No. 11-551

IN THE

Supreme Court of the United States

KENNETH L. SALAZAR, *et al.*, *Petitioners,*

v.

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

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

BRIEF IN OPPOSITION FOR RESPONDENTS

MICHAEL P. GROSS
Counsel of Record
M.P. GROSS LAW FIRM, P.C.
460 St. Michael's Drive
No. 401
Santa Fe, NM 87505
(505) 995-8066
mike@mpgrosslaw.com

C. BRYANT ROGERS
VANAMBERG, ROGERS, YEPA,
ABEITA & GOMEZ, LLP
P.O. Box 1447
Santa Fe, NM 87504
(505) 988-8979

DANIEL H. MACMEEKIN
DAN MACMEEKIN,
ATTORNEY AT LAW
1776 Massachusetts Ave., NW
Suite 801
Washington, DC 20036
(202) 223-1717

Of Counsel

LLOYD B. MILLER
DONALD J. SIMON
SONOSKY, CHAMBERS,
SACHSE, ENDRESON
& PERRY, LLP
1425 K Street, Suite 600
Washington, D.C. 20007
(202) 682-0240

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

In *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005), this Court held that a contract authorized under the Indian Self-Determination Act (ISDA) is enforceable like any other government contract. That decision further held that breach of the contractual promise to pay full contract support costs to a contractor is enforceable through a suit for money damages under the Contract Disputes Act, so long as Congress has appropriated sufficient funds to pay that contractor, even if it has not appropriated sufficient funds to pay all contractors nationwide.

The question presented is:

Whether, under *Cherokee,* a contractor which fully performed a contract was entitled to be paid the full contract price, where earmarked "not to exceed" appropriations were more than sufficient to pay that contractor but were insufficient to pay all the contracts the agency had made.

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In the Supreme Court of the United States

KENNETH L. SALAZAR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-87a) is reported at 644 F.3d 1054. The opinion of the district court (Pet. 90a-107a) is not reported.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at

25 U.S.C. §§ 450-458bbb-2) and other laws are set forth at Pet. 110a-131a.

STATEMENT

1. Respondent incorporates by reference the Tenth Circuit's statement of the case set forth at. Pet. 4a-14a. To summarize, Congress in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450bbb-2 ("ISDA"), required the Secretaries of Interior and Health and Human Services to award contracts upon request to qualified Indian Tribes and tribal organizations to perform the Secretaries' service programs. The purpose of this initiative was to enhance tribal self-governance, improve Indian education, and improve the delivery of governmental services to Indian people through a contracting mechanism that the Tribes, instead of the agencies, would control.

Originally, the Act simply directed that the amount of funds to be provided in ISDA contracts "shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract." Pub. L. No. 93-638, § 106(h), 88 Stat. 2203, 2211-12 (1975). But it quickly became clear that this 'secretarial amount' was insufficient to maintain program levels under contract, because program funds were being diverted to cover contractor overhead and administrative costs (for the most part, "indirect costs"). The agencies began to add supplemental funding for these indirect costs (also known as "contract support costs"), but the agencies' haphazard policies and actions proved unworkable.

Following years of controversy and congressional investigations into this problem and related difficulties in enforcing contract rights under the Act, Congress in 1988 converted what had until then been discretionary supplemental funding for contract support costs into a statutory right to have such costs fully funded, on a par with the existing right to have the full secretarial amount added to the contract. Pub. L. No. 100-472, § 205, 102 Stat. 2285, 2292 (1988) (adding 25 U.S.C. § 450j-1(a)(2)). Congress also made clear that ISDA agreements were contracts, fully enforceable as such for "money damages" against the government, in actions brought under the Contract Disputes Act. *Id.*, § 205, 102 Stat. at 2294-95 (adding 25 U.S.C. § 450m-1).

In 1994 Congress reinforced this mandate in three ways. First, Congress elaborated upon the kinds of indirect costs and other contract support costs that were to be added to each contract. Pub. L. No. 103-413, § 102(14), 108 Stat. 4250, 4257-58 (1994) (adding 25 U.S.C. § 450j–1(a)(3), (5)).

Second, Congress added the directive that, upon the approval of a contract, "the Secretary *shall add* to the contract the full amount of funds to which the contractor is entitled under [§ 450j–1(a)]", meaning the secretarial amount under § 450j–1(a)(1), plus the contract support cost amount under § 450j-1(a)(2). Pub. L. No. 103-413, § 102(17), 108 Stat. at 1259 (adding 25 U.S.C. § 450j–1(g)) (emphasis added).

Third, Congress instructed that "the total amount specified in the annual funding agreement ... shall not be less than the applicable amount

determined pursuant to [450j-1(a)]" (again, meaning the secretarial amount plus the contract support cost amount). *Id.* at § 103, 108 Stat. at 4260-68 (adding 25 U.S.C. § 450*l*(c), Model Contract, sec. 1(b)(4)(A)).

