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IN THE SUPREME COURT OF THE UNITED STATES

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KEN L. SALAZAR, SECRETARY OF THE :

INTERIOR, ET AL., :

Petitioners : No. 11-551

v. :

RAMAH NAVAJO CHAPTER, ET AL. :

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Washington, D.C.

Wednesday, April 18, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 a.m.

APPEARANCES:

MARK R. FREEMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:11 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-551, Salazar, Secretary of the Interior v. Ramah Navajo Chapter.

Mr. Freeman.

ORAL ARGUMENT OF MARK R. FREEMAN

ON BEHALF OF THE PETITIONERS

MR. FREEMAN: Mr. Chief Justice, and may it please the Court:

The funding dispute in the -- in this case is the result of two distinctive features of the ISDA's statutory scheme. On the one hand, Congress has required the Secretary of the Interior to accept every self-determination contract proposed by an Indian tribe, provided that the contract meets the requirements of the Act, without regard to the total number of contracts into which the Secretary must enter.

Now, on the other hand, in every fiscal year since 1994, Congress has enacted an explicit statutory cap on the amount of money that the Secretary may use to pay contract support costs under the ISDA and under those contracts.

Now, we think under the circumstances, Congress intended the Secretary to resolve these -- the

1 relationship between these provisions in exactly the way
2 that the Secretary has.

3 JUSTICE SOTOMAYOR: Excuse me, but could the
4 Secretary have done anything else?

5 MR. FREEMAN: I'm sorry. I couldn't hear
6 Your Honor.

7 JUSTICE SOTOMAYOR: Could the Secretary have
8 done anything else? There's an allegation that the
9 Secretary in fact pays some contractors more than their
10 pro rata share, that it pays some nothing --

11 MR. FREEMAN: Right.

12 JUSTICE SOTOMAYOR: -- so that it's in
13 effect acting -- I don't want to use the word
14 "arbitrarily" -- but acting in whatever its best
15 interest is. So what protects the contracting party
16 from that -- from that conduct, assuming it were to be
17 correct?

18 MR. FREEMAN: Yes, Your Honor. Well, the
19 Secretary has promulgated a formal nationwide policy.

20 JUSTICE SOTOMAYOR: Says it has a policy.

21 MR. FREEMAN: Yes, and --

22 JUSTICE SOTOMAYOR: The allegation is, is
23 that it's not following it, that it's choosing to pay
24 people some more than others.

25 MR. FREEMAN: Right. And let me address

1 that. The allegation is, I think, at page 9 to 10 of
2 Respondents' brief. Those allegations are, as a factual
3 matter, false. For example, they've given a couple of
4 examples where 0 percent contract support costs were
5 paid. One of those examples is a contract where it had
6 been entered into in that particular year. New
7 contracts are paid under a different appropriation.
8 Another example is they give a case of a tribe that was
9 paid 352 percent of its contract support costs.

10 And let me explain, because I think it's
11 important to understand how --

12 JUSTICE GINSBURG: Before you do that --

13 MR. FREEMAN: Yes.

14 JUSTICE GINSBURG: It was my understanding
15 that that system, that has been described as arbitrary,
16 was not the one that was applicable to the years in
17 question.

18 MR. FREEMAN: That's right. At -- at the
19 time of the district court's ruling in this case, from
20 1994 to about 2006, the Secretary followed a uniform pro
21 rata distribution methodology according to the needs of
22 each of the individual tribes. Now, that's what we
23 thought the tribes wanted. We thought that was the
24 fairest way to do it.

25 JUSTICE KENNEDY: And all within the -- all

1 within the dollar amount that was specified by the
2 Congress in the "not to exceed" language.

3 MR. FREEMAN: That's exactly right, Your
4 Honor. Yes. So each tribe has an amount of need. This
5 is the amount that is estimated. It's a negotiated
6 figure between the Secretary and each tribe. And it is
7 undisputed that the amounts that Congress has been --
8 has appropriated have never been enough to pay 100
9 percent of each of those figures for each member of the
10 Respondent class.

11 JUSTICE SCALIA: Didn't we have similar
12 language in Cherokee Nation? Didn't we say that that
13 language in Cherokee Nation, which was in the general
14 appropriations statute although not on each contract,
15 didn't mean the Secretary could refuse to pay?

16 MR. FREEMAN: No, Your Honor. We did not
17 have similar language in Cherokee, if you mean the
18 Appropriations Act. It was under the same --

19 JUSTICE SCALIA: No, I don't mean the
20 Appropriations Act. I mean -- I mean the general
21 statute that governed this program.

22 MR. FREEMAN: That's right. And maybe it
23 would be helpful if I could --

24 JUSTICE SCALIA: So why does it mean one
25 thing there and mean something else when -- in the

1 Appropriations Act?

2 MR. FREEMAN: Well -- I may not be
3 understanding Your Honor's question, but I -- I think it
4 might be helpful if I explain what was at issue in
5 Cherokee. In Cherokee, the government was not in this
6 Court making Appropriations Clause arguments. We were
7 here making a very different argument. It was
8 undisputed in Cherokee that Congress had appropriated
9 enough money for the unobligated available funds,
10 lawfully available funds, for the Secretary to pay all
11 of the contracts that were at issue.

12 Our argument -- and to be sure, we thought
13 we were right -- our argument was that Congress had in
14 other provisions of the Act allowed us to set aside a
15 certain amount of money that, albeit lawfully available
16 to pay the contracts, we thought we could use to fund
17 the agency's inherent Federal operations. And the Court
18 said: No, no, no. These are contracts. The money was
19 lawfully available for you to pay, and there was no
20 statutory restriction against you paying it, so you had
21 to pay it.

22 And this case involves the circumstance
23 that --

24 JUSTICE SOTOMAYOR: Well, how -- what was
25 our reference and acceptance of the Ferris doctrine?

1 And the Ferris doctrine was almost identical to this
2 situation, where Congress allotted a certain amount to
3 the building of a particular dam, and the same -- we
4 applied the Ferris principle and said even though they
5 gave it to one type of contract, the dam, they were
6 paying 1 percent less than others.

7 MR. FREEMAN: No -- no, Your Honor.

8 JUSTICE SOTOMAYOR: Where they had an
9 allotment adequate enough to cover that individual.

10 MR. FREEMAN: No. I think that's not quite
11 an accurate characterization of Ferris. And it's
12 important to understand what Ferris --

13 JUSTICE SOTOMAYOR: I know what the Federal
14 Circuit said. I don't think the Federal Circuit's
15 right. If you read Ferris, there was an appropriation
16 for the dam.

17 MR. FREEMAN: Ferris was an appropriation
18 for -- I think it was 40-some thousand dollars for
19 improvements to the Delaware River. And the government,
20 the Army Corps of Engineers, let out a contract for
21 \$37,000 to dredge the river. Then after the contract
22 had been let out -- and this is critical. If you stop
23 the movie at the time the contract was issued, there was
24 sufficient funds to pay that contract. They were
25 lawfully available. We obligated them to the -- to the

1 contractor.

2 And then what happened in Ferris was, after
3 that lawful binding agreement was entered, agency
4 officials decided in their discretion that they'd prefer
5 not to spend the money on that, and they instead built a
6 wharf or something.

7 And what the Court said in Ferris -- and
8 this is -- we're not -- we have no quarrel with this
9 principle -- is that when the funds are lawfully
10 available and you obligate them to a contractor without
11 some contingency, then you can't just decide to spend it
12 on something else. That's a breach. And it's not a
13 defense to the breach that at the end of the -- that at
14 the end, once you've breached the contract, there isn't
15 enough money left in the appropriation to go back and
16 pay them what you should have.

17 That's different from this case, that there
18 is not enough lawfully available money to pay every --

19 JUSTICE SCALIA: No, but -- but there wasn't
20 in Ferris either. I mean, that was the problem. If the
21 appropriations had been enough to cover that plus the
22 later expenditures, there would have been no problem.

23 MR. FREEMAN: Your Honor, I think Ferris is
24 correctly understood -- particularly given this Court's
25 subsequent decisions in Sutton, in Bradley, Leiter, and

1 other cases, Ferris is correctly understood as saying --
2 and this is the proposition, incidentally, for which the
3 Court's cited Ferris in Cherokee. Ferris is understood
4 as saying if you've got a binding obligation in which
5 you promised to pay money that is lawfully available,
6 Congress gave it to you, then if you, agency officials,
7 do something in your executive discretion --

8 JUSTICE SCALIA: Available subject to
9 appropriations. I mean, it was subject to
10 appropriations.

11 MR. FREEMAN: Well, in Ferris, there were --
12 in fact, the contract was not made subject to
13 appropriations. And one of the things the Federal
14 Circuit pointed out was that the "subject to the
15 availability of appropriations" language that is now
16 ubiquitous in government contracts was developed in part
17 to make sure that the Ferris situation didn't later
18 arise.

