 2001, the parties filed cross motions for summary judgment on the claims relating to years for which Congress had capped appropriations for contract support costs (FY 1994 and following). Pet. 13a-14a. Proceedings on the motions were delayed pending the litigation that led to this Court's decision in *Cherokee*, 543 U.S. 631. J.A. 34; Pet. 94a, 102a. There, this Court held that the IHS breached its ISDA contracts by failing to pay full contract support costs. Despite *Cherokee*, however, the district court entered summary judgment for the government. According to the court, *Cherokee* was distinguishable because the appropriations statutes in *Cherokee* did not include a "not to exceed" clause. Pet. 102a, 105a-106a.

B. The Court of Appeals Decision.

The Tenth Circuit reversed, relying on "three principles set down by" this Court. Pet. 17a. First, because the contract support appropriation was a lump-sum for all contractors, it did not "'impose legally binding restrictions'" on distribution, and the Secretary was thus not required to distribute the funds *pro* *rata*. Pet. 17a, 19a-20a (quoting *Lincoln* v. *Vigil*, 508 U.S. 182 (1993)).

Second, "there is no merit to the 'claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors.'" Pet. 17a, 22a (quoting *Cherokee*). The several hundred other contractors dealing with the Secretary in addition to Ramah, Oglala, and Zuni "are not a single conglomerated entity simply because each lays claim to a portion of the same appropriation any more than all federal highway contractors represent a single, undifferentiated mass." Pet. 21a-22a. The court of appeals majority cited the "venerable" opinion in *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892), to underscore that "'[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.'" Pet. 22a (quoting *Ferris*).

Third, as *Cherokee* concluded, "'if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds.'" Pet. 17a, 24a (quoting *Cherokee*). The risk of overcommitment falls on the government.

Relying on these principles, the court of appeals held that the government must fulfill its contractual commitments or answer in money damages. Rejecting the government's argument that "the 'not to exceed' language" allows the government to breach with impunity, the court explained that the clause did not distinguish the appropriations in *Cherokee*. In both instances, the appropriation "'establishe[d] a maximum that may not be exceeded,'" and in both, funds were legally available for each contract. Pet. 27a-28a.

Finally, the court held that *Cherokee* foreclosed the government's argument under the Appropriations Clause. Pet. 45a-46a. As *Cherokee* recognized, when an appropriation is fully spent without paying a contractor its due, a damages remedy lies, and payment is congressionally authorized in the Judgment Fund Act, 31 U.S.C. §1304. Pet. 45a-46a.

SUMMARY OF ARGUMENT

1.a. This is a basic contract case. The government entered into contracts with the Tribes, all of whom performed their end of the bargain. The government, however, refused to pay in full, contending it did not have the money. Because the government is treated like any other party when it enters into a contract, it breached the contracts and is liable for damages.

b. The government argues, for the first time in this Court, that it was never obligated to pay the Tribes' full contract support costs, but only "an amount" that it saw fit to pay. Even if this new argument were not waived, it is meritless. In multiple provisions, the ISDA and the Model Contracts unambiguously establish that the Secretary is obligated to pay "the full amount of [contract support] funds to which the contractor is entitled." 25 U.S.C. §450j-1(g); see §§450j-1(a)(2), 450j-1(d)(2), 450*l*(c), sec. 1(b)(4). Moreover, the government's novel interpretation would render the contracts illusory, with payment subject to the government's whim.

c. It is no defense that Congress failed to appropriate sufficient funds to cover all of the agency's contractual commitments. For over 120 years, it has been settled law that an agency is bound to its contractual promises regardless of whether Congress appropriated enough money to cover all of the agency's contracts. See *Ferris*, 27 Ct. Cl. 542; *Dougherty* v. *United States*, 18 Ct. Cl. 496 (1883). Having been repeatedly and consistently reaffirmed and never questioned or modified by Congress, this *Ferris* doctrine is a bedrock principle of government contract law. Indeed, in *Cherokee*, the Court cited *Ferris* four times in rejecting the government's claim (reprised here) that "tribes, not the Government, should bear the risk" of insufficient funds. 543 U.S. at 640; see also *id.* at 637, 641, 643. As the Court held, the contractor is "'entitled to payment even if the agency ... assumes other obligations that exhaust the funds.'" *Id.* at 641 (emphasis omitted). The *Ferris* doctrine's sole exception—for line-item appropriations that address a single contractor—is inapplicable.

2.a. The government is wrong in arguing that, because Congress imposed statutory caps on the BIA appropriations, *Ferris* is distinguishable. Indeed, *Ferris* itself involved an appropriation with a statutory cap, one which the GAO has determined is identical to the caps at issue here. Any distinction is imaginary.

Moreover, even if (contrary to fact) *Ferris* and its progeny did not involve caps, the government's argument would still fail. The government bears a heavy burden of showing that Congress intended to disturb the 120-year-old bedrock principle of government contract law that the risk of over-commitment falls on the agency, not the contractors. The mere use of the commonplace "not to exceed" clause does not suffice. The clause limits what the agency can spend out of an appropriation on contract support costs, thereby protecting other funds for other purposes, but it neither bars creation of a contract obligation nor limits a contractor's remedies for breach, including recovering damages from the Judgment Fund. Congress gave no indication it sought to displace *Ferris* or to restrict access to the Fund.

The government's construction is especially implausible because it would allow the government to breach with impunity, and would fatally undermine a central purpose of the ISDA, which Congress amended specifically to correct the BIA's "past failure" to pay indirect costs and "to require payment of those costs in the future." *Cherokee*, 543 U.S. at 639. Indeed, the government's position requires drawing the untenable conclusion that the statutory caps on appropriations impliedly amended the ISDA around the same time that Congress actually amended the statute to make clear that the agencies must pay "full" contract support costs. Especially considering Congress's direction that any ambiguity must be construed in favor of the Tribes, the government's argument is untenable.

b. The government is also mistaken in claiming that the Judgment Fund, which satisfies the Appropriations Clause, is unavailable. Congress expressly directed ISDA contractors to recover damages from the Fund, 41 U.S.C. §7108(a); 25 U.S.C. §450m-1(d), and this Court in *Cherokee* recognized the Fund's availability. 543 U.S. at 643.

c. There are plenty of steps Congress could have taken if it truly wanted to shortchange the Tribes. For instance, Congress could have amended the ISDA to remove the agencies' statutory mandate to enter into binding contracts. Or, it could have enacted true line-item appropriations for individual contractors, which would have given contractors clear notice that they would receive only specified amounts before performing the contracts. That Congress did not take these steps or others, see *infra* §II.C, only underscores that the Tribes are entitled to payment.

3. The government's claim that the insufficient appropriation excuses its breach also fails for a separate reason: The Secretary never even tried to obtain sufficient appropriations from Congress, as required by the ISDA, settled government contract law, and the implied covenant of good faith and fair dealing. *S.A. Healy Co.* v. *United States*, 576 F.2d 299, 300-05 (Ct. Cl. 1978); *Centex Corp.* v. *United States*, 395 F.3d 1283, 1304-05 (Fed. Cir. 2005). In all events, because the government received the full benefit of the contractual bargain, it must live up to its promises.

ARGUMENT

I. THE GOVERNMENT IS LIABLE FOR BREACHING ITS CONTRACTUAL OBLIGATIONS TO PAY FULL CONTRACT SUPPORT COSTS.

Under basic principles of contract law and the 120-year-old *Ferris* doctrine, the government is liable for breach of contract. The Secretary failed to pay a portion of the contract support costs despite having received the full benefit of the bargain. Because (1) the government is treated like any other party when it enters into a contract, (2) the contracts at issue require payment of full contract support costs, and (3) government over-commitment is not a defense to breach, the decision below should be affirmed.

A. When The Government Enters Into A Contract, It Is Treated Just Like Any Other Party And Is Liable For Breach.

As an initial matter, there should be no dispute that the government has, in fact, entered into contracts. This Court recognized in *Cherokee* that self-determination contracts are fully enforceable contracts, just like any other government procurement contract. *Cherokee*, 543 U.S. at 637. Indeed, the ISDA "uses the word 'contract' 426 times to describe the nature of the Government's promise." *Id.* at 639 (citing Restatement (Second) of Contracts §1 (1981)); see also 25 U.S.C. §450*l*(c) (Model Contract).

