No. 11-551

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL.

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

REPLY BRIEF FOR PETITIONERS

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Each year for more than 15 years, Congress has imposed a firm statutory ceiling on the appropriations available to the Secretary of the Interior to pay contract support costs under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.* Respondents acknowledge that Congress thus "capped" the relevant appropriation for each fiscal year at the "stated sum" (Br. in Opp. 6), and it is undisputed that those sums have never been large enough to satisfy all tribal claims for contract support costs. Nevertheless, the Tenth Circuit ruled that, because Congress in each fiscal year appropriated sufficient funds to meet the needs of any *one* tribal contractor considered in isolation, the government must pay *all* of the contract support costs claimed by *every* tribal contractor—even though the clear result is to exceed the statutory appropriations limits imposed by Congress. That decision

contravenes fundamental separation-of-powers principles embodied in the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and reinforced in the Anti-Deficiency Act, 31 U.S.C. 1341; disregards the plain language of the ISDA; and conflicts with prior holdings of the D.C. and Federal Circuits. The petition for a writ of certiorari should be granted.

I. THIS COURT'S REVIEW IS WARRANTED

A. Respondents do not seriously dispute that the question presented warrants this Court's review. They agree that the holding of the court below irreconcilably conflicts with the Federal Circuit's decision in *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (2010), petition for cert. pending, No. 11-83 (filed July 18, 2011) (*Arctic Slope*). Br. in Opp. 14. They agree that the authority of Congress to limit the government's contractual liability through the exercise of its appropriations power is a question of great practical significance. See *id.* at 24-25. And they do not deny that this case provides an appropriate vehicle for the Court's resolution of that important question.

Respondents briefly suggest (Br. in Opp. 14-15) that the Court should deny review because there are "indications" in a single House committee report accompanying a proposed appropriations bill that Congress may provide full funding for tribal contract support costs in fiscal year (FY) 2012. See H.R. Rep. No. 151, 112th Cong., 1st Sess. 42 (2011). That argument is without merit. Like every annual appropriations act for the Department of the Interior since 1994, the proposed appropriations bill for FY 2012 includes a "not to exceed" statutory cap on the funds available to pay contract support costs under the ISDA. See H.R. 2584, 112th Cong., 1st Sess. 24 (2011). The legal effect of such a statutory appropriations cap is the very question that has

divided the courts of appeals. Moreover, even if Congress were ultimately to approve sufficient funds to cover all tribal claims for contract support costs in FY 2012, that would have no effect on the more than $1 billion in accumulated tribal claims for such costs from previous fiscal years. See Pet. 29. Nor would it prevent Congress from capping the available funding at lower levels in the future. Particularly in the present economic climate, there is no serious doubt that the authority of Congress to impose—and the obligation of courts to respect—explicit statutory spending limits is a question of significant prospective importance.

B. Respondents devote most of their brief (Br. in Opp. 15-28) to defending the Tenth Circuit's decision on the merits. Their arguments reflect the same fundamental errors that pervade the court of appeals' decision, see Pet. 19-27, and serve only to highlight the need for this Court's intervention.

1. Respondents' principal argument is that the decision below was compelled by this Court's decision in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) (*Cherokee*). See, *e.g.*, Br. in Opp. 12-13, 14, 17-20. But as the petition explains, *Cherokee* involved the government's liability for contract support costs under an *unrestricted* appropriation. See Pet. 4-6, 17-18. In holding that the government could properly be held liable in that case for contract support costs that the Indian Health Service did "not deny that it promised to pay," the Court repeatedly stressed that Congress had "appropriated sufficient *legally unrestricted* funds to pay the contracts at issue." 543 U.S. at 636, 637 (emphasis added). Indeed, in rejecting the arguments advanced by the government, the Court referred at least eight times to the fact that Congress had placed no statutory restriction

on the Secretary's ability to reprogram other appropriated funds in order to satisfy the tribes' claims.[1]

Cherokee consequently did not address, let alone "squarely reject[]" (Br. in Opp. 20), the government's arguments here. To the contrary, the Court concluded that the ISDA's express reservation of congressional control over appropriations, 25 U.S.C. 450j-1(b), was irrelevant precisely because Congress had provided "adequate unrestricted funds" to pay the claims at issue. 543 U.S. at 643. Here, by contrast, it is undisputed that Congress has "capp[ed] appropriations at a level well below the sum total" of all tribal claims for contract support costs in every fiscal year since 1994. Pet. App. 2a. As the petition explains, those annual appropriations caps reflect a judgment by Congress that funding for ISDA contract support costs should not jeopardize other federal legislative priorities, including other programs benefitting Indians and Indian tribes. Pet. 28. Difficult funding decisions of that kind involve quintessentially legislative judgments that are committed to Congress un-