19 But I want to underscore, if we know one
20 thing in this case, we know that Congress intended for
21 the Secretary not to pay any more than the amounts in
22 the statutory caps.

23 JUSTICE KAGAN: Mr. Freeman, could I try a
24 hypothetical on you? And it's -- it really is going to
25 this question of what Ferris means. So suppose that

1 there's a government program, and it's to purchase
2 airplanes. And it's -- the authorization language says
3 this is subject to appropriations, in the same way that
4 this language does. And the government, under this
5 program, enters into 10 contracts of a million dollars
6 each to buy 10 airplanes. But then it turns out that
7 Congress appropriates only \$9 million, not \$10 million.

8 So my question is: Now there are 10
9 contractors and -- but there's a shortfall of a million
10 dollars --

11 MR. FREEMAN: Right.

12 JUSTICE KAGAN: -- do those contractors have
13 contractual rights under Ferris?

14 MR. FREEMAN: I -- Your Honor, it's going to
15 depend on a couple of things. And let me -- let me
16 explain. I think, because by hypothesis in your
17 hypothetical we're entering into the contracts in
18 advance of appropriations, there is no right to be paid
19 until the appropriations are made.

20 JUSTICE KAGAN: Yes. So the appropriation
21 has been made. It's a \$9 million appropriation.

22 MR. FREEMAN: Right. And in that
23 circumstance, the agency cannot pay more than
24 \$9 million, and there is no binding obligation,
25 contractual obligation, on the government to pay more.

1 Let me add something, though, in response --

2 JUSTICE KAGAN: So -- so either one of these
3 airplane manufacturers is going to not have what he
4 contracted for, or all of them are not going to have
5 what they contracted for, because everybody is going
6 to -- their contract is going to be sliced.

7 MR. FREEMAN: And, Your Honor, the reason
8 why this is not a problem in real life is that there are
9 other provisions in your ordinary procurement contracts,
10 under the ordinary kind of contracts that this case is
11 not, that take care of that.

12 And the principal one is --

13 JUSTICE KAGAN: My understanding,
14 Mr. Freeman, is that that is what Ferris said, was that
15 Ferris said in that situation where it turns out that
16 there's a shortfall but where there are contractual
17 commitments, that -- that the government is bound to
18 live up to those contractual commitments. And if
19 there's a shortfall, then it comes out of the Judgment
20 Fund.

21 MR. FREEMAN: No. Your Honor, it -- there
22 are a couple of things there. But let me first explain
23 why as a practical matter that doesn't happen in
24 circumstances that are -- are not like this scheme where
25 we're required to enter into every contract. In your

1 ordinary government procurement scheme, there are
2 termination for convenience provisions.

3 And, in fact, what happens in the
4 circumstances in which Your Honor posits is the
5 government terminates for convenience enough of the
6 contracts to make sure that we have the money to pay.
7 And if we didn't do that, it would be a violation of the
8 Anti-Deficiency Act. And this Court has said many
9 times --

10 JUSTICE SOTOMAYOR: So do the tribes have
11 the right to stop providing the services --

12 MR. FREEMAN: Yes.

13 JUSTICE SOTOMAYOR: -- that they've
14 contracted to?

15 MR. FREEMAN: Yes.

16 JUSTICE SOTOMAYOR: How do they know that
17 until they know what they're getting?

18 MR. FREEMAN: Well --

19 JUSTICE SOTOMAYOR: Meaning they don't know
20 what they're getting.

21 MR. FREEMAN: Well, they do know.

22 JUSTICE SOTOMAYOR: They signed a contract
23 that says you're going to pay them for their services to
24 their members and for their administrative costs. They
25 incur that cost, and then at the end of the year, the

1 government now says to them you've honored your part,
2 but we're not going to honor ours.

3 MR. FREEMAN: No -- no, Your Honor.
4 That's -- that's not correct, and let me explain why.

5 First, every contract that the -- every
6 member of the Respondent class signed in this case says
7 that the contractor's obligation to perform the services
8 that are at issue is subject to the availability of
9 appropriated funds. That's Section (1)(c)(iii) of the
10 model agreement that is read into every ISDA contract.

11 They further have the availability under
12 Section (1)(b)(v) of that model agreement to stop at any
13 point if they are worried that there's not going to be
14 enough money and seek assurances from the Secretary that
15 there will be.

16 Now, as to whether they know and when they
17 know how much money they are going to get, that was the
18 point of the 2006 distribution policy that the Secretary
19 adopted. Under the pro-rata system that we used for the
20 first many years, the tribes said, look, we don't know
21 how pro-rata is going to work out. So, in consultation
22 with the tribes, and, indeed, with the aid of several of
23 the counsel for the Respondent class, we drafted a
24 policy that --

25 JUSTICE SOTOMAYOR: What does the system do

1 to the 50-odd contracts that Arctic Slope, in its amici
2 brief, points to that are similar to these? Does this
3 now mean that moving forward, that every government
4 contractor who has a "subject to appropriations"
5 language takes the risk that at some point in the middle
6 of the contract, the government is going to dishonor its
7 obligation and pay it less than it said it would?

8 MR. FREEMAN: No. No, Your Honor. And this
9 is my --

10 JUSTICE SOTOMAYOR: So how do -- how do we
11 differentiate those 50 other contracts?

12 MR. FREEMAN: Well, I think they were citing
13 a number of different statutes in which the statutes
14 provide that funding is subject to the availability of
15 appropriations.

16 Now, it's important to underscore, that's
17 why I started with this point, I don't believe in any of
18 those statutory schemes is the government obligated to
19 enter into every contract that comes in the door.
20 And --

21 JUSTICE KAGAN: Well, but that's partly why
22 I asked you my hypothetical, Mr. Freeman, because I sort
23 of wanted to see whether you would distinguish the
24 hypothetical on that basis --

25 MR. FREEMAN: Right.

1 JUSTICE KAGAN: -- but you didn't. You said
2 no, it doesn't really matter. Even if the government is
3 not obligated to enter into contracts, if the government
4 has entered into too many, too bad; we can't make those
5 additional appropriations.

6 MR. FREEMAN: And, Your Honor, it is -- the
7 unique features of this statutory scheme are absolutely
8 important, but I want to -- I took Your Honor's question
9 to be under the general appropriations principles that
10 we are describing, what would the result be? And I
11 think I'm right, but I should also add, as I said
12 before, there are very strict fiscal controls in 31
13 U.S.C. 1501, et sequitur, that make clear and prevent
14 the circumstance that Your Honor describes.

15 JUSTICE BREYER: I'm sorry, I'm not clear on
16 what the hypothetical is. I thought her hypothetical --
17 Justice Kagan's -- was a situation where the statute
18 says, Mr. Secretary, you can spend no money beyond what
19 is appropriated.

20 MR. FREEMAN: Right.

21 JUSTICE BREYER: But the contract doesn't
22 mention it. That's Ferris.

23 I thought that the -- the real world is, in
24 contracting, you typically have both a statute that says
25 don't pay more than is appropriated --

1 MR. FREEMAN: Right.

2 JUSTICE BREYER: -- and in the contract it
3 says, subject to appropriation, putting the contracting
4 party on notice.

5 MR. FREEMAN: That's right. And -- and --

6 JUSTICE BREYER: So which were you
7 answering?

8 MR. FREEMAN: I -- with respect to
9 Justice Kagan, I believe we had a colloquy in which I
10 said that because in her hypothetical we were entering
11 into the contract in advance of appropriations, they
12 would have to be made express -- the contracts
13 themselves would have to be subject to the availability
14 of appropriations in the contracts.

15 JUSTICE BREYER: The words in the contract
16 are "subject to appropriations."

17 MR. FREEMAN: Yes. And without that, it
18 would be a violation of the Antideficiency Act --

19 JUSTICE BREYER: Yes.

20 MR. FREEMAN: -- yes.

21 JUSTICE BREYER: Okay. So in that world --
22 now we get to the question -- in that world, what
23 happens when 15 people each enter into such a contract
24 for \$100,000 each, and the appropriation turns out to be
25 too small to pay all of them, but big enough to pay

1 some?

2 MR. FREEMAN: And, Your Honor, what I was
3 trying to answer is that, in your ordinary contractual
4 scheme, the government solves that problem in a very
5 straightforward way. We terminate for convenience the
6 contracts -- enough of those contracts to ensure that we
7 have no obligations beyond the available appropriations.