As is typical in contracting arrangements where the contract is awarded before the fiscal year begins, the 1988 and 1994 Amendments provide that payments are "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b) (1988); 25 U.S.C. § 450*l*(c) (Model Contract sec. 1(b)(4)) (1994).

2. Most contract support costs are comprised of "indirect costs." *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 635 (2005) ("*Cherokee*"). The "reasonable" amount of indirect costs is typically determined by the negotiation of an indirect cost rate with a government agency. The process for negotiating indirect cost rates is set forth in OMB Circular A-87, 2 C.F.R. pt. 225 and Appx. B. Negotiations are conducted by the "cognizant agency," in this case a branch of the Interior Department. Once the rate is established, the Secretary multiplies the rate against the program base (the secretarial amount) to determine the required amount of indirect costs that the Bureau of Indian Affairs ("BIA") must add to the contract pursuant to 25 U.S.C. §§ 450j-1(a)(2) and 450j-1(g). *Cherokee*, 543 U.S. at 635; *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1463 n.8 (10th Cir. 1997) (*Ramah I*). Similar federal standards control the determination of direct contract support costs to be added under 25 U.S.C. § 450j-1(a)(3)(A)(i).

The United States' contract obligations for contract support costs are always mathematically determinable. Importantly, contract support cost

requirements are not mere "requests" for whatever a tribal contractor wants, Pet. 4, 8, 10, 12, 16, 18, 20 n. 7, 27, 29. Nor are they "demands." *Id.* at 9, 10, 13, 18, 30. They are determinable amounts that are set by the government under rigorous government standards and audit requirements. Midyear, the agency is required to submit a shortfall report to Congress based on these full contract support cost requirements. 25 U.S.C. § 450j-1(c).

3. The Ramah Navajo Chapter ("Ramah"), the Oglala Sioux Tribe ("Oglala"), and the Pueblo of Zuni ("Zuni") are parties to indefinite term "mature" ISDA contracts with the United States, awarded by the Secretary of the Interior.[1] Cir. J.A. 878-1016. Congress dictated the contract language verbatim in the ISDA. 25 U.S.C. § 450*l*(c). Each contractor also entered into "annual funding agreements" pursuant to sections 1(b)(4) and 1(f) of the Model Contract. Pursuant to these contracts, Ramah, Oglala, and Zuni administer Federal governmental services which the government would otherwise carry out, including law enforcement, courts, education assistance, land management, probate assistance, natural resources services, employment assistance, child welfare assistance, emergency youth shelters and juvenile detention services. J.A. Cir. 891, 932, 943, 985-987.

This case commenced in 1990 and was certified as a class action in 1993. In the first phase of this litigation, the Tenth Circuit concluded that

[1] The Pueblo of Zuni joined the case as co-plaintiff after the motion for summary judgment decided below was filed. For that reason, its data are not included in the record.

the Secretary's process for setting indirect cost requirements was flawed. *Ramah I.* In the second phase the parties settled the government's liability on all claims based on this rate-making defect for fiscal years 1989-1993. *Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999) (approving settlement). In the third phase (after Oglala and Zuni had intervened) the parties settled the government's liability for failing to pay full indirect contract support costs in fiscal years 1992-1993, and for failing to pay direct contract support costs in fiscal years 1992-1994. *Ramah Navajo Chapter* v. *Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002) (approving settlement). In the fourth phase the district court approved a partial settlement granting equitable relief to the class over the ratemaking process and related issues. *Ramah Navajo Chapter* v. *Kempthorne*, No. CIV 90-0957 (D.N.M. Aug. 27, 2008).

The current phase concerns the government's liability in fiscal years 1994 through 2001 for unpaid indirect costs, and in fiscal years 1995 through 2001 for unpaid direct contract support costs. These are the years when the congressional appropriation to the Secretary for payment of indirect contract support costs (FY 1994), or for all contract support costs (FY 1995-2001), was capped by a "not to exceed" clause that limited the appropriation to a stated sum. Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993); Pub. L. No. 103-332, 108 Stat. 2499, 2528 (1994).

Months after the commencement of each fiscal year, the BIA published a notice in the Federal Register addressed to "BIA personnel." Cir. J.A. 265,

273-306. Typical is 62 Fed. Reg. 1468-1470 (1997). The annual notice contained instructions to those personnel for "carrying out their responsibilities when distributing [the capped contract support costs appropriation]," noting that the instructions "are not regulations establishing program requirements."

The notices did not announce reductions in contract price. *Id.* Instead, they stated that 75% of the previous year's contract support cost requirement would be paid immediately, and that final payment would await further calculations. See, *e.g.*, *id.* at 1469. The notices said that *if* the appropriation proved to be insufficient to pay all contractors in full, the BIA would make a pro rata apportionment of the remaining appropriations. In the last month of the fiscal year (often not until the very last days)—when for all practical purposes full contractor performance was complete—the BIA made a second payment of contract support costs. Cir. J.A. 270, 280-81, 288, 301-02, 305-06, 809, 811, 1186, 1188. None of the notices advised the contractor of its right to curtail services if payments were not made but did suggest using program funds to make up insufficiencies. In each of the years at issue, this second payment was insufficient to pay the balance due for contract support costs. Pet. 8a.