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[1] See *Cherokee*, 543 U.S. at 637 ("These appropriation Acts contained no relevant statutory restriction."); *ibid.* (discussing the applicable rule when "Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue"); *id.* at 640 (discussing "who should bear the risk that an unrestricted lump-sum appropriation would prove insufficient" to pay all claimants); *id.* at 641 (noting that "the relevant congressional appropriations contained *other* unrestricted funds, small in amount but sufficient to pay the claims at issue"); *ibid.* (rejecting the argument that certain "funds, though legally unrestricted (as far as the appropriations statutes' language is concerned), were nonetheless unavailable" to the tribes); *id.* at 642 (recognizing that Congress may "protect funds needed for more essential purposes with *statutory* earmarks"); *id.* at 643 (concluding that the ISDA's availability of funds provision was irrelevant because "Congress appropriated adequate unrestricted funds here"); *id.* at 647 (emphasizing that Congress "unambiguously provided unrestricted lump-sum appropriations").

der the Appropriations Clause. U.S. Const. Art. I, § 9, Cl. 7. This Court's intervention is needed to correct the Tenth Circuit's erroneous holding that Congress "breach[es]" an enforceable "guarantee[]" to tribes (Pet. App. 45a) when it exercises its expressly reserved constitutional authority to control the expenditure of public funds under the ISDA.

2. Respondents' remaining arguments likewise underscore the need for this Court's review. Echoing the reasoning of the court of appeals, respondents insist that the ISDA creates a "statutory right to have [contract support] costs fully funded." Br. in Opp. 3. But as the petition explains (Pet. 20-23), that proposition is demonstrably wrong and has been rejected by every other court of appeals that has considered the question. The statutory provision on which respondents rely, 25 U.S.C. 450j-1(a)(2), provides only that the contract must include "*an amount for*" the contractor's reasonable costs, not that it must cover *all* such costs.[2] And in any event, the Act elsewhere makes clear that nothing in the ISDA guarantees to tribes any particular level of federal funding. See Pet. 21-22. In particular, Section 450j-1(b) provides that *all* funding under the ISDA is subject to Congress's plenary control over federal spending:

> *Notwithstanding any other provision in this [Act]*, the provision of funds under this [Act] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or

[2] Respondents' contention that the ISDA provides a "mathematically determinable" (Br. in Opp. 4) amount of contract support costs is at odds with the statute itself, which contemplates, *inter alia*, negotiations between the Secretary and the tribal contractor to identify "reasonable and allowable costs" and to ensure that contract support costs do not "duplicate" amounts already provided as part of the program funding. See, *e.g.*, 25 U.S.C. 450j-1(a)(3).

> activities serving a tribe to make funds available to another tribe or tribal organization under this [Act].

25 U.S.C. 450j-1(b) (emphasis added). See Pet. 21-22.

Like the court of appeals below, respondents make no attempt to reconcile their belief that the ISDA creates a "statutory right" to "full[] fund[ing]" of contract support costs (Br. in Opp. 3) with the plain language of Section 450j-1(b). See *Arctic Slope*, 629 F.3d at 1304 (Section 450j-1(b) "limits the Secretary's obligation to the tribes to the appropriated amount"); *Shoshone-Bannock Tribes* v. *Secretary, Dep't of Health and Human Servs.*, 279 F.3d 660, 667 (9th Cir. 2002) (tribes' claim of "entitlement" to funding for contract support costs "cannot withstand" the reservation of congressional authority in Section 450j-1(b)); *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1380 (Fed. Cir. 1999) ("The unequivocal statutory language prevents [an ISDA contractor] from asserting that it was entitled to full funding as a matter of right."), cert. denied, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996) ("[I]f the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds."); see also Pet. App. 82a (Hartz, J., dissenting) ("[T]he ISDA does not require full payment. Full payment is conditioned on the availability of funds.").

3. For similar reasons, respondents' objection that "this case involves binding enforceable *contracts*" (Br. in Opp. 17) misses the point. The question in this case is not whether a contractual bargain exists, but the content of the bargain itself. The Secretary did not promise to pay respondents' contract support costs irrespective of the availability of appropriations. Respondents point to nothing in the statute or any contract with the Secretary even hinting at such an agreement. Cf. 25 U.S.C. 450j-1(b). Indeed, under set-

tled precedent from this Court, the Secretary could not have validly made such a promise: absent a special grant of statutory authority absent here, a government official is "without power" to bind the government "to pay more than the amount appropriated." *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); see 31 U.S.C. 1301(d) ("A law may be construed * * * to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states * * * that such a contract may be made."). The ISDA's "subject to the availability of appropriations" proviso, 25 U.S.C. 450j-1(b), makes clear that no such power is conferred on the Secretary. See *Cherokee*, 543 U.S. at 643. And as this Court has emphasized, "[i]t is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." *OPM* v. *Richmond*, 496 U.S. 414, 430 (1990) (citing the Anti-Deficiency Act, 31 U.S.C. 1341, 1350).

Because the Secretary did not promise to provide funding irrespective of appropriations, respondents have no contractual claim for amounts in excess of the statutory appropriations caps. Respondents do not suggest that there are unrestricted funds available to the Secretary to satisfy their demands, as there were in *Cherokee*. Their argument is simply that the Secretary breached a contractual promise by declining to do what the Anti-Deficiency Act prohibits: disburse funds from the Treasury in excess of the appropriations authorized by Congress.[3] 31 U.S.C.