8 Now, we can't do that here, which is why
9 this is ultimately a question of congressional intent.

10 JUSTICE SOTOMAYOR: So why don't we let
11 Congress fix it? Because there are so many ways that
12 Congress could fix this problem directly. By doing a
13 line item allocation, it could take away the obligation
14 to enter into these contracts and fully fund. It could
15 be much more direct --

16 MR. FREEMAN: Your --

17 JUSTICE SOTOMAYOR: -- than it's being,
18 given the interpretation that you're advancing.

19 MR. FREEMAN: Your Honor, I think it's
20 important to understand what -- and maybe it would help
21 if I took a minute to explain this -- what Congress was
22 trying to do in this statutory scheme.

23 JUSTICE SOTOMAYOR: It was trying -- it was
24 trying to tell the tribes, we are honoring our
25 obligation by paying you the costs, but we are really

1 not going to do it because we are going to let the
2 government give you less?

3 MR. FREEMAN: No. Look, Congress could --

4 JUSTICE SOTOMAYOR: I have to assume
5 Congress intends what it says. It intends to obligate
6 you to enter into contracts that -- that give -- make
7 you commit to paying their costs, correct?

8 MR. FREEMAN: Not with -- yes. But
9 450j-1(b) says, notwithstanding any provision of this
10 Act, all funding under this Act is subject to the
11 availability of appropriations.

12 And let me explain why Congress would
13 have wanted to enact this statute that has some unusual
14 features. Congress, of course, could have said, we want
15 to give every tribe the opportunity to enter -- to
16 provide services in its own name to its own people, but
17 we are going to do this on a regular contract basis,
18 meaning we'll just give us -- some to the Secretary.
19 The Secretary signs contracts as they come in until he
20 doesn't have any money left. And then any tribe after
21 that who asks for a -- for a contract, the Secretary
22 says no, we don't have the money to do it.

23 But Congress chose a -- a different
24 approach. Congress wanted, as a matter of
25 self-determination, to require the Secretary to give

1 every tribe who wants the ability to do this the
2 opportunity to do it. But, if it didn't then say, all
3 funding is subject to the availability of
4 appropriations, the result would be that the government
5 would be exposed to a liability that Congress could not
6 estimate, because the ability of these tribes to pay for
7 overhead costs and whatever varies tremendously from
8 tribe --

9 JUSTICE GINSBURG: To what extent do you
10 rely on -- you haven't mentioned it up till now, but
11 Congress, in these appropriations, said "not in excess
12 of."

13 MR. FREEMAN: Yes.

14 JUSTICE GINSBURG: It wasn't just a general
15 "subject to appropriations." It was a specific amount,
16 the Secretary shall not pay in excess of a certain
17 dollar amount for these costs.

18 JUSTICE KENNEDY: I had exactly the same
19 question. The "not to exceed" language, which I think
20 is the word, not to exceed, hasn't been mentioned by you
21 yet because -- maybe you haven't had time.

22 MR. FREEMAN: Right.

23 (Laughter.)

24 MR. FREEMAN: That would be it.

25 JUSTICE KENNEDY: But -- but I thought that

1 was what Judge Dyk said --

2 MR. FREEMAN: Yes.

3 JUSTICE KENNEDY: -- was the critical -- the
4 difference between this and even the Cherokee case.

5 MR. FREEMAN: Right.

6 JUSTICE KENNEDY: And so my question is --
7 is the same as Justice Ginsburg's. Isn't a principal
8 part of your argument that this contract said not to
9 exceed, and then the sums differ from year to year, but
10 let's say \$95 million?

11 MR. FREEMAN: That's exactly right,
12 Your Honor.

13 I mean -- and what I -- what I tried to
14 answer to a question earlier, it is absolutely clear
15 what Congress was trying to do here. Congress said not
16 to exceed a specific sum from year to year --

17 JUSTICE KENNEDY: When the Congressional
18 Budget Office, or whatever agency it is that figures out
19 whether there is a deficit and, if so, of how much, do
20 they look at "not to exceed," and do they take that
21 amount seriously? Or --

22 MR. FREEMAN: Oh, oh, absolutely,
23 Your Honor. And --

24 JUSTICE KENNEDY: But the -- but the
25 position of the Respondents is that it makes no

1 difference.

2 MR. FREEMAN: No difference at all.

3 JUSTICE KENNEDY: Congress is saying nothing
4 at all.

5 MR. FREEMAN: Yes, yes.

6 JUSTICE GINSBURG: It really --

7 CHIEF JUSTICE ROBERTS: So the consequence
8 on the ground is that, if I'm a tribe and I want this
9 money, and I figure out that this is going to cost me
10 \$80,000 --

11 MR. FREEMAN: Yes.

12 CHIEF JUSTICE ROBERTS: -- I sign a contract
13 and say, this is going to cost me \$100,000, because I
14 know there isn't going to be \$100,000; there is only
15 going to be \$80,000, and that's what I need, right?

16 MR. FREEMAN: Well, in fact, it can't work
17 that way, Your Honor, because the amounts are limited by
18 statute to the reasonable and allowable costs that are
19 not duplicative of the principal program funds, the
20 funds to run the program --

21 CHIEF JUSTICE ROBERTS: Well, but it's --
22 well, if 80,000 is reasonable, the only way to get that
23 is to ask for 100?

24 MR. FREEMAN: Right. And if a tribe thinks
25 that we haven't put in to the -- we haven't offered them

1 enough money for their contract support costs, they are
2 allowed to decline the offer that we make. And they
3 can -- unusually, for government contractors, they can
4 file a separate lawsuit before entering into the
5 contract to litigate whether the terms are sufficient.

6 JUSTICE GINSBURG: Mr. Freeman, where did
7 these caps come from? Did the agency initiate them?
8 Or, there is a chart -- perhaps I don't understand it
9 correctly. It's on page 210 of the joint appendix. It
10 does -- it does seem to indicate that it was the BIA
11 that proposed the cutbacks.

12 MR. FREEMAN: The caps come from Congress,
13 Your Honor. Respondents have make -- have made an
14 argument at the end of their brief that the government
15 should be liable here notwithstanding the caps because
16 the BIA hasn't requested sufficient funding from
17 Congress -- or, rather, the President hasn't requested
18 sufficient funding from Congress.

19 That argument, we think, is baseless for a
20 number of reasons. And just as a factual matter, the
21 GAO has done some studies of this. There are reports in
22 the joint appendix explaining why BIA has not in every
23 year asked for what turned out to be enough money.

24 And that's because these -- this funding is
25 done on a prospective estimated basis. And because we

1 are required to take into -- we are required to accept
2 every contract that comes in the door, BIA may estimate
3 and make its best available estimate, and OMB and the
4 President may accept that if he chooses, but it still
5 turn may turn out not to be enough.

6 JUSTICE SCALIA: That's not really relevant
7 here anyway, is it?

8 MR. FREEMAN: No, it is not. It is not
9 relevant, Your Honor. No. That's right.

10 JUSTICE SCALIA: What I don't understand is
11 why the language "not to exceed" is any different from
12 Congress appropriating \$900,000. You mean the world
13 changes if -- if Congress, instead of just appropriating
14 \$900,000, authorizes the Secretary to expend not to
15 exceed \$900,000? Why --

16 MR. FREEMAN: I don't think in that
17 circumstance there would be any difference. Here, the
18 reason why it's different is that this is ultimately a
19 question of what Congress was trying to do. There is no
20 constitutional argument that Congress can't enact these
21 kind of caps, and we know from the "not to exceed"
22 language that Congress was being as emphatic as it
23 could.

24 JUSTICE SCALIA: Well, I -- I think \$900,000
25 is pretty emphatic, if that's all you appropriate.

1 MR. FREEMAN: Right. And just -- it's just
2 this is the way, as an ordinary matter, that in
3 appropriations Congress expresses an internal cap. It
4 said --

5 JUSTICE KAGAN: But that runs you right into
6 Ferris. Then you're saying that there's no difference
7 between the standard Ferris-type appropriation, which is
8 just an amount of money, and this kind of appropriation,
9 which is up to or not to exceed that amount of money.

10 MR. FREEMAN: Your Honor, Ferris we think is
11 inapplicable just to this type of statutory scheme where
12 we're required to enter into the contracts, and there's
13 a limited sum available. That's Judge Dyk's reasoning
14 in the Federal Circuit, but let me put that aside for
15 the moment and address Ferris directly.

16 As I said before, Ferris is about the
17 circumstance in which there are enough available funds
18 in the first instance to pay the contractual
19 obligations.