Nor should there be any dispute that, when the government enters into such a contract, it is treated like any other contracting party. As this Court has repeatedly affirmed, "'[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 Assocs.* v. *United States*, 536 U.S. 129, 141 (2002) (quoting *Mobil Oil Exploration & Producing Se., Inc.* v. *United States*, 530 U.S. 604, 607 (2000)); see also *United States* v. *Winstar Corp.*, 518 U.S. 839, 895 (1996) (plurality opinion) (same); *Cherokee*, 543 U.S. at 639. This is because "[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." *Lynch* v. *United States*, 292 U.S. 571, 580 (1934). Were the government free to avoid its contractual obligations, "the certain result" would be to "undermine[] the Government's credibility at the bargaining table and increas[e] the cost of its engagements." *Winstar*, 518 U.S. at 884 (plurality opinion).

It is thus no surprise that "Congress ... meant to treat alike promises made under the [ISDA] and ordinary contractual promises." *Cherokee*, 543 U.S. at 639. Consequently, when the government breaches a self-determination contract, the Tribe may recover damages. Restatement (Second) of Contracts §346(1) (1981). The amount of damages is the "sum of money that will, to the extent possible, put [the Tribe] in as good a position as [it] would have been in had the contract been performed." *Id.* §347 cmt. a. Congress explicitly authorized adjudication of claims for "money damages" in accordance with the Contract Disputes Act and appropriated funds for their payment through the Judgment Fund. 25 U.S.C. §450m-1(a), (d).

B. The Self-Determination Contracts Obligated The Government To Pay The Contractors' Contract Support Costs In Full.

Because the government must be treated like any other contracting party, it cannot escape its obligation to pay the Tribes their full contract support costs. That obligation is unambiguously spelled out in both the ISDA and the self-determination contracts.

1. Starting with the ISDA, §450j-1(a)(2) unmistakably provides that there "*shall be added*" to the secretarial amount "contract support costs," which "*shall consist* of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. §450j-1(a)(2) (emphases added). Likewise, the Act requires 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)]," which, as noted, specifically includes contract support costs. §450j-1(g) (emphasis added). Further, in a section added to counteract the habitual underpayments of these costs, the Act states that, regardless of any past shortfalls, the agencies may not "fund less than *the full amount of need* for indirect costs associated with a self-determination contract." §450j-1(d)(2) (emphasis added); see S. Rep. 100-274, at 37-38. Read to-

gether, these provisions—which Congress specifically added to correct the government's "past failure" to pay indirect costs and "to require payment of those costs in the future,"[4] *Cherokee*, 543 U.S. at 639—"require[] that the Secretary provide funds for *full* administrative costs to the tribes." *Thompson* v. *Cherokee Nation*, 334 F.3d 1075, 1081 (Fed. Cir. 2003) (emphasis added), *aff'd sub nom. Cherokee Nation* v. *Leavitt*, 534 U.S. 631; see also *Cherokee*, 543 U.S. at 634 ("The Act specifies that the Government *must* pay a tribe's costs, including administrative expenses.") (emphasis added).

Consistent with these statutory provisions, the ISDA's Model Contract—which every self-determination contract must incorporate, 25 U.S.C. §450*l*(a)(1)—provides that the Secretary "shall make available … the *total amount* specified in the annual funding agreement," §450*l*(c), sec. 1(b)(4), which "*shall not be less than* the applicable amount determined pursuant to [§450j-1(a)]." *Id.* (emphasis added). The annual funding agreements, in turn, obligate the Secretary to pay mathematically determinable amounts of contract support funds.

[4] As the Senate Report states: "Under [the Act], a tribal contractor may secure relief … , including orders that require the offending agency to pay amounts required by the plaintiff's contract." S. Rep. 100-274, at 34. These "strong remedies" for "compelling BIA and IHS compliance with the [Act]" are "required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law." *Id.* at 37; *see also id.* (warning that "[s]elf-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs").

Ramah's annual funding agreement for FY 2000 is illustrative. In a section titled "Funding and Payments," it provides that the "amount of Indirect Cost Funding shall be based upon the Contractor's Indirect Cost Agreement which is applicable to this period of performance." J.A. 99. The agreement then specifies a precise amount of "Indirect Costs," $1,173,684, which is based on an indirect cost rate of 86.4% applied to the direct base amount. J.A. 97. This is the "total amount" that the Secretary was obligated to pay.[5] Other annual funding agreements similarly identify contract support cost amounts, whether by specifying an amount, *e.g.*, J.A. 123, specifying the indirect cost rate, *e.g.*, Cir. J.A. 1489, or specifying that an indirect cost rate will be set according to the OMB standards. In all agreements, however, contract support costs equal a determinable amount that is based on the Tribe's actual costs and that does not vary according to Congress's appropriation.

2. Notwithstanding the plain language of the ISDA and the contracts, the government argues that it was never obligated to pay the full amount of reasonable contract support costs, but only "'an amount'" that the government decides to pay in its "equitabl[e]" discretion. Pet. Br. 10, 37. This argument, which was not made below and is therefore waived, *e.g.*, *United*

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[5] The annual funding agreement notes that the indirect cost rate for FY 2000 had not been finalized yet, J.A. 97, as this rate results from the OMB's rigorous audit process in which the contractor explains how it allocates overhead costs among particular programs. *See* OMB Circular A-87; 25 C.F.R. pt. 900, subpt. F. Subsequent adjustments to indirect cost rates are commonplace in government contracts, and these adjustments do not limit the contractor's right to full reimbursement.

States v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001), is dumbfounding.

First, as explained, the statute does not speak merely of "an amount" but uses the phrases "full amount" and "total amount," words which would have no meaning if the government could just pick any amount it wanted to pay in its discretion. Moreover, as Ramah's annual funding agreement illustrates, the contracts provide for a mathematically determinable amount. That is the amount owed by the government.[6]

Second, the government's novel interpretation would render the self-determination contracts illusory. An agreement in which the payor has discretion as to the amount of payment is not a contract at all. See 1 Richard A. Lord, *Williston on Contracts* §4:27 (4th ed. 2011) ("[W]here the promisor retains an unlimited right to decide later the nature or extent of his or her performance[, the] unlimited choice in effect destroys the promise and makes it illusory." (footnote omitted)); accord *Winstar*, 518 U.S. at 913 (Breyer, J., concurring) ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." (quoting *Murray* v. *Charleston*, 96 U.S. 432, 445 (1878))). Congress's use of the word "contract" 426 times was not meant to create an illusion.

[6] Contrary to the government's claim (Pet. Br. 37), §450j-1(a)(3) speaks of "eligible costs," not to limit their full funding, but to identify the costs that can "receiv[e] funding under [the ISDA]." Such costs "*shall* include" particular types of direct and indirect costs specified in the statute (emphasis added). These costs are allowed in §450j-1(k) and OMB Circular A-87, 2 C.F.R. pt. 225, app.A, and are typical in government contracting.

Accordingly, this Court and others have declined interpretations that would permit the government to set the terms of its own performance. For example, in *Detroit* v. *Detroit Citizens' Street Railway*, the Court dismissed as "hardly ... credible" the city's suggestion that a fare rate agreed to with a railroad company, which "amounted to a contract," could be "subject to change from time to time by the sole decision of the [city] council." 184 U.S. 368, 384 (1902); see also, *e.g.*, *Willard, Sutherland & Co.* v. *United States*, 262 U.S. 489, 493 (1923) (contract to supply coal was not enforceable because of a provision stating that "the Government [was] not ... obligated to order any specific quantity") (emphasis omitted); *Torncello* v. *United States*, 681 F.2d 756, 769 (Ct. Cl. 1982) (rejecting notion that government promise to use contractor "for all of its pest control work" included possibility that government "could give [the contractor] none").

Yet, according to the government, it has "equitable" discretion to choose "an amount" as low as zero—which is what the government has sadly paid some contractors, see *supra* 9-10.[7] Were the government's position correct, it would be "'madness'" for contractors to enter into such agreements with the government. *Winstar*, 518 U.S. at 863 (plurality opinion).