Delays and insufficiencies in recovery of CSC greatly impacted delivery of contractors' government services. Cir. J.A. 268-270, 875-877.

Under the Act the Secretary was supposed to submit to Congress a mid-year report of any deficiency in contract support cost payments due the contractors, contractor by contractor. 25 U.S.C.

§ 450j-1(c). The uncontroverted evidence is that these annual deficiency reports either were never submitted, or were submitted long after the years in question were over. Cir. J.A. 240-256. The uncontradicted evidence also showed that in the years at issue the Executive Branch never asked Congress for the full amount required to pay all of the contractors' contracts. Cir. J.A. 231, 239, 1380, 1384, 1388, 1392, 1396, 1400.

4. The district court entered summary judgment for the government, ruling that "the United States is not liable for shortfalls in contract payments when Congress has specified an insufficient 'not to exceed' lump sum appropriation." Pet. 105a-106a.

The Tenth Circuit reversed. In a careful and scholarly opinion the court found the outcome controlled by this Court's recent unanimous decision in *Cherokee*, and three cases discussed therein, *Lincoln* v. *Vigil*, 508 U.S. 182 (1993); *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892); and *Dougherty* v. *United States*, 18 Ct. Cl. 496 (1883).

The court of appeals began by focusing on (1) the government's argument "that the phrase 'subject to the availability of appropriations' ... unambiguously limits the plaintiffs' entitlement to [contract support cost] funding to a pro rata share" of each annual appropriation, and (2) Respondents' contention that the availability clause instead "voids the government's obligation on a given contract only if Congress fails to appropriate enough funds to pay that particular contract." Pet. 16a. The court of appeals found ready answers because "we do not

write on a blank slate." Pet. 16a. While the court made note of the mandatory rule of statutory and contract construction favoring tribal contractors—a rule which Congress placed in the Act and the contract (Pet. 15a, citing 25 U.S.C. § 450*l*(c), Model Contract, sec. 1(a)(2))—together with the related common law canon of construction, the court never applied the rule or the canon because it found answers in clear and controlling principles of federal contract and appropriations law.

The court of appeals drew upon "three principles set down by the Supreme Court" to resolve the issue presented. Pet. 17a. First, the government was wrong to insist that the Secretary had a duty to prorate the contract support cost appropriation across all contractors—and that a given contractor therefore only had an entitlement to that prorated amount—because the contract support appropriation at issue was a lump-sum appropriation over which the Secretary had complete discretion. As this Court said in *Lincoln*, 508 U.S. at 192, "'where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions.'" Pet. 17a (quoting same) (internal quotations omitted). The court of appeals noted that the Secretary's discretion with respect to such a lump sum amount is only limited by "the concept of legal availability," Pet. 18a, under which secretarial expenditures must simply meet the traditional purpose-time-amount rule. Pet. 18a-19a.

The government has now abandoned the proposition championed below that Ramah, Oglala

and Zuni were entitled only to a pro rata share of the contract support appropriation—understandably so, for in the parallel *Arctic Slope* litigation the government must defend the Secretary's allocation of an identical lump sum appropriation in a fashion that was anything but pro rata, and which actually overpaid some contractors while underpaying most. *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), *cert. pending*, 80 U.S.L.W. 3059 (U.S. July 19, 2011) (No. 11-83) (Petition at 5).

Second, the court of appeals again drew upon *Cherokee* for the principle that "'mutual self awareness among tribal contractors [does not mean that] tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors.'" Pet. 17a, 22a (citing *Cherokee*, 543 U.S. at 640). That is, the several hundred other contractors dealing with the Secretary along with 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 drew upon the "venerable" opinion in *Ferris*—cited three times by this Court in *Cherokee*—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*, 27 Ct. Cl. at 546). The court of appeals also relied

upon *Dougherty*—also cited approvingly in *Cherokee*, 543 U.S. at 643—to underscore the distinction between "single-contract appropriations" (now called "line-item" appropriations) and "general" or "multi contract appropriations" (now, simply "lump-sum" appropriations): "'[W]e 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.'" Pet. 22a-23a (quoting *Dougherty*, 18 Ct. Cl. at 503).

Based upon these binding authorities, the court of appeals concluded that, while "[i]t may be tempting to consider all tribes' claims to an appropriation collectively, to view tribal self-determination contract funds as a single line-item appropriation, and to assume that because funds were insufficient to pay all tribal contractors they were unavailable to [pay] each contractor, but *Cherokee*, *Ferris*, and *Dougherty* prohibit such analytical shortcuts." Pet. 23a.