20 Now, Ferris does not and cannot stand for
21 the proposition that an executive officer looking at the
22 amount Congress made available in the first instance can
23 bind the Treasury to pay more than Congress has
24 expressly stated he may bind it to. This Court has said
25 many, many times --

1 JUSTICE KENNEDY: I take it the Respondents'
2 position is that the contracting officer says, now, this
3 is going to go over the not-to-exceed amount, but not to
4 worry, just sue us under the judgment -- just sue us
5 under the Judgment Act.

6 MR. FREEMAN: Right. And there is no reason
7 to think that Congress contemplated such a scheme, which
8 would amount to essentially giving full contract support
9 cost funding, but only for the tribes who have the
10 resources and sophistication to sue, minus litigation
11 costs. That makes no sense at all. When Congress says
12 "not to exceed," a certain amount of money may come out
13 of the Treasury --

14 CHIEF JUSTICE ROBERTS: It makes sense if
15 you're looking at the reality of the budgeting process
16 because in one case, that one line item appears on the
17 Department of Interior budget; and in the other case, it
18 appears somewhere else in the Judgment Fund budget. And
19 they can say it's not our fault. The Judgment Fund --
20 the court made us do it --

21 MR. FREEMAN: Well, I don't think so,
22 Your Honor. The Judgment Fund is not a new thing. The
23 Judgment Fund is available only to pay judgments validly
24 entered against the United States.

25 Now, we don't dispute that it's available to

1 pay breach of contract damages; but, of course, a breach
2 of contract requires a violation of -- a violation, a
3 failure to perform a binding contractual promise.

4 Now, we think we've performed our promise
5 here because our -- our promise was to pay the sums that
6 Congress made lawfully available. And we think that, to
7 the extent Respondents think we promised to pay more
8 than Congress explicitly said could be available, the
9 Secretary had no authority to enter into that promise.
10 Now --

11 JUSTICE SOTOMAYOR: But that's true of every
12 contract. That's where I'm getting stuck on what your
13 theory is. The Anti-Deficiency Act says you can't spend
14 more than you're given.

15 MR. FREEMAN: Yes.

16 JUSTICE SOTOMAYOR: So every single
17 contractor, under your logic, should know that when they
18 sign a contract, the government can break it because if
19 it doesn't have enough funds, it can't pay.

20 MR. FREEMAN: And, Your Honor, that --

21 JUSTICE SOTOMAYOR: But -- so there's no
22 real logic to your argument, other than to say we
23 can't -- we're -- if the contract says "subject to
24 appropriations," let's do away with Ferris, let's do
25 away with Cherokee Nation and --

1 MR. FREEMAN: No, no --

2 JUSTICE SOTOMAYOR: -- it just means that we
3 pay you what we can.

4 MR. FREEMAN: No. That is emphatically not
5 true. As -- as an initial matter, as I've tried to
6 explain before, there are very strict requirements in
7 the government's contracting processes, such as the
8 Federal Acquisition Regulation, that limit the ability
9 of the government to make many promises it can't keep,
10 particularly with regard to funding.

11 JUSTICE SOTOMAYOR: But what you're saying
12 is you make two promises on the ISDA. We're going to
13 pay you your support costs, your administrative costs,
14 in full, and we're going to retain the right to break
15 that promise. That's really what you're saying the ISDA
16 says.

17 MR. FREEMAN: No. That's not right,
18 Your Honor. And I -- I'll answer this, and then I'd
19 like to reserve the balance of my time.

20 The ISDA says our promise is to pay you what
21 Congress lets us pay you. It's not breaking our promise
22 to limit it to appropriation; it is keeping our promise.

23 JUSTICE SOTOMAYOR: So you ignore all the
24 language where it says we're going to pay you X amount,
25 all the law that says you have to be reimbursed -- the

1 tribes have to be reimbursed for all their costs; all of
2 that is going to be ignored?

3 MR. FREEMAN: Well, it's not that it's
4 ignored, it's that section 450j-1(b) says,
5 notwithstanding any other provision of this Act, and we
6 think that's fairly clear.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Phillips.

9 ORAL ARGUMENT OF CARTER G. PHILLIPS
10 ON BEHALF OF THE RESPONDENTS

11 MR. PHILLIPS: Thank you, Mr. Chief Justice,
12 and may it please the Court:

13 I guess I'd like to start on the Ferris
14 doctrine because it seems to me that is the fundamental
15 issue in this case.

16 And the principle of Ferris -- and it's
17 interesting to me that counsel for the government never
18 once makes any reference to the Comptroller General's
19 interpretation of the Ferris doctrine, which in the
20 Redbook says, as plain as day, that in circumstances
21 like this one, where the government has more contractors
22 than it had -- than one, and those contractors are
23 subject to an appropriation, and it cannot exceed that
24 appropriation -- I think all of that language, frankly,
25 is implied anyway -- the contract --

1 JUSTICE KENNEDY: So you say -- you say you
2 don't want us to mention "not to exceed" in our opinion
3 --

4 MR. PHILLIPS: Oh, no. The --

5 JUSTICE KENNEDY: -- other than to say that
6 it's irrelevant?

7 MR. PHILLIPS: No. "Not to exceed" has a
8 very significant role to play, Justice Kennedy, because
9 --

10 JUSTICE KENNEDY: Does the Redbook talk
11 about "not to exceed" as being any different from
12 general appropriations?

13 MR. PHILLIPS: The place where "not to
14 exceed," I think, carries particular significance is
15 that in the ordinary situation, we would be entitled to
16 seek injunctive relief to take money from other sources
17 within -- within the budget and get an injunction. And
18 that's very unique to the -- to this context.
19 Ordinarily, government contractors cannot seek
20 injunctive relief. This "not to exceed" language --

21 JUSTICE KENNEDY: Does the Redbook --

22 MR. PHILLIPS: -- deprives us of that.

23 JUSTICE KENNEDY: Does the Redbook refer to
24 "not to exceed" -- the "not to exceed" language?

25 MR. PHILLIPS: I'm sorry, Justice Kennedy?

1 JUSTICE KENNEDY: Does the Redbook have --
2 refer to the "not to exceed" language?

3 MR. PHILLIPS: The Redbook doesn't -- well,
4 actually, the Redbook does say that all of these phrases
5 are essentially the same, which is that they --

6 JUSTICE BREYER: I saw -- I read the
7 Redbook. I might have missed the part that you're about
8 to cite to, because I'd like you to tell me where in the
9 Redbook it says that a contractor who has a contract
10 that says "subject to appropriations" and is then
11 dealing with the law of Congress which says the
12 appropriation will not exceed X million is then entitled
13 to be paid on a contract where he and like contracts do
14 exceed X million. Where does it say that in the
15 Redbook?

16 MR. PHILLIPS: The Redbook --

17 JUSTICE BREYER: I couldn't find it.

18 MR. PHILLIPS: Well, the Redbook talks about
19 subject to appropriations; it talks about --

20 JUSTICE BREYER: I did read it. I just
21 would like to know what page you want me to read again.

22 I read the Chamber of Commerce brief. The
23 Chamber of Commerce brief says everybody knows the
24 contractors are paid in this situation. So I looked up
25 the authorities that they cited. Okay?

1 I read the Redbook. I read my other case of
2 Cherokee. I read Ferris. I read Sutton. I can't say
3 I'm perfect at reading --

4 MR. PHILLIPS: Okay.

5 JUSTICE BREYER: -- but I couldn't find it.

6 MR. PHILLIPS: Justice Breyer --

7 JUSTICE BREYER: So I would appreciate your
8 referring me to those citations.

9 MR. PHILLIPS: 2 GAO Redbook 6-44 --

10 JUSTICE BREYER: Okay.

11 MR. PHILLIPS: -- says --

12 JUSTICE BREYER: I have it in front of me,
13 by coincidence.

14 (Laughter.)

15 JUSTICE BREYER: Here it is.

16 MR. PHILLIPS: This is in our brief at
17 page --

18 JUSTICE BREYER: No, no. I have the Redbook
19 6-44.

20 CHIEF JUSTICE ROBERTS: What page, for those
21 of us who don't have it in front of us?

22 MR. PHILLIPS: In my brief, it's on page 31.

23 CHIEF JUSTICE ROBERTS: Thank you.

24 JUSTICE BREYER: I'm not saying it isn't
25 there. I just read through these pretty quickly. I

1 just need a little refresher.