Third, the government's position would render this Court's decision in *Cherokee* a meaningless intellectual exercise with no practical consequence. If the

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[7] The government's claim that the "Secretary was required to allocate" funds "equitably," Pet. Br. 10, is refuted by *Lincoln* v. *Vigil*, 508 U.S. at 192 (Secretary has unreviewable discretion), and belied by the Secretary's abandonment of *pro rata* distribution and by his actual, inequitable practice.

government has freedom to pay whatever "amount" it wants (*pro rata* or otherwise), there was no shortfall requiring this Court's (or any court's) attention. *Cherokee* was litigated for a reason, however, and that reason was that the government had entered into real contracts with real obligations. The government has no basis to argue now that the Secretary has the discretion to pay a lesser "amount."

At the very least, the statutes in question are ambiguous. Indeed, the government itself has conceded that it is "at a minimum ... reasonable" to conclude that the agency is liable for failing to pay on its contracts. Cir. J.A. 1660; see also Cir. J.A. 1673 ("defendants might be held liable for plaintiff's contract support costs despite the inclusion of the [availability] clause in their contract").[8]

Any such ambiguity must be resolved in Respondents' favor. Congress has expressly mandated that the ISDA and self-determination contracts "be liberally construed for the benefit of the Contractor." 25 U.S.C. §450*l*(c), sec. 1(a)(2); see also *Neal & Co.* v. *United States*, 19 Cl. Ct. 463, 471-73 (1990) (holding that, because the government drafted the contracts, ambiguities are construed against it, just like any other drafter). Further, reflecting the "'unique trust relationship between the United States and the Indians,'" this Court has held that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Mon-*

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[8] The government made this admission in litigation over the government's duty to enter into ISDA contracts in the first place. *S. Ute Indian Tribe* v. *Sebelius*, 657 F.3d 1071 (10th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3431 (Dec. 19, 2011) (No. 11-762).

tana v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Accordingly, Respondent's construction of the contracts and ISDA, which the government concedes is "reasonable," must be accepted over the government's competing position.

3. Equally meritless is the government's claim that four provisions of the ISDA show that contractors are not "guarantee[d] ... *any* particular level of federal funding." Pet. Br. 38 (citation omitted) (emphasis added). Three of the government's four provisions recite the customary government-contract clause stating that the contract is "subject to the availability of appropriations." *Id.* at 38-41 (citing 25 U.S.C. §§450j(c)(1), 450j-1(b), 450*l*(c)). In *Cherokee*, this Court explained that this clause is a *timing* provision that affects *when* the contract becomes binding, not how much money a party is owed:

> This kind of language normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year. It also makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations.

543 U.S. at 643 (citations omitted). The Court stressed that the clauses do *not* give the government "the legal right to disregard its contractual promises" by changing the amount it pays once the contracts are in effect. *Id.* at 643-44. Provided Congress enacts an appropriation covering the contract—thereby making the appropriation legally available, see *infra* 31-34—the contract is binding, and the government cannot shortchange the contractor.

There is no reason to reach a different result here. Indeed, as noted, if the government had complete discretion concerning what to pay the Tribes, the contracts would cease being contracts at all, despite Congress's repeated use of the word "contract" and its express mandate that these agreements be fully enforceable. Considering that Congress clearly intended to remedy the agencies' past failure to reimburse indirect costs and "to *require* payment of those costs in the future," *Cherokee*, 543 U.S. at 639 (emphasis added), the government's argument fails.[9]

The government's fourth provision actually undermines its position. Pet. Br. 39. Section 450j-1(c) requires the Secretary to submit mid-year, annual reports to Congress specifying, among other things, "any deficiency in funds needed to provide required contract support costs to all contractors." 25 U.S.C. §450j-1(c)(2). Congress did not ask to be informed about mere "requested" contract support costs. It understood that contract support costs are determinate sums "*required*" to be paid under the ISDA and the contracts; hence the deficiency.

Moreover, Congress has demonstrated elsewhere that it knows how to use clear, precise language when it intends funding to vary according to appropriations. See, *e.g.*, 25 U.S.C. §2008(j)(2) (providing advance notice that, if total amount of all eligible Tribes' administrative cost needs exceeds appropriated funds, "the Secretary shall reduce the amount of" each Tribe's administrative cost funding "by [a *pro*

[9] The government's reliance on 25 U.S.C. §450j(c) is also misplaced for another reason: This provision plainly refers to multi-year contracts, which are not at issue here. *See* H.R. Rep. 93-1600, at 29 (1974); *infra* 45 n.16 (discussing same).

rata] amount"). No remotely comparable language exists in the ISDA.

4. Finally, the government seeks refuge in a single, irrelevant line in a single annual funding agreement. Pet. Br. 44-45. The "Billing" section of the Oglala FY 2000 funding agreement instructs the contractor preparing invoices to multiply its indirect cost amounts by the "'percentage of rate funded by BIA.'" *Id.* (quoting J.A. 132). According to the government, this provision proves that the parties "'recognized that contract support costs might not be fully paid.'" *Id.*

But the provision merely recognizes that the BIA pays out contract support costs in multiple distributions, not one single lump sum. Thus, the agreement specifies that the BIA will pay the Tribe an *initial* allocation of $29,459, reflecting 75% of the Tribe's expected contract support cost requirements for FY 2000, with the *balance* to "be added as soon as it becomes available subject to congressional appropriation." J.A. 123. Certainly, such language does not mean that the Tribe has agreed to forfeit the remaining 25%. Indeed, the contract elsewhere confirms that "[t]he Contractor is to be reimbursed for *all* allocable and allowable indirect costs incurred in performance of this contract, subject to any statutory limitations applicable." J.A. 132 (emphasis added). At most, the provision reflect ambiguity, which must be construed in favor of the Tribes. See 25 U.S.C. §450*l*(c), sec. 1(a)(2).

In any event, no annual funding agreement can supplant the Model Contract, which incorporates the ISDA and its full-funding obligation. §450*l*(a), (c), sec. 1(f)(2). Thus, the Oglala agreement cannot be read as vesting the agency with discretion to pay only a portion of contract support costs. See also *MAPCO Alaska Petrol., Inc.* v. *United States*, 27 Fed. Cl. 405, 416 (1992) ("The contractor cannot, by waiver, permit the Government to enter an illegal contract."), *abrogated on other grounds by Tesoro Haw. Corp.* v. *United States*, 405 F.3d 1339 (Fed. Cir. 2005); *LaBarge Prods., Inc.* v. *West*, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995); *Seldovia Vill. Tribe*, 03-2 BCA ¶32,400 (ICBA 2003).[10]

C. The Government Is Liable For Breach Even If Appropriations Are Insufficient To Cover All Of Its Contracts.

For over a century, it has been settled law that an agency is bound to its contractual promises regardless of whether Congress has appropriated enough money to cover all of the agency's contracts. The only qualification to this rule is that the appropriation must be large enough to pay the particular contract in dispute. So long as the appropriation equals or exceeds that particular contract, funds are legally available for the contract, and the government must honor its obligations, even if the appropriation is inadequate to pay all the agency's contracts taken together.

1. This bedrock rule derives from an 1892 Court of Claims case, *Ferris* v. *United States*, 27 Ct. Cl. 542. In *Ferris*, the contractor contracted with the U.S. Army Corps of Engineers to dredge a portion of the Delaware River for $37,000, to be paid out of a larger congressional appropriation for the improvement of the river. Before the contractor could complete the project, however, the Corps of Engineers ordered him to stop, because the larger appropriation had been exhausted. *Id.* at 545-46. The contractor sued for

[10] Of course, there is no argument that the Oglala contract compromises the rights of other Tribes.

damages and prevailed. Rejecting the government's argument that exhaustion of the appropriation excused payment, the court explained:

> 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. An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; *but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.*

Id. at 546 (second emphasis added). Thus, the contractor was entitled to recover his damages. *Id.* at 547.