Third, the court of appeals again drew upon *Cherokee* for the principle that "'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*, 543 U.S. at 641; emphasis in *Cherokee*). Indeed, the court of appeals observed that "[i]n *Cherokee*, the Court considered an issue nearly identical to that under review," and that "[t]he Court agreed with

[Respondents], quoting the *Ferris* rule." Pet. 24a (citing *Cherokee*, 543 U.S. at 637-38).

As the court of appeals noted, in *Cherokee* this Court already rejected the government's construction of the ISDA's "subject to the availability of appropriations" clause, explaining that its function is not to cut off a contractor's rights when he is paid from a lump sum appropriation. Rather, the clause plays a *timing* function—to "make[ ] clear that an agency and 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." Pet. 25a (quoting *Cherokee*, 543 U.S. at 643). Thus in *Cherokee* "the 'subject to the availability of appropriations' language did not help the government '[s]ince Congress appropriated adequate unrestricted funds here.'" Pet. 25a (quoting *Cherokee*, 543 U.S. at 643). So, too, in this case "an agency's decision to allocate legally available funds to some other permissible purpose does not render an appropriation unavailable with respect to an ISDA contract." Pet. 25a. In other words, an agency's discretionary decision about how to spend or allocate funds—even if it is to pay other contractors—cannot convert an available appropriation which *could have paid* a contract into an unavailable appropriation which cannot pay the contract.

These three principles, all drawn from this Court's unanimous decision in *Cherokee*, readily disposed of the matter. First, each capped appropriation was a lump-sum appropriation, just as in *Cherokee*. Pet. 26a-27a. Second, the agency's decision to spend each appropriation down could not

alter the legal availability of the appropriation ab initio to pay the contractor in full—again, just as in *Cherokee*. Pet. 28a-29a. (The fact that the other spending was on similar contracts provides no "basis in logic" for a different outcome. Pet. 29a.) Third, "[i]n this case, as in *Cherokee*, there is no statutory restriction that would preclude the Secretary from using appropriated funds to pay full [contract support cost] need to the individual contractors bringing suit." Pet. 30a. Fourth, the fact that each appropriation here turned out to be insufficient to pay all contractors cannot overcome the principle from *Cherokee* that "'mutual self-awareness'" is insufficient to shift to any one contractor the risk that the appropriation will prove to be insufficient to pay all. Pet. 31a. Finally, the Circuit court noted that a system that leaves a contractor's payment rights in the hands of agency officials exercising "unfettered" (and, under *Lincoln*, unreviewable) discretion "sows uncertainty among contractors that could 'block the wheels of the Government.'" Pet. 32a (quoting *Dougherty*, 18 Ct. Cl. at 503).

Based upon these principles, the court of appeals disposed of the contrary decision reached by the Federal Circuit in *Arctic Slope*, along with decisions which predated this Court's seminal opinion in *Cherokee*. Pet. 34a-38a, 39a-40a. It also disposed of the government's Anti-Deficiency Act and Appropriations Clause arguments (also rejected in *Cherokee*). As to the former, the court of appeals observed that an ISDA contract is the very kind of contract that is expressly *excepted* from the Anti-Deficiency Act. Pet. 44a-45a (discussing 31 U.S.C. § 1341(a)(1)(B)). As to the latter, the court noted

that in *Cherokee*, 543 U.S. at 642-43, this Court already rejected the government's Appropriations Clause argument by reasoning that when an appropriation is fully spent without paying a contractor what he is due, a damages remedy lies and payment of any recovery is congressionally authorized in the Judgment Fund Act, 31 U.S.C. § 1304. Pet. 45a-46a.

ARGUMENT

I. THE DECISION BELOW DOES NOT WARRANT REVIEW BY THIS COURT.

The substantive issue presented here was correctly decided below under long established principles of federal contracting and appropriations law reaffirmed only six years ago in *Cherokee*. The court of appeals below carefully applied these principles. While the Federal Circuit reached a contrary ruling in *Arctic Slope Native Association* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), *cert. pending*, (U.S. July 19, 2011) (No. 11-83), the fact that a sister Circuit has seriously misconstrued a decision of this Court does not warrant granting a Petition from a ruling which faithfully adheres to that decision.

To the extent Congress believes this Court in *Cherokee* misconstrued the ISDA, Congress is free to amend it or to alter the appropriations structure. Pet. 46a-47a. But here, indications are that Congress agrees with this Court. H.R. Rep. No. 112-151, at 42 (2011) ("The Committee believes that the

Bureau should pay all contract support costs for which it has contractually agreed and directs the Bureau to include the full cost of the contract support obligations in its fiscal year 2013 budget submission"), 98 (identical statement regarding Indian Health Service). Future liabilities are also unlikely if Congress continues to fully fund these contracts. *Id.* at 42 ("Contract support costs are fully funded at $228,000,000"). Congress's ability to alter the controlling rules if it so chooses, and the elimination of future liabilities for non-payment, are additional reasons not to hear this case.

The Petition should therefore be denied and the matter left to Congress.