2 MR. PHILLIPS: Yes. If you look at -- I'm
3 sorry -- 2 GAO -- well, I think you can use either of
4 these: 2 GAO Redbook 6-28 to -29 talks --

5 JUSTICE BREYER: Oh, I don't have that.

6 MR. PHILLIPS: -- talks about "for" followed
7 by a purpose and an amount has the, quote, "same effect
8 as" -- quote -- "'words like "not more than" or "not to
9 exceed".'

10 So, I mean, what they're saying is that
11 all of this --

12 JUSTICE SOTOMAYOR: Could you give me that
13 cite again.

14 MR. PHILLIPS: I'm sorry. I apologize, Your
15 Honor.

16 2 GAO Redbook 6-28 to -29. And I think the
17 same --

18 JUSTICE BREYER: No. That isn't quite my
19 question. My question was: I would like the authority
20 for the proposition that when you have a set of
21 contractors, and they read their contract, and it says
22 "subject to appropriation," and then you read the law,
23 and it says they will not be paid, it shall not exceed
24 \$4 million, and then you discover that the amount of the
25 contracts of the same kind in this category are more

1 than \$4 million, I want to know where in the Redbook it
2 says that they get paid more than \$4 million. That's
3 all. That's fairly simple.

4 And if that's -- if that's normal practice,
5 it must be there's a lot of authority for it. So I just
6 want to know what to read.

7 MR. PHILLIPS: Well, here, 6-45 says, if a
8 contract is but one activity under a larger
9 appropriation, it is not reasonable to expect the
10 contractor to know how much of that
11 appropriation remains available.

12 JUSTICE BREYER: But they aren't talking
13 about there where it says specifically in the contract
14 "subject to appropriations." At least, I think they're
15 not.

16 Now, I would like you right now to tell me,
17 no, you're wrong; it does say that.

18 MR. PHILLIPS: Well, it says, if Congress
19 appropriates a specific dollar amount for a particular
20 contract --

21 JUSTICE BREYER: They're distinguishing
22 Sutton from Ferris.

23 MR. PHILLIPS: I'm sorry?

24 JUSTICE BREYER: They're trying to use that
25 to distinguish Sutton from Ferris, and it's filled with,

1 well, we're not sure about this because Sutton, which is
2 Brandeis, which comes out the opposite way, did have a
3 line appropriation, and I thought that just refers to
4 the fact that because there's a line appropriation the
5 contractor is on notice.

6 MR. PHILLIPS: Right. Exactly.

7 JUSTICE BREYER: Exactly.

8 And when you do business with the government
9 over a period of years, and it says subject to
10 appropriation, not necessarily you but your lawyer, who
11 is a good lawyer, should look up and see what the
12 appropriation is or whether it was made. I mean, that's
13 what I --

14 MR. PHILLIPS: Justice Breyer, as a matter
15 of policy -- you know, if Congress --

16 JUSTICE BREYER: No, no, not as a matter of
17 policy. I'm putting it as a question because that was
18 my first reaction, and I expect you to say, no, Justice
19 Breyer --

20 MR. PHILLIPS: Well, clearly --

21 JUSTICE BREYER: -- you're wrong, and that
22 isn't the practice, and here is what I read to show that
23 isn't the practice. That's all I'm asking.

24 MR. PHILLIPS: Well, I guess I don't
25 understand exactly how to answer that question, Justice

1 Breyer, because --

2 JUSTICE BREYER: By showing me where in the
3 law it says -- and I don't want to repeat the question
4 for the third time, but it says --

5 JUSTICE SCALIA: I wish you would. I've
6 lost the question.

7 (Laughter.)

8 JUSTICE BREYER: Well, here sometimes not
9 everyone pays sufficient attention to these very clear
10 questions.

11 (Laughter.)

12 MR. PHILLIPS: I'm doing my best,
13 Justice Breyer.

14 JUSTICE BREYER: Where -- Look,
15 hypothetical, four people, four identical contracts, the
16 words appear, "subject to appropriation."

17 MR. PHILLIPS: Right.

18 JUSTICE BREYER: Each is for a million
19 dollars.

20 Then you read the appropriation that was
21 later made, and in that statute it says, "we hereby
22 appropriate three million," and -- it is, "the payments
23 are not to exceed three million." Okay? Something like
24 that.

25 MR. PHILLIPS: Right.

1 JUSTICE BREYER: All I want is the authority
2 that says each of those four people can come in and get
3 the \$1 million, totaling four million. I want the
4 authority that says that.

5 MR. PHILLIPS: I mean, I would read Ferris.

6 JUSTICE BREYER: No. It did not say
7 anything about it in the contract.

8 MR. PHILLIPS: Well, I mean, Ferris has a
9 limitation. The government has already told us that
10 subject to appropriation is implicit in every -- in
11 every agreement anyway, so there's nothing special about
12 putting in the words "subject to appropriation."

13 JUSTICE BREYER: Oh, there certainly is.
14 Putting in the words gives the lawyer notice.

15 MR. PHILLIPS: Well, again, the only notice
16 it gives is that there has to be enough money when you
17 look at the appropriation to cover your contract.

18 JUSTICE SCALIA: Ferris did not say, as I
19 recall, that you can't expect the contractor to have
20 notice that appropriations have been limited. It said
21 you can't expect them to have notice as to how much of
22 the expenditures under that appropriated act have been
23 spent. Isn't that the only thing it required notice of?

24 MR. PHILLIPS: Right. That's --

25 JUSTICE SCALIA: I would think, if you sign

1 a contract, you better be sure that there are
2 appropriations for it.

3 MR. PHILLIPS: Clearly. And that -- I mean,
4 and, Justice Breyer, the Court's opinion in Cherokee
5 said that the primary purpose of the subject to
6 availability clause is to deal with the situation where
7 you enter into the agreement ahead of the fiscal year,
8 and so everybody knows that if Congress, for whatever
9 reason, decides not to appropriate any money, there is
10 no deal, and nothing happens.

11 JUSTICE KENNEDY: So, in your view, if the
12 Tribe comes to the government, and they say, look, we've
13 been looking at what you've done with the other tribes,
14 you've appropriated \$95 million, and the appropriation
15 says, "not to exceed \$95 million," but go ahead and make
16 this contract with us, anyway, no one cares. And you
17 say, go ahead and make it. Right?

18 MR. PHILLIPS: Well, I mean, it seems to me
19 it's the government's problem to sort it out.

20 JUSTICE KENNEDY: That's your position,
21 isn't it?

22 MR. PHILLIPS: Right. But, again, put it in
23 the context, Justice Kennedy, of the individual tribe.

24 JUSTICE GINSBURG: You can't get it from
25 Cherokee. I mean, yes, there's Ferris, and then

1 Cherokee --

2 MR. PHILLIPS: Right.

3 JUSTICE GINSBURG: -- is relying on Ferris;
4 but, Cherokee is very careful to point out that there
5 were funds to cover --

6 MR. PHILLIPS: No question about it, Justice
7 Ginsburg. I don't think this case is controlled by
8 Cherokee.

9 I do think Cherokee answers the question of
10 how far can you carry the "subject to availability"
11 language. I don't think it gets the government anywhere
12 near home.

13 And then the question is, what do you do
14 with the "not to exceed" language. And I would suggest
15 there is that, that's no different, frankly, from Ferris
16 or any other situation, because what the -- Congress
17 operates against the backdrop of Ferris, which is a
18 120-plus-year-old doctrine that has been allowed to stay
19 in place by Congress for that entire time. And as the
20 Chamber of Commerce tells us, this is a rule that every
21 contractor takes as an article of faith in dealing with
22 the United States Government.

23 JUSTICE SCALIA: Well, am I correct that
24 what the government is arguing is that the fact that
25 this limitation was included in the particular contract

1 makes it different from Ferris?

2 MR. PHILLIPS: Well, it's hard to make that
3 argument because the "not to exceed" language, at least,
4 that comes out of the -- that's in the appropriations
5 provision. That's not in the contract itself. The
6 contract itself simply says subject to appropriations.

7 JUSTICE SCALIA: Which Ferris did not. Did
8 the Ferris contract say that?

9 MR. PHILLIPS: It's -- Ferris doesn't have
10 the "subject to appropriation," but the Ferris contract
11 says the appropriation limit is X.

12 JUSTICE BREYER: It does? Where do you get
13 -- I couldn't find the contract. The language in Ferris
14 is, "a contractor who is one of several persons to be
15 paid out of an appropriation is not chargeable with
16 knowledge of its administration." True.

17 Now, Dyk says, in his opinion, that one
18 difference from Ferris is they wrote the idea into the
19 contract, saying you're subject to appropriation to
20 get -- to make that lawyer chargeable with knowledge.