The court's decision in *Ferris* flowed directly from its decision in *Dougherty* v. *United States*, 18 Ct. Cl. 496. In *Dougherty*, a meat merchant agreed to supply beef to the Department of the Interior under a contract to be paid from a general appropriation for subsistence of certain Indian Tribes. After the merchant completed performance, the Department discovered it had exhausted the appropriation through other contracts, and refused to pay. *Id.* at 502-03. The merchant sued, and, as in *Ferris*, the government defended on the ground of insufficient appropriations.

The court squarely rejected this argument, stating, "we have never held that persons contracting with the Government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department. To do so might block the wheels of the Government." *Id.* The court then explained: "The statutory restraints in this respect apply to the official, but *they do not affect the rights in this court of the citizen honestly contracting with the Government*." *Id.* (emphasis added). Depletion of the appropriated funds may have terminated the contracting official's authority to make further payments on the contract, but it did not excuse the agency's liability for breach on a fully performed contract.

The rationale for this rule is that "a contractor cannot justly be expected to keep track of appropriations where he is but one of several being paid from the fund." *Ross Constr. Corp.* v. *United States*, 183 Ct. Cl. 694, 699 (1968). In such cases, the risk that an agency might not have enough money lies instead with the government, for the contractor cannot be expected to know how much of the appropriation remains available at any given time. "A requirement to obtain this information would place an unreasonable burden on the contractor, not to mention a nuisance for the government as well." 2 GAO, *Principles of Federal Appropriations Law* 6-45 (3d ed. 2004) (hereinafter "GAO Redbook").

In the 120 years since *Ferris*, the rule has become a foundation of government contract law untouched by any subsequent congressional action. In case after case, the Court of Claims and its successor courts have consistently and expressly reaffirmed that exhaustion of a general appropriation does not relieve an agency from liability for breach of contract. See, *e.g.*, *Ross Constr.*, 183 Ct. Cl. at 699; *N.Y. Airways, Inc.* v. *United States*, 177 Ct. Cl. 800, 811 (1966) (per curiam); *Lovett* v. *United States*, 104 Ct. Cl. 557, 582 (1945), *aff'd*, 328 U.S. 303 (1946); *Whitlock Coil Pipe Co.* v. *United States*, 71 Ct. Cl. 759, 761-62 (1931); see also *Wetsel-Oviatt Lumber Co.* v. *United States*, 38

Fed. Cl. 563, 570 (1997); *N.Y. Cent. R.R.* v. *United States*, 65 Ct. Cl. 115, 128 (1928), *aff'd*, 279 U.S. 73 (1929); *N.Y. Cent. & Hudson River R.R.* v. *United States*, 21 Ct. Cl. 468, 473 (1886); 2 U.S.C. §622(2) (distinguishing between authority to obligate and expenditure); cf. *Viacom, Inc.* v. *United States*, 70 Fed. Cl. 649, 657 (2006).

Scholars, too, recognize that exhaustion of an appropriation does not discharge the government's liability for breach. See, *e.g.*, Alan I. Saltman, *The Government's Liability for Actions of Its Agents That Are Not Specifically Authorized: The Continued Influence of* Merrill *and* Richmond, 32 Pub. Cont. L.J. 775, 824 (2003); Kenneth Michael Theurer, *Sharing the Burden: Allocating the Risk of CERCLA Cleanup Costs*, 50 Air Force L. Rev. 65, 126 (2001); see also Nash & Cibinic, Cherokee Nation*: More Than Meets the Eye,* 19 Nash & Cibinic Report ¶29 (2005).

Indeed, the GAO Redbook, the federal government's own comprehensive and authoritative summary of federal funding law, verifies the *Ferris* doctrine's enduring place at the center of government contract law. This Court and others frequently rely on the Redbook as an "'expert opinion[]'" that courts should "prudently consider." *Thompson*, 334 F.3d at 1084; see *Cherokee* 543 U.S. at 643 (citing Redbook); *Lincoln* v. *Vigil*, 508 U.S. at 192 (same); *Republic Nat'l Bank of Miami* v. *United States*, 506 U.S. 80, 90 (1992) (plurality opinion) (same); see also *Int'l Union, United Auto Workers* v. *Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.).

According to the GAO, "it is *settled* that contractors paid from a general appropriation are not barred from recovering for breach of contract even though the appropriation is exhausted." 2 GAO Redbook 6-44 (emphasis added). Thus,

> 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. If the appropriation becomes exhausted, the Antideficiency Act may prevent the agency from making any further payments, but valid obligations will remain enforceable in the courts.

Id.; see, *e.g.*, *Lanier Bus. Prods.*, No. B-187969, 1977 WL 12991, at *4 (Comp. Gen. May 11, 1977).

The GAO further explains that the "legal availability" of funds for a project paid out of a general appropriation does not turn on whether the appropriation is large enough to cover *all* expenditures authorized by that appropriation. Rather, the inquiry turns on whether the particular "obligation and expenditure" at issue is "within the amounts Congress has established" (and whether its "purpose" is "authorized" and its occurrence "within the time limits applicable"). 1 GAO Redbook 4-6 (the time-purpose-amount rule). Thus, in *Newport News Shipbuilding & Dry Dock Co.*, the Comptroller General found that the full amount of an appropriation to build two ships was "legally available" to be spent on just one, even though spending the full amount on one would leave no money for the other. 55 Comp. Gen. 812, 821-22 (1976).

Congress has never modified, much less overturned, the *Ferris* rule in the 120 years that it has been a centerpiece of government contract law. If the fundamental default rule should be changed now, it should be changed by Congress alone.

2. This Court's decision in *Cherokee* confirmed that *Ferris* is controlling law. Citing *Ferris* four times, *Cherokee* expressly rejected the argument that "mu-

tual self-awareness among tribal contractors" that potential appropriations might not suffice to pay all contract support costs shifts the risk of insufficient funds from the government to the contractors. 543 U.S. at 640. The Court also cited *Ferris* to explain when funds are "availabl[e]" so as "to bind the Government." *Id.* at 643. And, consistent with *Ferris*, the Court held that the contractors were entitled to the full amount of their costs because Congress had "appropriated sufficient legally unrestricted funds to pay the contracts at issue." *Id.* at 637. That the Secretary allocated the appropriated funds to other uses was immaterial, given that, as the government itself admitted, "'if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds*.'" *Id.* at 641 (some emphasis added) (quoting Br. for Fed. Parties 23 (Sept. 3, 2004)). Exhaustion of an appropriation, this Court made clear, is not a defense to breach.

3. The one exception to this firm rule lies in cases in which the entire appropriation is insufficient to cover the *single* contract in dispute. In such cases, the contractor may properly be held to know that the agency is not obligated to pay the contract's total amount because the contractor need only compare the amount of the appropriation against the amount of the contract to know whether the government will be able to pay. See *Dougherty*, 18 Ct. Cl. at 503. Thus, the GAO instructs that when funding comes, not from a general appropriation for multiple contracts, but rather from a specific line-item appropriation restricted to a single project, "[e]xhaustion of the appropriation will generally bar any further recovery beyond that limit." 2 GAO Redbook 6-45; see *Sutton*

v. *United States*, 256 U.S. 575, 577-79 (1921) ($20,000 appropriation for dredging proved insufficient to pay the sole contractor); *Bradley* v. *United States*, 98 U.S. 104, 111-12 (1878) (line-item appropriation to pay a post office lease); see also *Hooe* v. *United States*, 218 U.S. 322, 333 (1910); *Shipman* v. *United States*, 18 Ct. Cl. 138, 146 (1883).

This case, however, involves a general appropriation, not a line-item appropriation. For each fiscal year at issue, Congress appropriated a lump sum for *all* contractors' contract support costs, without restricting or specifying particular amounts for particular contractors. The funds are thus "unrestricted" in the *Ferris* and *Cherokee* sense. *Cf. Cherokee*, 543 U.S. at 640 (citing *Ferris* and holding that that the government "should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors"). Indeed, at times, the appropriations committees contemplated line-item appropriations for specific contractors, but each time chose not to include them. H.R. Rep. 107-234, at 122 (2001) (Conf. Rep.) ("As in past years, there is no specific earmark for any individual tribe for contract support costs."). Under *Ferris*, then, because this case involves a lump-sum rather than a line-item appropriation, the insufficiency of the appropriation to pay *all* Tribes is immaterial. Because Congress appropriated enough unrestricted funds to pay each contract, the government remains liable.