That said, if the Court decides not to deny the Petition here and grants the Petition in *Arctic Slope*, the Court should not hold this Petition in abeyance but should instead grant the Petition here too. In this way, the Court will have the benefit of reviewing the issue presented in two different settings and with two different records.

II. THE GOVERNMENT'S PETITION SERIOUSLY MISCONSTRUES *CHEROKEE* AND OTHER CONTROLLING LAW

A. The Purpose of the Capped Appropriations Was Not to Reduce the Contract Obligation for Full Contract Support Costs But to Protect Non-Contracted Programs.

This Court in *Cherokee* anticipated statutory earmarks capping contract support cost appropria-

tions. The Court said that if the Secretary needed to protect a given fund, then the Secretary could "ask[] Congress in advance *to protect funds needed for more essential purposes with statutory earmarks.*" 543 U.S. at 642-43 (emphasis added). This is exactly the purpose of the statutory earmark capping contract support costs, and this is specifically confirmed in one of the early appropriations Act's legislative history:

> *In order to protect the Bureau's ability to provide services to those tribes who do not elect to contract* for a part or all of their programs, the Committee has retained bill language which establishes a limit of the amount of funding to be available for contract support.

S. Rep. No. 103-294, at 57 (1994) (emphasis added). This explanation, echoed by this Court in *Cherokee*, and this legislative history were omitted from the Petition. The government's suggestion that the real purpose was to cut off a contractor's right to full payment (Pet. 25-26) is wrong.[2]

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[2] That Congress would want to protect the remainder of the Secretary's appropriation, including operations benefiting other Tribes, is apparent from the fact that both the ISDA, 25 U.S.C. § 450j-1(b), and this Court's decision in *Lincoln* v. *Vigil*, 508 U.S. at 192 (1993), make plain that in the absence of earmarks fencing off the rest of an appropriation, the Secretary would have been free to reduce other operations in order to fund in full his contract obligations to all contractors.

B. The Government's Arguments Ignore the Principal Holding in *Cherokee*—That Indian Self-Determination Act Contracts Are Enforceable.

The government advances several arguments to overcome the decision below, all of which fail to heed this Court's teachings in *Cherokee*.

1. First, the government tries to paper over the fact that this case involves binding enforceable *contracts*. For instance, it says payment of these contracts is on a par with "funding for other federal programs," Pet. 3; that the Secretary is funding these contracts "like other agency programs," Pet. 6; that these contracts are really "[t]ribally administered federal programs" and as such "are not uniquely immune from the appropriations process," Pet. 13; and that paying the contracts cannot come "at the expense of other priorities for the public welfare," Pet. 13. See also Pet. 28 (characterizing this as a case about "the unlimited disbursement of public money at the expense of other priorities.") Along similar lines, it seeks to make this case into one about "funds ... for federal programs administered by tribes under the ISDA ... [and] the same programs administered by the Secretary directly." Pet. 20-21.

All this is but another way of saying that these are not contracts at all, and that what we are really dealing with is simply whether to fund some programs over other programs. But that argument was firmly rejected when the Court made plain that:

> Congress, *in respect to the binding nature of a promise*, meant to treat alike promises made under the Act and ordinary contractual promises (say, those made in procurement contracts). The Act, for example, uses the word "contract" 426 times to describe the nature of the government's promise; and 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," Restatement (Second) of Contracts § 1 (1979).

543 U.S. at 639. The Court thus repudiated the government's notion that an ISDA contract is a "special" and "unique" instrument which puts the contractor "into the shoes of a federal agency" so that the contractor "enjoys no legal entitlement to receive promised amounts from Congress." *Id.* at 638.

Cherokee demonstrates again that where a contractor has performed services for the federal government, the law will enforce its right to be paid.[3]

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[3] See, *e.g.*, *Collins* v. *United States*, 15 Ct. Cl. 22, 35 (1879) (contract liabilities may be created where there is no appropriation of money to pay the obligations); *Gibney* v. *United States*, 114 Ct. Cl. 38, 50-53 (1949) (same); *Neal & Co.* v. *United States*, 19 Cl. Ct. 463, 471-73 (1990) (where federal contract provision is susceptible to more than one reasonable interpretation, ambiguity must be resolved in favor of the contractors); *Wetsel-Oviatt Lumber Co.* v. *United States*, 38 Fed. Cl. 563, 570-71 (1997) (government obliged to compensate fully contractor that had performed contract despite unavailability of appropriations); *AT&T Co. v United States*, 177 F.3d 1368, 1375-76 (Fed. Cir. 1999) (contractor entitled to be paid even though it proceeded with construction of a major defense

In *New York Airways* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966), a contractor who performed mail services for the government under implied-in-fact contracts was held entitled to damages for non-payment even though earmarked appropriations for the service proved insufficient. The governing statute contained a clause much like the one here. *Id.* at 745 ("The Board shall make payments of the remainder of the total compensation payable under this section *out of appropriations made to the Board for that purpose*") (emphasis added). And, the contractor had prior knowledge of the overall appropriations cap. *Id.* at 747 ("The carriers and the Board were aware of the legislated limitations.") The carriers prevailed. This Court twice cited *New York Airways* approvingly in *Cherokee*. 543 U.S. at 642, 643.