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[3] Respondents mistakenly argue that the Anti-Deficiency Act is irrelevant because ISDA contracts may be (and generally are) executed in advance of appropriations. Br. in Opp. 23-24 (citing 31 U.S.C. 1341(a)(1)(B)). This confuses two different prohibitions in the Anti-Deficiency Act. The Tenth Circuit's decision is at odds with the Act not because self-determination contracts are signed before the fiscal year

1341(a)(1)(A); see 31 U.S.C. 1350 (criminal prohibition). The Secretary could not and did not make such a promise. Nor was the Secretary required to take funding for contract support costs away from one tribal contractor to satisfy the demands of others: the ISDA expressly relieves the Secretary of any such obligation. See 25 U.S.C. 450j-1(b).

4. Equally extraordinary is respondents' contention that the Tenth Circuit's decision "does no violence to the Appropriations Clause" (Br. in Opp. 23) because the Judgment Fund, 31 U.S.C. 1304, is available to pay "damages" for Congress's failure to provide respondents' desired level of funding. See Br. in Opp. 20-21, 23. As the petition explains (at 18-19), the Judgment Fund is not a back-up source of agency appropriations, nor does it permit litigants to circumvent explicit statutory restrictions imposed by Congress on the amount and use of public funds for particular purposes. Respondents' arguments on this score only confirm that the Tenth Circuit's decision renders the statutory caps imposed by Congress a nullity.

Respondents contend that the Judgment Fund is available to underwrite their contract support costs because the ISDA permits breach-of-contract actions to proceed under the Contract Disputes Act, and money judgments entered in such actions are payable from the Judgment Fund. Br.

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begins, cf. *Cherokee*, 543 U.S. at 643, but because the Act separately provides that no government officer or employee may "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. 1341(a)(1)(A). In other words, the Secretary can execute an ISDA contract in advance of the relevant fiscal year, but the Secretary *cannot* promise in that contract to pay more than the amount that Congress actually appropriates. Yet that is exactly what respondents contend—and the Tenth Circuit held—that the Secretary did here.

in Opp. 20, 23; see 25 U.S.C. 450m-1(d); Act of Jan. 4, 2011, Pub. L. No. 111-350, sec. 3, § 7108, 124 Stat. 3825 (to be codified at 41 U.S.C. 7108). But that argument erroneously presupposes that the Secretary breached a contractual obligation in the first place by refusing to pay money that Congress had not authorized to be paid. See pp. 6-8, *supra*. Because there is no such promise and no breach, there is no basis for a judgment to be paid from the Judgment Fund.

Congress acted with unmistakable clarity in restricting the amount of money that may be drawn from the Treasury for ISDA contract support costs. The Tenth Circuit's decision, which permits respondents to recover from the Judgment Fund the funding that they believe Congress should have appropriated to the Secretary in the first instance, warrants this Court's review.

C. Finally, respondents suggest that the Court may affirm the judgment below on the alternative ground that the Executive Branch "failed" (Br. in Opp. 26) to request sufficient appropriations from Congress to cover all of respondents' contract support costs or to provide Congress with adequate notice of funding shortfalls. That contention, which was not addressed by the majority below or by the district court, is without merit. See Pet. App. 84a-86a (Hartz, J., dissenting); see also *Arctic Slope*, 629 F.3d at 1305-1306 (rejecting the same argument). The statutory appropriations caps are themselves proof that Congress was well aware of respondents' mounting claims for contract support costs and declined to fund them in full.

II. THIS CASE PROVIDES THE BETTER VEHICLE FOR THE COURT'S REVIEW.

As the government's petition for a writ of certiorari explains (at 29-30), this case provides the better vehicle for the Court's resolution of the question presented. Respon-

dents suggest (Br. in Opp. 29) that the Court should grant review in *Arctic Slope*, No. 11-83, as well. But as respondents do not dispute, the sole tribal contractor in that case received all of the funding for contract support costs that was specifically contemplated in its annual funding agreements, entirely apart from any question of the sufficiency of appropriations. See 629 F.3d at 1300-1301. The Court could thus potentially conclude in that case that it was unnecessary to reach the question presented.

This case, by contrast, involves a nationwide class action, and it is undisputed that the Secretary could not satisfy the contract support cost demands of all members of the respondent class in any fiscal year without exceeding the statutory appropriations cap imposed by Congress. The case thus squarely presents the question that the court of appeals concluded was dispositive (Pet. App. 29a-30a): whether the government is liable for *all* of the contract support costs of *all* tribal contractors, irrespective of a statutory appropriations cap, merely because Congress provided sufficient funds to satisfy the claim of any single contractor considered in isolation. But if the Court concluded that its consideration of the issues presented would benefit from granting review of *Arctic Slope* as well, we of course would urge it to do so.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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