II. THE STATUTORY CAP DOES NOT EXCUSE THE GOVERNMENT'S BREACH.

Despite the plain terms of the ISDA and over 120 years of foundational government contract law, the government nevertheless contends that it is free to breach these contracts with impunity. According to the government, because Congress imposed statutory caps on the appropriations to the BIA, Congress intended to allow the BIA to renege on contracts after over-committing itself, to render the Judgment Fund unavailable, and to prevent the contractors from obtaining any judicial redress. For several reasons, this argument fails.

A. The Government's Position Contradicts 120 Years Of Government Contract Law.

1. The government tries to avoid the well-established *Ferris* doctrine by claiming that the appropriations in *Ferris* and *Dougherty* did not contain statutory caps. Pet. Br. 49. This distinction is fictitious.

Contrary to the government's suggestion, the appropriation in *Ferris* provided a capped amount for a particular purpose, stating: "For improving [the] Delaware River below Bridesburg, Pennsylvania, forty-five thousand dollars." Act of Mar. 3, 1879, ch. 181, 20 Stat. 363, 364; see *Ferris*, 27 Ct. Cl. at 544. The *Dougherty* appropriation followed the same formulation.[11] As the GAO instructs, this formulation ("for" followed by a purpose and an amount) has the "same effect" as "[w]ords like 'not more than' or 'not to exceed.'" 2 GAO Redbook 6-28 to -29. There is, therefore, no difference between the caps in *Ferris* and *Dougherty* and the caps at issue here.

Likewise, the appropriations at issue in *Cherokee* were also capped. The FY 1995 appropriation, for instance, stated: "For expenses necessary to carry out ...

[11] Although *Dougherty* does not identify the appropriations act at issue, 18 Ct. Cl. 496, examination of the *Dougherty* case file indicates that the appropriation was likely: "For subsistence of [certain] Indians ... , three hundred thousand dollars." Act of Mar. 3, 1875, ch. 132, 18 Stat. 420, 423.

the [ISDA], the Indian Health Care Improvement Act, and [several other laws], $1,713,052,000." Pub. L. 103-332, 108 Stat. 2499, 2527-28 (1994); see *Cherokee*, 543 U.S. at 637. That appropriation restricted agency expenditures to a sum certain ($1,713,052,000), just as the appropriations here restricted contract support costs to a sum certain.[12] Indeed, except for a handful of appropriations for indefinite amounts, such as the Judgment Fund, virtually all appropriations are capped, because Congress generally does not write blank checks. Nonetheless, for 120 years, courts have held that these caps do not shift the risk of agency over-commitment to the contractor.

Moreover, there is no logical basis for distinguishing among the caps. Whether the cap is on the type of expenditure (as here), the type of project (as in *Ferris*: "improving the Delaware River"), or the agency as a whole (as in *Cherokee*), the cap limits appropriations just the same. In all three instances, the statutorily limited, lump-sum amount is sufficient to pay the contract at issue but insufficient to pay all of the commitments covered by the appropriation. Accordingly, in each situation, the long-settled rule has been that the contractor is not charged with knowing whether the agency has exhausted the appropriation

[12] To be sure, the statutory caps produce one difference from the *Cherokee* appropriations, in that IHS was free in *Cherokee* to reprogram funds to pay the contract support costs fully (and not fund other commitments and priorities), 543 U.S. at 641, whereas that option ended once contract support funds were separately earmarked. It was in connection with the reprogramming option that the *Cherokee* petitioners addressed the "not to exceed" earmark. Pet. Br. 27. But it remains true that both cases involve caps and, within the capped appropriation, funds are legally available to pay each individual contract.

by paying other contractors. See 2 GAO Redbook 6-45; *e.g.*, *N.Y. Airways*, 177 Ct. Cl. at 811 (applying *Ferris* in context of earmarked appropriation for contract subsidy to be paid to multiple air service contractors); *Schuler & McDonald, Inc.* v. *United States*, 85 Ct. Cl. 631, 642 (1937) (awarding damages for breach even though "'available cash'" under "'roads and trails appropriation'" had been "'completely exhausted'"); *N.Y. Cent. & Hudson River R.R.*, 21 Ct. Cl. at 469, 473 (applying *Dougherty* in context of a "'special appropriation'" of $150,000 for "'obtain[ing] proper facilities from the great trunk lines of railroads for the railway post-office service'"). Regardless of the type of cap, the contractor's ability to assess whether the agency has mismanaged its funds or otherwise over-committed or overspent is identical; and the agency, not the contractor, bears all of these risks. See, *e.g.*, 2 GAO Redbook 6-45.

2. In any event, even if *Ferris*, *Dougherty*, and their progeny did not involve capped appropriations akin to the cap at issue here (and they clearly did), the government's argument that Congress shifted the risk to the contractors would still fail. The government bears a heavy burden of showing that Congress intended to disturb the 120-year-old bedrock principle of government contract law that the risk of over-committing funds falls on the agency. Indeed, "Congress will be presumed to have legislated against the background of our traditional legal concepts." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978); see, *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-85 (1988). And, the "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank* v. *N.J. Dep't of Envtl. Prot.*, 474

U.S. 494, 501 (1986). The expression of intent needed to change course should be even more clear where, as here, the background law has existed for well over a century and has supplied a foundation for government contracting, an area in which "uniform interpretation of similar language" is paramount, *Cherokee*, 543 U.S. at 644.

Congress gave no indication, however, that it intended to depart from *Ferris*'s foundational principle that the risk of over-commitment remains with the agency. The mere use of the words "not to exceed" does not suffice. That is a commonplace formulation for capping appropriations, signals nothing about the rights of contractors to recover damages in a lawsuit for breach, and says nothing about the availability of the Judgment Fund to pay those damages. With these three words, Congress did not signal that it sought to unsettle government contract law and to undermine the century-old protections that *Ferris* has provided contractors. The clause simply limits the BIA's use of appropriations, thereby protecting funding for non-contracting Tribes, see, *e.g.*, Pet. Br. 19, 28 (recognizing that clause serves this purpose), but it does not limit contractors' rights to damages for breach. Likewise, the "notwithstanding" clause that Congress started adding to appropriations in FY 1999 does not change the result, and no one is arguing that it does. *E.g.*, Pub. L. 105-277, 112 Stat. at 2681-245. Limiting only the BIA's use of appropriations, that clause does not purport to transform government contract law, overturn *Ferris*, authorize breach, and preclude all damages remedies.

This Court should be especially reluctant to impute special meaning into these generic words in the appropriations statutes considering the extreme consequences of such a shift. If, as the government asserts, the statutory caps allow the Secretary to pay whatever "equitable distribution" he wants (whether *pro rata* or otherwise), it would be "'madness'" for contractors to enter into future agreements. *Winstar*, 518 U.S. at 863 (plurality opinion). "A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *Id.* at 913 (Breyer, J., concurring) (quoting *Murray*, 96 U.S. at 445). Contractors would be at the whim of the agency.

Finally, the government's position would fatally undermine one of the central purposes of the ISDA. As this Court recognized in *Cherokee*, the Act "reflects a congressional concern with Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future." 543 U.S. at 639. Under the government's logic, however, at the same time that Congress sought to address the Government's failures to reimburse Tribes, and "to require" future payment of contract support costs, it simultaneously began to vest the BIA with unfettered discretion *not* to pay those same contract support costs.[13] That simply makes no sense.

[13] The first two statutory caps (for FY 1994 and 1995) were adopted in November 1993 and September 1994. Pub. L. 103-332, 108 Stat. at 2511; Pub. L. 103-138, 107 Stat. at 1390-91. Even at that time, the ISDA's full-funding obligation was clear. *See* Pub. L. 100-472, §205(g), 102 Stat. at 2294 (adding §450j-1(g) (1988)) ("the Secretary *shall add* the indirect cost funding amount" (emphasis added)). Then, just a month after enacting the FY 1995 cap, Congress passed the 1994 ISDA amendments, which underscored the full-funding obligation, requiring use of the Model Contract and mandating that "the Secretary shall add to the contract the full amount of funds to which the contractor is entitled." Pub. L. 103-413, §102(g), 108 Stat. at 4259; 25 U.S.C. §450j-1(g); *see supra* 5-8.