At bottom the government's position would allow one party to a contract to set the price after performance by the other. This defies ordinary contract principles long recognized by this Court. *Murray* v. *Charleston*, 96 U.S. 432, 445 (1877) (government's "promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity"). In fact, a "contract" where one party can vary the price is not a contract at all. That cannot be what Congress intended when it required the government to add the full contract support cost amount to each contract, 25 U.S.C. § 450j-1(g), and when it "use[d] the word 'contract' 426 times to

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system exceeding express statutory limits because "[a]n invalidation of a contract after it has been performed is not favored.").

describe the nature of the Government's promise." *Cherokee*, 543 U.S. at 639.

The government's argument, squarely rejected in *Cherokee*, creates a direct conflict between 25 U.S.C. § 450j-1(g) and § 450j-1(b) when none exists.

2. The government repeatedly tries to mischaracterize this suit as one to recover additional contract support costs through some secondary appropriation. *E.g.*, Pet. 9 (saying other courts have "rejected tribal demands for contract support costs in excess of the express statutory caps"), 11 (stating Respondents are seeking "excess" contract support costs "from the Judgment Fund"), 25 (discussing "[t]he court of appeals' theory, under which *every* tribal contractor could recover its reasonable costs from the Treasury" through the Judgment Fund).

The government's mischaracterization failed in *Cherokee*, and in rejecting it this Court made plain that if agency appropriations which could have paid the contractor are gone, the remedy is not a suit to secure additional contract payments from somewhere else, but a suit for *money damages* for breach of contract under 25 U.S.C. § 450m-1 and the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (formerly codified at 41 U.S.C. §§ 601-612). *Cherokee*, 543 U.S. at 642-43 (discussing "appropriate legal remedies arising because the government broke its contractual promise," and citing the Contract Disputes Act and the Judgment Fund). It is not a matter of seeking additional contract payments, but of seeking *damages* for the payments the government failed to make. (Obviously, when contract damage claims are

resolved after years of litigation, the original appropriation is always long gone. That fact never impedes the right to a damages recovery under the CDA.)

3. On a related note, the government argues that, since the Judgment Fund only covers situations where payment "'is not otherwise provided for,'" and since contract support costs are provided for in the agency operating appropriations, the Judgment Fund cannot be a source of payment for any judgment without "circumvent[ing]" the congressional cap. Pet. 18-19 (quoting 31 U.S.C. § 1304(a)). But this Court explained in *Cherokee* that a contractor may pursue "appropriate legal remedies" if the government breaks a "contractual promise," and in doing so the Court expressly referenced the Judgment Fund. *Cherokee*, 543 U.S. at 643. The "payment" that must not be "otherwise provided for" is the payment of "final judgments" for money damages, 31 U.S.C. § 1304(a), and "'unless otherwise provided by law, agency operating 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 U.S. Government Accountability Office, *Principles of Federal Appropriations Law* 14-31 (3d ed. 2008)). As the court of appeals correctly observed (Pet. 45a), Congress's establishment of the Judgment Fund is a complete answer to the government's invocation of the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7.

4. The government adds atmospherics with the claim that "the problem [of insufficient appropriations] grows worse with every federal

budget cycle." Pet. 13. But the government is expected to seek sufficient funds to meet all its contract obligations, *Train* v. *City of New York*, 420 U.S. 35, 39 n.2 (1975), Congress is honoring this Court's judgment in *Cherokee* by providing the Secretary with sufficient monies to pay *all* of the BIA's contract support cost requirements. Congress is therefore capable of adjusting the appropriation so that future damage claims become unnecessary.

5. The government urges that Congress could not possibly have intended to design a system where contractors would have to sue to recover damages for underpayments caused by appropriations which Congress capped with a statutory earmark. Pet. 25-26. But as noted, supra, at 15, the purpose of these "statutory earmarks" was not to cut off liability, but "to protect funds." *Cherokee*, 543 U.S. at 642. The system that Congress designed requires that the contracts be fully funded, 25 U.S.C. § 450j-1(g), that the Secretary notify Congress mid-year for any deficiency appropriation if funds come up short, 25 U.S.C. § 450j-1(c), and that the Secretary ask for full funding in the first place, see, *e.g.*, H.R. Rep. No. 112-151, at 42, 98. It is only because the Secretary has failed to abide by these requirements that the enforcement mechanism Congress placed in the Act has been triggered.

6. The government's reliance on the Federal Circuit's decision in *Babbitt* v. *Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999) ("*Oglala*"), and the District of Columbia Circuit's decision in *Ramah Navajo School Board* v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) is misplaced.

Pet. 13-16. Those decisions were rendered before this Court's unanimous *Cherokee* decision and can have force only if they are consistent with that decision—which they are not.