21 And the second thing in Ferris is that it
22 was an individual who went off on his own in the
23 administration and paid money that he shouldn't have
24 paid. It should have been over here for the contract.

25 In this case, it is an instance where

1 Congress itself required the money to be paid, as it was
2 paid, and didn't provide enough. Okay.

3 So that's where I am with Ferris, which is a
4 big question mark. And I guess you can talk about that,
5 but all I wanted to know is what is well established in
6 this field.

7 MR. PHILLIPS: Well --

8 JUSTICE BREYER: I don't want to write
9 something that suddenly upsets what is well established.

10 MR. PHILLIPS: Okay. Well, I take this,
11 then, straight from the Red Book again. "It is settled
12 that contractors paid from a general appropriation are
13 not barred from recovering for breach of contract, even
14 though the appropriation is exhausted."

15 And so even though -- and there is
16 nothing in -- there's no limitation --

17 JUSTICE BREYER: -- as it says in the
18 contract, you are barred, you are barred from recovering
19 if we don't appropriate enough money. Should it say
20 that wouldn't matter? Is that right?

21 MR. PHILLIPS: Well, it would say that if
22 you don't appropriate enough money for the specific
23 contract, yes. I think that's clearly what Sutton
24 holds. Is that if -- if Justice Scalia and I have an
25 agreement, and the appropriation goes to \$100 for our

1 agreement, and the contract says \$500, I'm out of luck
2 for the extra \$400.

3 JUSTICE SOTOMAYOR: Mr. Phillips, this is an
4 unusual situation with the tribes because in the normal
5 "not to exceed" appropriation by Congress, the
6 government rightly says we have the power to not
7 contract. And in military contracts and others, we have
8 a for convenience cancellation. We have all sorts of
9 things that protect us from the deficiency.

10 But this is a unique situation because the
11 government, on the one hand, despite their protestations
12 to the contrary, are forced to accept these contracts.

13 MR. PHILLIPS: Right.

14 JUSTICE SOTOMAYOR: And on the other hand,
15 Congress is saying, don't pay more on them. We are
16 telling you to accept more payment than we are going to
17 give you.

18 MR. PHILLIPS: Right.

19 JUSTICE SOTOMAYOR: Should we create a
20 special rule for this -- why shouldn't we create a
21 special rule for this unique situation?

22 MR. PHILLIPS: Because, essentially, what
23 you're doing is putting the backs of this problem --
24 putting the burden of this problem on the backs of
25 innocent contractors who --

1 JUSTICE SCALIA: Well, is it --

2 MR. PHILLIPS: Who entered into in good
3 faith these agreements.

4 JUSTICE SCALIA: Well, is it just a question
5 of our creating a new rule; or, rather, is the
6 proposition whether the tribes, when they entered into
7 this, should have realized that because of the
8 peculiarity of these contracts, that they had to be
9 entered into, that the rule which otherwise would apply
10 does not apply? It ought to be a question of
11 expectation of the tribe, should it not?

12 MR. PHILLIPS: Well, I would -- I would
13 suggest a couple things about that. I mean, I think in
14 general it's reasonable to look for the -- obviously,
15 the intent of the parties and the expectations of the
16 parties.

17 This case went off on summary judgment that
18 we lost, I mean, even on a -- so we didn't have an
19 opportunity for any analysis of this. But the reality
20 is, is that from the Tribe's perspective, they
21 recognize, because of Ferris, and because of the way the
22 Comptroller General has interpreted Ferris, that they
23 are under a duty to make sure that there is an
24 appropriation that covers this contract, that the
25 amount, purpose, time requirements are all satisfied

1 with enough money to accomplish that.

2 And then, of course, we have the obligation
3 to perform, which, of course, that's the other half of
4 the equation here. And, Justice Sotomayor, that's why I
5 wouldn't say --

6 JUSTICE GINSBURG: But you don't -- you
7 don't have the obligation to perform. I mean, right?
8 In a term of the contract, that if there are lack of
9 sufficient appropriations, performance by either party
10 is excused.

11 MR. PHILLIPS: Well, that -- yes,
12 Justice Ginsburg. But the problem is, we don't know the
13 answer to that until after the year of performance is
14 done, or at least months into the performance. And
15 sometimes, literally, after we've already performed.

16 JUSTICE KENNEDY: Suppose you did know.
17 Suppose the Tribe knew that the 95 million -- let's
18 assume that that's the not to exceed amount -- had
19 already been obligated. Could the Tribe then go ahead
20 and make the government -- a contract with the
21 government, and would the government have to make that
22 contract, in your view?

23 MR. PHILLIPS: I mean, that is the Southern
24 Ute case. And I -- and, certainly, you can make an
25 argument to that. The government has an argument on the

1 other side.

2 JUSTICE KENNEDY: Is it your argument that
3 the answer to that is yes?

4 MR. PHILLIPS: The argument is, it appears
5 that Congress intended to require them to enter into
6 that agreement. You know, the idea of Congress
7 requiring an official to enter into an agreement that
8 violates a criminal statute is at least a difficult
9 concept to sort of wrap your mind around.

10 JUSTICE KENNEDY: Isn't this more specific
11 language than the general language? Doesn't this
12 specific language, not to exceed, supersede the general
13 obligation to make the contract? Otherwise, it's
14 meaningless. The "not to exceed language" is
15 meaningless.

16 MR. PHILLIPS: No, but --

17 JUSTICE KENNEDY: You say it's meaningless.

18 MR. PHILLIPS: No, Justice Kennedy. I told
19 you what the meaning of the "not to exceed" language is.

20 The "not to exceed language" ensures that we
21 cannot turn to the BIA or anyone else at the Interior
22 and say, give us money from another source in order to
23 pay for our contract. And we can't use the injunctive
24 relief that's otherwise available to us for that
25 purpose.

1 So that language has very significant
2 importance in limiting what our options are --

3 JUSTICE GINSBURG: Mr. Phillips --

4 MR. PHILLIPS: -- in a circumstance where we
5 are not being paid enough under the -- the agreement.

6 JUSTICE GINSBURG: -- do I understand your
7 position to be that, yes, the cap has meaning, because
8 in order to exceed the cap, the tribe has to sue; so,
9 any tribe that sues, for any tribe that sues, the cap is
10 meaningless? It's only for the ones who are not
11 sophisticated enough to sue. They are just stuck with
12 what Congress said.

13 So it seems to me that would be a very
14 bizarre scheme to say that; that you have a cap, but the
15 cap is meaningless if you bring a lawsuit.

16 MR. PHILLIPS: No. I -- I mean, I -- it
17 seems to me that we can't -- I mean, aside from bringing
18 a lawsuit, I mean, we -- we could go to the Secretary
19 and say, we don't have enough money to satisfy our
20 contract, would you take money from some other source in
21 order to accomplish that.

22 Because, in the ordinary course, that's not
23 uncommon to re -- re-jigger the appropriation.

24 JUSTICE SCALIA: Do you think it protects
25 these -- these unsophisticated tribes who don't know

1 enough to sue by not allowing anybody to sue?

2 MR. PHILLIPS: Well, that -- yes, there
3 is --

4 JUSTICE SCALIA: Does that make their
5 situation better somehow?

6 MR. PHILLIPS: To be sure, that would not
7 make our situation any better, but --

8 JUSTICE GINSBURG: My question is whether
9 the cap was meaningless. And I think your answer is,
10 yes, for anyone who sues, the cap is meaningless.

11 MR. PHILLIPS: No. No. It -- I don't -- I
12 don't think it does that. It -- it -- it places
13 inherent limitations -- I mean, it says specifically
14 that the Secretary is not authorized to shift money
15 around in order to take care of this particular problem
16 in this particular year that otherwise would be
17 available to us.

18 JUSTICE KENNEDY: You just go to the
19 judgment --

20 MR. PHILLIPS: I'm sorry?

21 JUSTICE PHILLIPS: You just go to the
22 judgment fund --

23 MR. PHILLIPS: Of course. Then, we --

24 JUSTICE KENNEDY: -- which makes it
25 meaningless.

1 MR. PHILLIPS: Well, ultimately, it means
2 that the burden of it will not fall on the tribes. It
3 is -- it does mean that.

4 But -- and let's be clear about this. The
5 judgment fund -- this is not simply going to the
6 judgment fund and asking for our contract support costs
7 to be paid. Our argument here is that there has been a
8 breach of contract, and we are entitled to the damages
9 for the breach of contract, whether those are reliance
10 damages or restitutionary damages, whether we -- whether
11 we are supposed to get what we expected out of the deal
12 or put back in the position we would have been in.