Indeed, the government's position requires drawing the implausible conclusion that the statutory caps on appropriations impliedly amended the ISDA. This position "surely do[es] violence to the 'cardinal rule ... that repeals by implication are not favored.'" *TVA* v. *Hill*, 437 U.S. 153, 189 (1978) (omission in original). According to this rule, a repeal "'will not be presumed unless the intention of the legislature to repeal'" is "'clear and manifest.'" *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009); see also *Georgia* v. *Pa. R.R.*, 324 U.S. 439, 456-57 (1945). The rule "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act," which has "the limited and specific purpose of providing funds for authorized programs." *TVA*, 437 U.S. at 190.

Assuredly, Congress did not effect an implied repeal of the ISDA when it passed the appropriations at issue. At the very least, the statute is ambiguous, and as such, it must be construed in favor of the contractor. See *supra* 24-25.

3. Unaided by the statutory text, the government turns to legislative history. But, even if the legislative history behind an appropriations statute could ever impliedly and unambiguously repeal substantive law—and it cannot, see *TVA*, 437 U.S. at 191 ("Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress …."); *Cherokee*, 543 U.S. at 646 ("restrictive language contained in Committee Reports is not legally binding")—the history here does not come close.

Rather, the appropriations committee reports are, at best, ambiguous and reflect varying intentions regarding the statutory caps. Some reports indicate that the capped amounts were expected to "fund fully contract support costs." H.R. Rep. 103-158, at 55

(1993); see also S. Rep. 103-114, at 52 (1993) (with first cap "the Committee believes the program should be adequately funded to avoid shortfalls in [FY] 1994").

Other statements acknowledge that there could be a shortfall in contract support funding, but explain that the caps were simply imposed to ensure that funds were available to provide services to non-contracting Tribes, since without the cap, such funds could be reprogrammed to pay contract support costs. S. Rep. 103-294, at 57 (1994); see H.R. Rep. 103-299, at 28 (1993) (Conf. Rep.).[14] Committee members expressed a similar intention when they added language to the statutory cap providing that it applied "notwithstanding any other provision of law, including but not limited to the [ISDA]," *e.g.*, Pub. L. 105-277, 112 Stat. at 2681-245 (1998). See H.R. Rep. 105-609, at 57 (1998) ("[w]ithout a ceiling on contract support, the Bureau could be required to reprogram from other tribal programs").

Of course, a desire to protect federal services for non-contracting Tribes does not translate into an intent to shortchange contracting Tribes and to deprive them of all judicial redress, including access to the Judgment Fund. To the contrary, various committee reports acknowledged that the ISDA "implies a 100 percent funding requirement" for contract support costs, and that the caps therefore leave the government "vulnerable to litigation." H.R. Rep. 106-406, at

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[14] This concern for protecting non-contracting Tribes became more serious after this Court's 1993 decision in *Lincoln* v. *Vigil*, 508 U.S. 182, which confirmed that the Secretary had complete discretion to alter or rescind non-contractual tribal programs funded under a general appropriation.

137 (1999) (Conf. Rep.); see also H.R. Rep. 103-551, at 56-57 (1994) (acknowledging risk of "future claims"). Most importantly, nowhere in the legislative history did Congress say that it sought to overturn *Ferris* and 120 years of bedrock government contract law, to allow the government to breach with impunity, to render the contracts illusory, and to undercut the very ISDA protections that it enacted at the same time it passed the appropriations statutes. Legislative history cannot bear the weight the government's argument places on it.

4. The government's other reasons to depart from *Ferris* are equally unavailing.

a. The government cites the Antideficiency Act, but its predecessor statutes were present when *Dougherty* and *Ferris* were decided. 2 GAO Redbook 6-34 to -35. As those cases explained, the Antideficiency Act's requirements of an appropriation "apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government." *Dougherty*, 18 Ct. Cl. at 503; *Ferris*, 27 Ct. Cl. at 546 (appropriation "merely imposes limitations upon the Government's own agents" and does not "cancel its obligations, nor defeat the rights of other parties"). The Act has been consistently construed ever since. *Supra* §I.C; 2 GAO Redbook 6-44 (while the "Antideficiency Act may prevent the agency from making any further payments," the contractor's rights "will remain enforceable in the courts"). Moreover, the contracts were binding and authorized by the ISDA. See Pet. 44a. Thus, regardless of any duties the Secretary has under the Act, it does not impair the contractor's express rights under the ISDA to sue for breach and to obtain damages "in the courts." *Id.* And, again, Congress has never modified the Antideficiency Act in the face of those long-standing and authoritative interpretations of its language.

b. Next, the government once again returns to an argument that this Court rejected in *Cherokee*. According to the government, it does not owe the Tribes their contract support costs because of the ISDA's routine "subject to the availability of appropriations" clause. But, as discussed, *supra* 25-26, *Cherokee* made clear that this language does not bestow on the government "the legal right to disregard its contractual promises." 543 U.S. at 644. Instead, the clause is a timing provision that was satisfied once Congress enacted these appropriations statutes. *Id.* at 643.

The availability clause does not remotely "overcome the *Ferris* rule." *Contra* Pet. Br. 50. To the contrary, *Cherokee* cited *Ferris* in explaining what the clause actually means. As *Cherokee* stated, the clause clarifies that an agency lacks "special statutory authority to bind the Government without regard to the availability of appropriations." 543 U.S. at 643 (citing *Ferris*). That truism, however, plays no role in this case because, again, appropriations were legally available for each contract. *Contra* Pet. Br. 32.[15]

[15] The government's fleeting reference (Pet. Br. 50) to *C.H. Leavell & Co.* v. *United States*, 208 Ct. Cl. 776 (1976) (per curiam), is inapposite. *Leavell* involved a multi-year contract that repeatedly stated that the contractor was not to proceed with work in later years unless and until it received written notice that the contracting officer had sufficient funds, and further stated that absent such notification the government would "in no case [be] liable" for a shortfall. *Id.* at 805-08. The contractor then received advance notice. The case turned on the express language of the contract, which is nothing like the availability clause at issue here. *Winston Bros. Co.* v. *United States*, 130 F. Supp. 374 (Ct. Cl. 1955), which the government cited below but not to this Court, is in accord. *Id.* at 376-78 (multi-year con-

Indeed, not even the government believes its argument. Elsewhere, the government concedes that the availability clause makes no difference. Pet. Br. 31. According to the government, the clause is actually "'unnecessary'" because, with or without the clause, an agency does not have "'implied direct spending authority.'" *Id.* The clause is no excuse to disregard *Ferris*.

c. The government next relies on the principle that "the United States cannot be bound in contract by agents acting without actual authority." *Id.* at 33. According to the government, the Secretary lacked actual authority (despite ISDA §§450f(a)(1)) because the appropriation was insufficient to cover all contractors' contract support costs. Pet. Br. 32-34. But this is nothing more than a direct assault on *Ferris*.