Further, *Ramah Navajo School Board* was an abuse-of-discretion case under the Administrative Procedure Act, not a breach-of-contract case, and it did not raise the contract law questions at issue here. Instead, it addressed the Secretary's lack of power to penalize a tribal contractor by reducing its contract payments when its indirect cost rate proposal was late. 87 F.3d at 1342-43 & n.5. Nonetheless, the Tenth Circuit carefully analyzed this decision, too, and likewise rejected its reasoning. Pet. App. at 19a-21a.

7. The government's repeated invocation of the Appropriations Clause is misplaced. First, a recovery of a damages award here does no violence to the Appropriations Clause because Congress always controls whether to pay such awards. Exercising that authority, Congress long ago enacted the Permanent and Indefinite Judgment Fund precisely for that purpose, 31 U.S.C. § 1304(a), and the Contract Disputes Act expressly refers to that congressional authority in addressing the payment of damage awards. 41 U.S.C. § 7108(a).

Similarly, the Anti-Deficiency Act is not a bar because (as the court of appeals correctly reasoned, supra 13), that Act expressly excepts the award of contracts that are "authorized by law," 31 U.S.C. § 1341(a)(1)(B). See also 2 U.S.C. § 622(2)(A) (distinguishing entitlement authority from obligation authority). If the ISDA is anything it is a

statute expressly authorizing—indeed, *directing*—the award of contracts before appropriations are made, 25 U.S.C. § 450f(a)(2), and mandating precisely how much money is to be specified. See, *e.g.*, 25 U.S.C. § 450j-1(g). This is why the government's reliance on *OPM* v. *Richmond*, 496 U.S. 414 (1990) is so misplaced, for that case concerned a mere estoppel claim by a federal employee who was given incorrect advice by a Navy official. Here, we are dealing with a claim that Congress expressly authorized to be brought under the Contract Disputes Act, 25 U.S.C. § 450m-1(a), and the controlling statute and contract documents mandated that the contract price "shall" include full contract support costs. 25 U.S.C. §§ 450j-1(g), 450*l*(c), Model Contract, sec. 1(a)(1) and 1(b)(4).

To revisit a foundational case like *Sutton* v. *United States*, 256 U.S. 575 (1921), as the government suggests (Pet. 27-28), and by necessary implication to revisit *Ferris* and *Dougherty* too, would upset over one hundred and twenty years of government contract law. These venerable precedents establish clear rules that control contractor rights and remedies in the case of (1) line-item appropriations specific to the contractor or project being contracted, and (2) lump-sum appropriations generic to hundreds of contractors or hundreds of projects being contracted. As compellingly demonstrated in the amicus brief of the U.S. Chamber of Commerce in *Arctic Slope*, a contrary ruling would be "highly destabilizing to government contracts." Amicus Br. 12. The reason is clear, for it would put contractors at the mercy of government agents deciding how much to pay and

how much not to pay, all the while leaving the contractor in the dark. This is because, absent a line-item appropriation telling the contractor about a limit on its contract or project, there is simply no way for the contractor to know what the agency is doing, how much he will be paid, and when, if at all, he should stop performance (assuming cessation were realistic).

The wildly differing payment levels that occurred in *Arctic Slope* (Pet. Br. 5) demonstrate vividly the extreme impact such a regime would have on contractor rights, a regime which would both severely discourage contracting and substantially increase the cost of contracting. It is these precise concerns which animated this Court's decision in *Cherokee*. 543 U.S. at 644 ("We believe it important to provide a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services.")

If Congress sees fit to adopt a different regime in the case of this particular class of contracts, it certainly knows how to fashion limitations putting contractors on clear notice prior to the commencement of any performance. See, *e.g.*, 25 U.S.C. § 2008(j)(2) (directing a prorated reduction in price). That Congress did not do so here should be the end of the matter.

8. An independent ground for affirming the decision below is that the government may not rely on a "funds available" clause to deny contract

liability where the contract does not expressly shift the risk of loss to the contractor and the Executive Branch fails to seek sufficient appropriations from Congress. *Cf. S.A. Healy Co.* v. *United States*, 576 F.2d 299, 300-301 (Ct. Cl. 1978). Although the court of appeals did not reach this argument, it is undisputed that the Executive Branch failed to request sufficient appropriations in any year at issue to meet its contract support cost obligations to all contractors. Cir. J.A. 231, 239, 506, 540-41, 1281, 1284, 1380, 1384, 1388, 1392, 1396, 1400-01, 1403-05. Worse yet, it failed to notify Congress of this insufficiency, Cir. J.A. 240-256, contrary to the ISDA's command. 25 U.S.C. § 450j-1(c).