13 JUSTICE KAGAN: Mr. Phillips, if you look at
14 this situation, it seems pretty clear that Congress did
15 want to do something, which was to limit the amount of
16 money that was going to the tribes under these
17 contracts.

18 Do you think that there is a way that
19 Congress can do that --

20 MR. PHILLIPS: Oh, sure.

21 JUSTICE KAGAN: -- consistent with this
22 scheme that's set up by the statute?

23 How could Congress do that? You know, if --
24 if -- if they can't do it this way, how could they?

25 MR. PHILLIPS: Well, the easy way would be

1 to impose specific limitations in -- in every one of the
2 contracts, which -- which, frankly, if you read
3 appropriations bills, which I hate to say I have
4 occasionally done --

5 JUSTICE KAGAN: When you say specific
6 limitations, what would that look like?

7 MR. PHILLIPS: It would look like -- for the
8 agreement between the United States and Ramah Navajo
9 for -- for contract support costs in this particular --
10 for taking over the police department, the contract
11 support costs shall not exceed \$150,000, period. That's
12 the total appropriation.

13 And if we look at our contract -- and there
14 is a specific number in the contract -- and that
15 contract says \$174,000, then we know that we are out of
16 luck for the \$24,000. We've been put on specific notice
17 --

18 JUSTICE ALITO: For any particular year, are
19 they all entered into it at about the same time?

20 MR. PHILLIPS: What's that, Justice Alito?

21 JUSTICE ALITO: For any particular fiscal
22 year, are all of these contracts entered into by a
23 particular date?

24 MR. PHILLIPS: Yeah, nothing is all that
25 easy, obviously. Some of them enter into it on a fiscal

1 year basis. Some of them enter into it on a -- on a --
2 on a calendar year basis.

3 And, frankly, the -- part of the problem is
4 when does the government get around to signing these
5 agreements.

6 And, also, there are 12 regions. I mean,
7 part of the reason -- I would like to spend a second
8 talking about the comment that, you know, we have this
9 fair and equitable scheme in place in which we are
10 allocating moneys out, when the reality is, is that
11 there is substantial evidence in the record, even though
12 we have not had an opportunity to make a full record,
13 that the -- that the -- that the Bureau makes mistakes
14 in 40 percent of these contractual arrangements.

15 And I know my -- my colleague is going to
16 dispute that, but the truth is we've known that for
17 years. They just make mistakes, and people get
18 impaired -- their contract rights are impaired on that
19 basis.

20 This is not some kind of an inequitable
21 scheme that's operating here. There are 12 different
22 regions operating in 12 different ways. Some people get
23 money, some people get 300 percent of theirs, some
24 people get zero percent of theirs.

25 JUSTICE SOTOMAYOR: Mr. Phillips, how does

1 Congress do this without upsetting the entire scheme?
2 Knowing that these contracts are not all signed on one
3 day, that there are 12 regions, that the negotiations go
4 over time, how could Congress achieve the scheme that
5 the government wants now? How would it write this
6 contract?

7 MR. PHILLIPS: Right. Well, the easy way
8 would be to take away the requirement that the
9 government has to enter into all of these contracts at
10 the request of the tribe. And -- and -- and that's
11 clearly available. If they want to go down that path,
12 they can do that in a heartbeat. And then they have all
13 of the discretion they want -- they want to apply under
14 these circumstances.

15 So, I mean, there's -- obviously, there is a
16 bit of, as we said in the brief, schizophrenia. And I
17 have some misgivings about describing Congress that way,
18 but there is some schizophrenia in how they approach
19 this problem.

20 JUSTICE SCALIA: Do you have to solve it
21 contract by contract? Couldn't there be a -- a
22 provision in the -- in the law which -- which says that,
23 where appropriated funds are inadequate to cover the
24 totality of -- of -- of costs under this statute, it
25 will be apportioned as follows?

1 MR. PHILLIPS: Yes. Congress could --

2 JUSTICE SCALIA: Or the Secretary will
3 apportion it? That's all it would take. You wouldn't
4 even have to do it contract by contract; right?

5 MR. PHILLIPS: Right. I -- I mean, I think
6 that would --

7 JUSTICE SCALIA: You would prefer contract
8 by contract for your clients.

9 MR. PHILLIPS: Well, I just think it's been
10 noted --

11 JUSTICE SCALIA: Oh, absolutely --

12 MR. PHILLIPS: -- but, you know, I don't
13 disagree with that.

14 Look, and as we argued in our brief, there
15 are three or four different ways that Congress can fix
16 this problem going forward, but -- and that's -- and
17 that's the message, I thought, from Justice Sotomayor,
18 is why don't we let Congress fix the problem and allow
19 the background principles of Ferris, as interpreted by
20 the Comptroller General, to apply in this case in order
21 to resolve the contract dispute that's properly,
22 obviously, before the Court at this point.

23 I'm sorry, Mr. Chief Justice.

24 CHIEF JUSTICE ROBERTS: I think -- I think
25 this may have been asked, and I'm not sure of the -- I

1 understood the answer.

2 This is -- is this on an ongoing, forward
3 looking basis? In other words, you enter into the
4 contracts, and then you wait and see whether there are
5 appropriations?

6 MR. PHILLIPS: Yes. Typically, what happens
7 is you enter into the agreement sometime just before the
8 appropriation comes down. It's -- it's -- it's usually
9 pretty close, because --

10 CHIEF JUSTICE ROBERTS: Well, so doesn't it
11 make -- I mean, doesn't the system that the government
12 is operating under make a lot of sense? Because let's
13 say the tribe says, look, we need a million dollars.
14 The Secretary agrees to it. And then I assume the two
15 of them get together and say, well, we'll try to get the
16 appropriation for it. You know, you understand we may
17 not get it, but this is how much you need, we'll go back
18 and get it. If you get it, that's great; if you don't,
19 well, then that's --

20 MR. PHILLIPS: And -- and, Mr. Chief
21 Justice, if they did that on a -- on a tribe-by-tribe,
22 contract-by-contract basis, I -- I wouldn't have any
23 problem with that, because then you're on notice.

24 But when they say to you, okay, fine,
25 here's -- you know, this is -- there is your contract

1 support cost provision, there is a specific number in
2 there, 1.3.78 dollars and 63 cents, that's what you
3 ought to get, and we get an appropriation that comes
4 back in that says the government will -- that, you know,
5 we have appropriated \$100 million for contract support
6 costs.

7 There are 330 other tribes out there
8 potentially with contracts that are involved here. It
9 is -- and -- and just to put it in context, we are
10 talking about -- you know, many of these tribes are in
11 incredibly remote situations. They don't have access to
12 all the other information about what's going on. And
13 the real question is, should you impose --

14 CHIEF JUSTICE ROBERTS: Are you
15 suggesting that --

16 MR. PHILLIPS: -- that on the tribes.

17 CHIEF JUSTICE ROBERTS: Are you suggesting
18 that Congress has to go through each of those contracts
19 and say, this is how much we are going to appropriate,
20 this is how much?

21 MR. PHILLIPS: I think that's -- I actually
22 think that would be the fairer way to do it. And I
23 don't think it would be as burdensome as -- as your
24 question implies because, again, what else does staff
25 have better to do than to sit down and put all those

1 appropriations together.

2 CHIEF JUSTICE ROBERTS: Well, the question
3 is whether it's the staff in Congress that's going to do
4 it or the staff at the Department of the Interior?

5 MR. PHILLIPS: Well --

6 CHIEF JUSTICE ROBERTS: And I suppose
7 Congress can reasonably determine that the people at
8 Interior know better about how to do it than we do.

9 MR. PHILLIPS: Right. But then -- then they
10 could do it by -- by -- expressly by reference.

11 I mean, if, in fact, Interior has set it out
12 that way and has it all done, then they can just
13 incorporate it into the statute anyway.

14 I mean, there are simple ways to do it.
15 There are broader ways to do it. And as I said to
16 Justice Sotomayor, clearly Congress could simply, you
17 know, absolve the government of its responsibility to
18 enter into any contract that a -- that a -- when an
19 Indian tribe shows up at their doorstep.

20 All of those seem to me preferable than
21 saying to the tribes, after they have fully performed
22 their side of the deal, okay, I'm sorry, we are not
23 going to pay you.

24 The -- the other thing that's odd about
25 this --

1 JUSTICE SOTOMAYOR: I'm sorry. You keep
2 saying that, but I thought in your earlier answer you
3 said that the contracts are generally signed by the time
4 of the appropriation.