Further, none of the cases cited by the government (*id.* at 33-35) contradicts *Ferris* or supports the government's assertion. Most of the cited cases deal with a line-item appropriation for a single contractor, and in that situation, it is reasonable to require the contractor to bear the risk. See *Sutton*, 256 U.S. at 582; *Hooe*, 218 U.S. at 333; *Bradley*, 98 U.S. at 115-16; see also *supra* 33-34 (contrasting *Ferris* with cases in which the appropriation is inadequate to pay the single contract). Other cases rejected claims because there was no applicable appropriation at all. *St. Louis Sw. Ry.* v. *United States*, 262 U.S. 70, 72 (1923) (rejecting the plaintiff's claim for payment for delivering parcels because he had no contract nor were there any appropriations for the period in question); *Ree-*

tract, advance notice, and express release of liability); *see also* 3 GAO Redbook 13-187; *infra* note 16. In any event, *Cherokee* controls, and *Cherokee*'s treatment of *Ferris* confirms that *Ferris* is not "overcome."

side v. *Walker*, 52 U.S. (11 How.) 272, 291 (1850) (holding, before Congress enacted the Judgment Fund, that a judgment of indebtedness could not be paid absent an appropriation by Congress).[16] And, in *United States* v. *Jones*, 121 U.S. 89 (1887), the Court denied payment both because there was no applicable appropriation, and because Congress had never authorized the contracts in the first place. *Id.* at 99, 101 ("the contract on its face shows that it was made with reference to appropriations to be thereafter made," and Congress never "suppl[ied] the want of authority … to contract, in behalf of the United States, for the subsistence of the Indians in advance of the ratification of the treaties negotiated with them").[17]

There is no case cited by the government or found by Respondents in which any court has ever held that, when an appropriation is sufficient for the contract at issue but insufficient for all of the agency's commitments, the agency can avoid its contractual obligations solely on the ground that it lacked actual authority to over-commit itself.[18] That is no surprise

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[16] *Leiter* v. *United States*, 271 U.S. 204 (1926), turned on the related principle that when a contract for multiple years is "entered into under an appropriation available for but one fiscal year," the contract "is binding on the Government only for that year." *Id.* at 206-07. This issue is not present here because annual funding agreements last for only one year.

[17] *See also Hensley* v. *United States*, 7 U.S. Cong. Rep. C.C. 189 (Ct. Cl. 1859), *available at* 1859 WL 5367, at *11-12 (holding agent lacked authority to execute contracts at issue in *Jones*, *see* 121 U.S. at 96-97 (referring to *Hensley*)).

[18] Of course, an agent may lack actual authority to enter into a contract for reasons besides insufficient appropriations, such as the contract not meeting regulatory requirements. *E.g.*, *Fed. Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-84 (1947). Those

because the rationale for this "actual-authority" rule is entirely inapposite. In other contexts, actual authority is required because "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler* v. *Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984); see, *e.g.*, *Merrill*, 332 U.S. at 384-85 ("Regulations were binding on all who sought to come within the [Act], regardless of actual knowledge of what is in the Regulations"); *Whiteside* v. *United States*, 93 U.S. 247, 257 (1876) ("ignorance of the law furnishes no excuse").

But, as this Court recognized in *Cherokee*, and as the Court of Claims recognized in *Ferris* and *Dougherty*, it makes no sense to expect contractors to know what an agency is doing with its own money. See *supra* §I.C; 2 GAO Redbook 6-45. There is no "law" to consult, only facts wholly within the agency's control. Thus, *Cherokee* rejected the claim that "the tribe should bear the risk that a total lump-sum appropriation (though sufficient to cover its own contract) will not prove sufficient to pay *all* similar contracts." 543 U.S. at 638.

Indeed, not even the government is willing to follow the logic of its own argument. On the government's theory, a self-determination contract that obligates the government to pay in excess of the appropriation "would be without legal effect" as an "*ultra vires* promise." Pet. Br. 32. This would mean that the earlier-signed contracts that did *not* push the agency's collective obligations beyond the appropriation pose no problem; it is only later-signed contracts that push

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cases are inapposite because the government's only defense here is insufficiency of appropriations.

the Secretary's obligations beyond the cap that would be invalid. Yet, the government does not believe that the earlier-signed contracts should be paid in full or that the later-signed contracts are invalid and worthless. Instead, the government invokes the agency's over-commitment as a license to force *all* contractors to take a haircut (sometimes *pro rata*, sometimes *pro bono*, sometimes something else) in the agency's sole discretion. Neither the government's actual-authority argument, nor any of the cases the government cites, supports this novel approach. Rather, the correct approach is the one that courts have followed for over 120 years: The risk of over-commitment falls on the agency, not the contractor, and thus the government's breach is fully compensable.

d. The government is also mistaken in contending that the tribal contractor's "aware[ness]" of "the insufficiency of the appropriations" should bar recovery. Pet. Br. 49-50. This too was argued and squarely rejected in *Cherokee*. See Br. for Fed. Parties 25 ("all Tribes also are fully aware that there is a threshold allocation of funds"); *id.* at 12-13 (IHS allocated funds "in consultation with the Tribes"); *Cherokee*, 543 U.S. at 638-39. There is no basis for reversing course today. Neither *Ferris* nor *Cherokee* nor any case in between turned on a factbound, contractor-by-contractor assessment of what each contractor actually knew and when. Instead, the rule is simple and straightforward: "'A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration ....'" *Id.* at 637-38 (quoting *Ferris*, 27 Ct. Cl. at 546).[19]

[19] Nor does it matter that the contractors brought suit as a class. To be sure, the appropriated funds for contract support were insufficient to cover all of the class members' claims. But

At any rate, the incomplete notices the BIA provided cannot possibly excuse the Secretary's breach. It is "hornbook law" that the government, like any other party to a contract, is not free simply to announce its intention not to perform and then walk away. *La.-Pac. Corp.* v. *United States*, 656 F.2d 650, 652 (Ct. Cl. 1981). Rather, when a party gives notice that it intends not to perform, the party "repudiates" the contract and thereby becomes liable for damages for breach. See Restatement (Second) of Contracts §§250, 253; see also *Mobil Oil*, 530 U.S. at 608. Moreover, as a practical matter, the actual payment notices did not arrive until near the end—or even after the close—of the fiscal year, by which point the contractors had already fully performed or close to it.[20] Since 2006, the agencies have provided no notice and instead have adopted a system under which some contractors are fully paid, some are partially paid, and some receive nothing at all. *Supra* 9-10. Thus, no contractor has any way of knowing whether or not it will be fully paid (or even *over*paid) until after it has performed, regardless of any prior "consultation" with the government.

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the *Ferris* doctrine requires that individual contractors' claims be treated individually. And the fact that the contractors have elected the procedural device of a class action cannot "'abridge'" their "'substantive right[s].'" *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting Rules Enabling Act, 28 U.S.C. §2072(b)).

[20] A party's anticipatory repudiation triggers the other party's duty to mitigate damages, which in turn affects the amount of damages to be recovered. Restatement (Second) of Contracts §350 cmt. b. The government is not, however, asserting that its notices repudiated the contract nor that Respondents failed to mitigate damages—nor that the result differs for years in which no notice issued.

e. The government's final attempt to avoid the *Ferris* doctrine rests upon 25 U.S.C. §450j-1(b), which provides that 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.'" Pet. Br. 51-52. According to the government, this provision is an affirmative grant of discretion to the Secretary that "frees" him to "adopt … equitable mechanism[s] for distributing among tribal contractors whatever sum Congress elects to appropriate in a given year." *Id.* at 52. This reading is utterly implausible, however, in light of the numerous provisions Congress added to the ISDA to foreclose the Secretary's claims of discretion over contract support cost distribution. *Supra* 5-8.

Moreover, Respondents are not claiming that the Secretary should have reduced another Tribe's payment, whether under the ISDA contracts or otherwise. Rather, Respondents claim only that the government must fulfill its contractual commitments, and when it does not, it must pay damages for breach just like any other contracting party. By its terms, §450j-1(b) protects the secretarial amounts of other Tribes, but it does not authorize the BIA to short-change contractors who are owed contract support costs.

B. Damages Are Properly Paid From The Judgment Fund.

The Judgment Fund is available to pay contract damages, satisfying the Appropriations Clause and distinguishing *OPM* v. *Richmond*, 496 U.S. 414, 431-32 (1990). Congress enacted the Judgment Fund precisely to cover situations like this, 31 U.S.C. §1304(a), and the Contract Disputes Act, which applies to ISDA contracts, 25 U.S.C. §450m-1(d), expressly refers to the Judgment Fund in addressing payment of damages awards. 41 U.S.C. §7108(a). Moreover, *Cherokee* recognized that tribal contractors may recover from the Judgment Fund. 543 U.S. at 643-44.

1. The government notes that the Judgment Fund is available only when "payment is not otherwise provided for," 31 U.S.C. §1304(a), and argues that "the annual appropriations" for contract support costs "otherwise provide for" payment. Pet. Br. 53. But the "payment" that must not be "otherwise provided for" is the payment of "final judgments" for money damages. 31 U.S.C. §1304(a). Like any other "'agency operating appropriation[],'" the contract-support-cost appropriations "'are not available to pay judgments against the United States.'" *Samish Indian Nation* v. *United States*, 657 F.3d 1330, 1341 (Fed. Cir. 2011) (quoting 3 GAO Redbook 14-31). Thus, the Judgment Fund is the only proper source of Respondents' recovery. Indeed, under the government's theory, damages recoveries in government contract litigation would never be available from the Judgment Fund because every government contract is paid out of some appropriation.