C. The Government's Petition Misstates the Facts.

1. The government twists the statutory words "reasonable costs" in 25 U.S.C. § 450j-1(a)(2) to argue that the Respondents are simply seeking "every dollar requested," as if there were no standards and no contract price. Pet. 4, 8, 10, 12, 16, 18, 20 n.7, 27, 29. In fact, Respondents are seeking to enforce through a damages remedy their initial right to full payment of the "indirect costs" that were *fixed by the government.* Congress recognized the indirect cost rate-making process in the Act, 25 U.S.C. § 450b(f), (g), and these are the amounts which the ISDA says Respondents are "entitled to receive." 25 U.S.C. § 450j-1(a)(3)(B); *Ramah I*, 112 F.3d at 1463 n.8.

Contract price terms are frequently calculated by reference to an extrinsic standard such as this. See, *e.g.*, Uniform Commercial Code § 2-305 (recog-

nizing that contract price may "be fixed by an agreed market or other standard as set or recorded by a third person or agency"); *Family Snacks of North Carolina, Inc.* v. *Prepared Products Co.*, 295 F.3d 864-68 (8th Cir. 2002) (contract price to be determined according to "sophisticated and highly detailed 'cost plus' pricing formula"); *United Steel Paper & Forestry, Rubber, Mfg., Energy, Allied Indus & Serv. Workers Intern. Union* v. *Wise Alloys*, 642 F.3d 1344, 1347 (11th Cir. 2011) (price tied to Consumer Price Index). Such methods to determine a contract price do not make contracts unenforceable.

2. The government also mischaracterizes the annual BIA notices. Pet. 26. First and foremost, the notices, which were sent months after each fiscal year began, never informed Respondents they were going to be underpaid (and if so, by how much), and there was no other way for Respondents to independently find "the condition of the appropriation account at the Treasury," or to review "the contract book of the Department." *Dougherty*, 18 Cl. Ct. at 503. The notices merely alluded to a possible shortfall and spelled out a contingency plan for apportioning the remainder of the appropriation on a pro rata basis. They never stated that funds would run out and contract operations would need to stop.

In the end, Respondents only learned what they were going to get at the close of the fiscal year—when their performance was already complete and the government had received the benefit of the bargain. Cir. J.A. 265, 270, 276, 280-81, 288, 301-02, 305-06, 809, 811, 1186, 1188. To suggest that

Respondents should have retroactively rolled back performance to meet the reduced contract payment they got after performance was completed is nonsensical. Pet. 21 (citing 25 U.S.C. 450*l*(c), Model Contract, sec. 1(b)(4) and (c)(3).

3. The government also mischaracterizes one clause in one Oglala contract (but not its others, nor in Ramah's or Zuni's). Pet. 24. As the court of appeals correctly observed, the cited provision is "not an indication that the tribes were agreeing to limit the government's liability." Pet. 41a. Rather, "the most logical reading is that [the clause] is simply referring to the 75 percent to be paid up front by the BIA, established earlier in the agreement" where it is recited that the "balance of funds will be added as soon as it becomes available subject to congressional appropriation." Pet. 41a n.13. Even if one Oglala contract contained a term demanded by the government that was contrary to the ISDA, such a term would be unenforceable by the government under established contract law. *LaBarge Products, Inc.* v. *West*, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995); *MAPCO Alaska Petrol., Inc.* v. *United States*, 27 Fed. Cl. 405, 416 (1992), *abrogated on other grounds*, *Tesoro Hawaii Corp.* v. *United States*, 405 F.3d 1339 (Fed. Cir. 2005); *Appeal of Seldovia Village Tribe*, IBCA Nos. 3862 & 3863, 03-2 BCA ¶ 32400 (Oct. 20, 2003) (applying rule to ISDA contract).

CONCLUSION

For the foregoing reasons, Respondents respectfully suggest that the Court deny the Petition in this case and grant the petition in *Arctic Slope*, together with an order summarily reversing the

Federal Circuit's decision in *Arctic Slope* in light of *Cherokee*. But if the Court decides not to deny the Petition here and also to grant the Petition in *Arctic Slope*, the Court should not hold this Petition in abeyance but should instead grant the Petition here too. In this way, the Court will have the benefit of reviewing the issue presented in two different settings and with two different records. Counsel for Petitioner in *Arctic Slope* concurs.

Respectfully submitted.

MICHAEL P. GROSS
Counsel of Record
M.P. Gross Law Firm, P.C.
460 St. Michael's Drive, No. 401
Santa Fe, NM 87505
(505) 995 8066
mike@mpgrosslaw.com

C. BRYANT ROGERS
VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP
P.O. Box 1447
Santa Fe, NM 87504
(505) 988 8979
cbrogers@nmlawgroup.com

LLOYD B. MILLER
DONALD J. SIMON
Sonosky, Chambers, Sachse, Endreson & Perry, LLC
1425 K Street, Suite 600
Washington, D.C. 20007
(202) 682 0240
lloyd@sonosky.net

Counsel for Respondents

DANIEL H. MACMEEKIN
Dan MacMeekin, Attorney at Law
1776 Massachusetts Ave., NW
Suite 801
Washington, DC 200036
(202) 223-1717
dan@macmeekin.com

Of counsel