5 MR. PHILLIPS: Right.

6 JUSTICE SOTOMAYOR: Where is that in the
7 cycle of performance? Is that at the beginning of
8 performance?

9 MR. PHILLIPS: That's at the beginning of
10 performance. But -- but what we find out about the
11 notices that we are -- that we've later received is at
12 some point, we're sending you 75 percent in some
13 situations, or we're going to send you exactly the same
14 amount of money you got last year, even though that
15 won't cover it.

16 JUSTICE SOTOMAYOR: So the tribes -- even
17 when the appropriation comes out, they don't know how
18 much the Department has contracted with other tribes.

19 MR. PHILLIPS: Right. We haven't --

20 JUSTICE SOTOMAYOR: So they're performing
21 until they get that notice later on.

22 MR. PHILLIPS: Exactly. And, candidly,
23 assume that -- either one of two things will happen.
24 Either we will ultimately be paid in full, which has
25 happened -- I mean, the last year, they were in fact

1 paid in full. Or alternatively, that they will have
2 access to the judgment fund in order to -- to get the
3 recovery they are otherwise entitled to.

4 JUSTICE KAGAN: Mr. Phillips, do you
5 think -- and the long question here is what did Congress
6 want. And what -- one answer might be Congress wanted
7 exactly what the government says it wanted. But another
8 answer might be something different, that actually,
9 Congress wanted there to be unlimited funds for these
10 tribes, but that it wanted to shift the costs of some of
11 those funds to the judgment fund outside of the Interior
12 budget.

13 MR. PHILLIPS: Right.

14 JUSTICE KAGAN: Do you -- I mean, do you
15 contest the government's view of what Congress wanted
16 here? And if so, how?

17 MR. PHILLIPS: Well, I think the question is
18 it's unclear what Congress really wanted in this case,
19 and therefore, you ought to construe the -- the scheme
20 in a way that is most favorable to the tribes. And if
21 that means that the scheme operates so as to protect the
22 integrity of the appropriations process and the spending
23 process for a particular year, and prevents us from
24 being able to seek relief outside of this contract
25 support cost appropriation limitation, that makes

1 perfect sense to me, leaving open obviously the
2 availability of the judgment fund at the end of the day
3 so that the tribes do not in fact have to bear the full
4 burden of -- of this arrangement as opposed to -- as
5 opposed to anyone else.

6 I mean, that's -- again, we do provide --
7 we've performed the services. We don't know. We do it
8 in good faith. Under those circumstances, it seems to
9 me that's the classic situation in which we should
10 receive full compensation.

11 If there are no further questions, Your
12 Honor, thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Phillips.

15 Mr. Freeman, you have 4 minutes remaining.

16 REBUTTAL ARGUMENT OF MARK R. FREEMAN

17 ON BEHALF OF THE PETITIONERS

18 MR. FREEMAN: Thank you --

19 JUSTICE SOTOMAYOR: Do you dispute
20 Mr. Phillips' statement that the tribes don't know how
21 much they're getting until some point further into the
22 performance cycle?

23 MR. FREEMAN: In part, Your Honor. Let me
24 explain. As I mentioned earlier, for the first many
25 years in this scheme, we did a uniform pro rata

1 distribution methodology. The tribes came to us and
2 said, look, that's a problem for us because we don't
3 have any budget transparency; we can't see how much
4 we're going to get. So we adopted this policy in 2006.
5 And one of the principal elements of that policy is that
6 it guarantees that, if -- as long as Congress
7 appropriates as much money as it did in the previous
8 fiscal year, which it generally has, the tribe will get
9 immediately, like within 2 weeks, the exact amount of
10 money that it received in the previous year. And that
11 money comes immediately. They can use it however they
12 want. It's not subject to apportionment. Unlike most
13 Federal agencies, we don't dole it out. They get it
14 right away.

15 Now, the question then becomes what to do
16 with any additional money that Congress has
17 appropriated, and the policy provides for distribution
18 of that money on what we call a bottoms-up basis. We
19 give it to the tribes that are the farthest away from
20 100 percent of funding. That resolution was negotiated
21 with the tribes and, indeed, with some counsel for
22 Respondents. It's, we think -- and I might be wrong
23 about this -- but we think that that's the solution that
24 the tribes want, if the caps have any effect. There
25 are --

1 JUSTICE KAGAN: I guess what I don't
2 understand about the government's argument, Mr. Freeman,
3 is exactly what the contractual rights of the tribes
4 become. I mean, as I -- this is supposed to be a
5 contract, and we've held that it's a contract, and
6 usually contracting parties have rights to something.

7 MR. FREEMAN: Yes.

8 JUSTICE KAGAN: So what do they have a right
9 to in your view?

10 MR. FREEMAN: Well, first of all, let's make
11 clear -- let's make sure that we're not --

12 JUSTICE KAGAN: That was -- that was a
13 straightforward question.

14 (Laughter.)

15 MR. FREEMAN: Well, they have a right, Your
16 Honor, in the first instance to the principal promise
17 that's under any ISDA contract, which is we give the
18 amount of money that the Secretary would have provided
19 for the program funds, for operational --

20 JUSTICE KAGAN: No, but what do they have a
21 right to with respect to these additional overhead
22 costs?

23 MR. FREEMAN: Contract support costs. They
24 have a right as a class to the distribution of every
25 dollar that Congress appropriates, and for every

1 contractor --

2 JUSTICE KAGAN: What does each individual
3 tribe have a right to?

4 MR. FREEMAN: A proportionate share based on
5 the Secretary's policy for the distribution of these in
6 light of the caps. Let me --

7 JUSTICE KAGAN: So you think they do have a
8 right to a pro rata share?

9 MR. FREEMAN: We think that --

10 JUSTICE KAGAN: In other words, the
11 Secretary could not say, oh, you know, these tribes have
12 been doing a better job, so we'll give to them; or these
13 tribes need it more, so we'll give it to them. You
14 think that there's a contractual right to a pro rata
15 share.

16 MR. FREEMAN: We think there's a contractual
17 right to -- and, in fact, the contracts often reference
18 these policies directly. For example, page 123 of the
19 joint appendix, one of the contracts in this case says
20 you'll be paid according to the distribution policies
21 adopted by the Secretary. So in that case, yes, we
22 bound ourselves --

23 CHIEF JUSTICE ROBERTS: I'm sorry. I didn't
24 think that was responsive. Does the Secretary --
25 Justice Kagan can defend her own question -- but does

1 the Secretary have the discretion to adopt something
2 other than a pro rata distribution when there are not
3 sufficient appropriations?

4 MR. FREEMAN: We think within a range of
5 reasonable solutions after consultation with the tribes,
6 yes. We don't --

7 JUSTICE GINSBURG: You must that question --

8 JUSTICE SOTOMAYOR: The system that's in
9 place does not --

10 JUSTICE GINSBURG: You must answer that
11 question "yes" --

12 MR. FREEMAN: Yes.

13 JUSTICE GINSBURG: -- because that's exactly
14 what the Secretary did.

15 MR. FREEMAN: Right.

16 JUSTICE GINSBURG: You explained that it was
17 pro rata.

18 MR. FREEMAN: That's right. And --

19 JUSTICE KAGAN: This is a very -- this is a
20 very strange kind of contractual right. The -- the
21 contracting tribe has a right to have the Secretary to
22 use discretion to decide how much the contracting tribe
23 gets. What kind of contract is that?

24 (Laughter.)

25 MR. FREEMAN: Respectfully -- respectfully,

1 Your Honor, that is an exaggeration. Congress has
2 appropriated since 1994 more than \$2.3 billion in
3 contract support cost funds. We've distributed all of
4 that money to the tribes. All of the tribes here have
5 gotten substantial sums.

6 JUSTICE KAGAN: No, I'm not contesting -- I
7 mean, clearly you think and the Secretary thinks that
8 there's an obligation to distribute all that money.

9 MR. FREEMAN: Right.

10 JUSTICE KAGAN: And -- and I don't think
11 anybody disagrees with that. The question is what each
12 individual tribe has a contractual right to.

13 MR. FREEMAN: May I answer the question,
14 Your Honor?

15 Your Honor, once it is clear the caps
16 control the total amount of money that the Secretary may
17 spend, every further question is a question of
18 allocation. We think we have the policy that's right --
19 it was negotiated with the tribes and counsel for
20 Respondents -- but if we're wrong about that, we can
21 have that fight another day. The question here is
22 whether the caps define the maximum amount of money that
23 the Secretary may spend, and we think they do.

24 CHIEF JUSTICE ROBERTS: Thank you counsel,
25 counsel.

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The case is submitted.

(Whereupon, at 11:08 a.m., the case in the
above-entitled matter was submitted.)

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