2. Equally meritless is the government's claim, Pet. Br. 54, that the reimbursement provision of the Contract Disputes Act, 41 U.S.C. §7108(c), bars Respondents' recovery from the Judgment Fund. This provision directs "the agency whose appropriations were used for the contract" that led to a judgment to reimburse the Judgment Fund "out of available amounts or by obtaining additional appropriations for purposes of reimbursement." *Id.*

On its face, the provision is plainly directed to the agency, not the contractors. The government cites no case, and we are aware of none, that holds or even remotely suggests that this reimbursement provision undermines the rights of contractors and implicitly amends the scope of the Judgment Fund, allowing the government to breach with impunity. Indeed, the provision does not even bind the agencies because it is not legally enforceable. See GAO, GAO-04-481, *Judgment Fund* 11 (2004) (statutes provide "no sanctions that will compel agencies to reimburse the Treasury, and no Treasury authority to take money owed directly from the agency").[21]

Moreover, the provision does not render the statutory caps "pointless." Pet. Br. 54. The government's argument assumes that the point of the caps is to shortchange the Tribes and to allow the agency to breach contracts. Because that assumption is false, the government's argument fails. Whether or not the BIA is required to make reimbursement, the caps continue to have the effect of segregating agency funds that are not legally available for contract support costs from those that are, thereby protecting funding for non-contracting Tribes.[22] *Supra* 41-42. The government elsewhere concedes this is the purpose of the caps. Pet. Br. 19, 28. But, even if the non-binding reimbursement provision were "pointless" (as non-binding provisions often tend to be), that is no basis for disregarding the Judgment Fund, abandoning the venerable *Ferris* doctrine, and allowing

[21] The BIA has never repaid any of the judgments awarded against it in the long history of this litigation. *See* GAO, GAO-08-295R, *The Judgment Fund: Status of Reimbursements* 9 (2008).

[22] Nor is there any risk that the BIA's reimbursement obligation would threaten ongoing tribal programs because funds needed for ongoing agency programs are not "available" to repay the Fund. Comp. Gen. Op. B-27990.25-O.M. (1987); GAO-04-481, *Judgment Fund* 10-11.

the government to breach contracts without paying damages.

In any event, even if these statutory provisions were ambiguous, the decision below must be affirmed. As discussed, any ambiguity must be resolved in favor of the tribal contractors.

C. Awarding Damages Does Not Undermine Congress's Control Over Appropriations.

Finally, the government asserts that the *Ferris* doctrine "undermine[s] Congress's ability to control expenditures." Pet. Br. 47. The government even suggests that affirming the decision below would turn agencies loose to obligate the government to infinite liability, so long as each individual obligation is a dollar less than the appropriated amount. See *id.* at 21, 47.

This argument is a distraction. First, as the government contends (*id.* at 24), it is generally a federal crime for agencies to obligate the government beyond an appropriation, thus providing a deterrent. See 31 U.S.C. §§1341(a), 1350. But see 25 U.S.C. §450f(a)(1). Second, precisely because of concern for such liability, the government has established stringent requirements for the making and recording of obligations in order to prevent exhaustion of appropriations. See 31 U.S.C. §1501; 2 GAO Redbook 7-6 to -59.

At bottom, the source of the government's problem here is that Congress mandated that the agencies enter into all qualifying self-determination contracts with full payment of contract support costs, but at the same time underfunded the agency. Just as Congress created the problem, it has the power to fix it. See GAO, GAO/RCED-99-150, *Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need* *to Be Addressed* 54-63 (1999) (discussing options available to Congress); Pet. 46a.

For example, Congress could amend the ISDA to remove the agencies' statutory mandate to enter into contracts, or it could give the agencies authority to negotiate lower contract support cost obligations. Cf. *N.Y. Airways*, 177 Ct. Cl. at 808 (Congress could avoid liability by "changing the substantive law … , rather than by curtailing appropriations"). Alternatively, Congress could pass a moratorium on the formation of new self-determination contracts, as it has done before. See Pub. L. 105-277, §328, 112 Stat. at 2681-291 to -292. Or, Congress could enact true line-item appropriations for particular contractors, giving contractors notice that they would receive only certain amounts. Congress previously contemplated such line-item appropriations but declined to enact them. H.R. Rep. 107-234, at 122 (Conf. Rep.). Congress could also decide to eradicate self-determination contracts and replace them with a system of non-binding grants. Finally, Congress could simply appropriate sufficient funds to cover the contracts, as it recently did for FY 2012. H.R. Rep. 112-151, at 42 (2011).

But, for the periods in question, Congress did not exercise any of these options, and this Court must enforce the choices Congress made. Congress chose to authorize self-determination contracts that create legally binding obligations to pay full contract support costs. Further, it established a mechanism for contractors to bring suit and recover money damages for breach. 25 U.S.C. §450m-1(a). The most that Congress's seemingly schizophrenic statutory scheme creates is ambiguity, and in that circumstance, the decision below must be affirmed.

III. THE GOVERNMENT CANNOT DEFEND ON GROUNDS OF INSUFFICIENT APPROPRIATIONS BECAUSE IT DID NOT SEEK SUFFICIENT APPROPRIATIONS.

Alternatively, the government's claim that the insufficient appropriations excuse its breach also fails for an independent reason: The government did not even try to obtain sufficient appropriations to meet its obligations to all contractors.

Under *S.A. Healy Co.* v. *United States*, the United States cannot defend a breach of contract claim on the basis of an availability clause when the agency did not request sufficient appropriations, unless the contract expressly and clearly shifted to the contractor the risk that the agency may not seek sufficient appropriations to meet its contract obligations. 576 F.2d at 300-05; see *San Carlos Irrigation & Drainage Dist.* v. *United States*, 23 Cl. Ct. 276, 283 (1991) (rejecting appropriations defense because "the BIA did not attempt to obtain appropriations from Congress"). In addition, the United States is bound by the "covenant of good faith and fair dealing" not to "act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp.*, 395 F.3d at 1304-05. These common-sense rules that apply to all government contracts ensure that a contractor whose contract is subject to the availability of appropriations does not shoulder the risk that the contracting agency will fail even to *request* the appropriations needed to fulfill its end of the bargain. When the government receives the benefit of a contract, it should take all reasonable measures to ensure full satisfaction of its contractual commitments.[23]

The circumstances necessary to the United States' insufficient-appropriations defense are absent here. First, there is no dispute that, in each relevant year, the Executive Branch's annual budget submitted to Congress did not request sufficient funds to meet the contract support cost need. *E.g.*, J.A. 208-21; Cir. J.A. 231. And, second, nothing in the Model Contract shifts the risk of an insufficient request to the contractor.

In the court of appeals, the government contended that the Secretary satisfied his obligation to seek sufficient funding, not by requesting the necessary appropriations, but by filing contract payment shortfall reports pursuant to 25 U.S.C. §450j-1(c). But the Secretary never submitted timely reports before 1998, and for most years since then, the Secretary submitted *no* reports, and when he did, they were late. *Supra* 10. In any event, even timely reports, which are among thousands of reports Congress receives annually and which do not request funding, would not satisfy the Secretary's burden to request sufficient funding. Having failed to ask for adequate appropriations, the agency's claim of poverty is no defense to breach. *S.A. Healy*, 576 F.2d at 300-05; *Centex Corp.*, 395 F.3d at 1311.

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[23] *See also Collins* v. *United States*, 15 Ct. Cl. 22, 35 (1879) (contract liabilities may be created where there is no appropriation to pay obligations); *Gibney* v. *United States*, 114 Ct. Cl. 38, 50-53 (1949) (same); *AT&T Co.* v. *United States*, 177 F.3d 1368, 1375-76 (Fed. Cir. 1999) (en banc) (invalidation of contract after full performance "is not favored").

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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