No. 11-762

In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

SOUTHERN UTE INDIAN TRIBE

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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The Tenth Circuit ruled that the Secretary must accept an Indian tribe's proposal for a self-determination contract under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, even if the Secretary lacks sufficient funds under an express statutory appropriations cap to pay the tribe's requested contract support costs. See Pet. App. 23a-24a. As the petition for a writ of certiorari explains (at 14-15), that decision expressly builds upon the same court's earlier ruling in *Ramah Navajo Chapter* v. *Salazar*, 644 F.3d 1054, 1077 (10th Cir. 2011), cert. granted, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-551) (*Ramah Navajo*), that the ISDA "guarantee[s] funding" for a tribe's contract support costs without regard to the availability of appropriations. This Court recently granted the government's

petition for a writ of certiorari to review the Tenth Circuit's decision in *Ramah Navajo*. Because the decision below proceeds from the same flawed premises—including the notion that the ISDA itself guarantees "full" federal funding for tribes' contract support costs, see Pet. App. 23a-24a; *Ramah Navajo*, 644 F.3d at 1077—it is appropriate for the Court to hold this case pending its decision in *Ramah Navajo* and then dispose of the petition as appropriate.

Respondent contends that *Ramah Navajo* "presents an entirely different question, the answer to which should not affect the decision below." Br. in Opp. 10. But as respondent itself recognized in its briefs below, the Secretary's putative obligation under the ISDA to *promise to pay* money that Congress has not appropriated (the issue in this case) is both practically and legally intertwined with the Secretary's asserted liability under the ISDA for failing to *pay* money that Congress has not appropriated (the issue in *Ramah Navajo*). This Court's decision in *Ramah Navajo* is therefore likely to clarify, if not control, the proper resolution of the question presented here.

1. Respondent contends that "there is no reason to hold this case" for *Ramah Navajo* because the decision below concerns contract *formation* under the ISDA, while *Ramah Navajo* concerns contract *performance*. Br. in Opp. 14; see *id.* at 10-12. But the Tenth Circuit's error in this case was precisely that it treated those issues as unrelated—particularly where, as here, the "formation" issue is the Secretary's refusal to enter into a contract promising to pay sums that Congress has forbidden to be paid from the Treasury. While the ISDA generally "direct[s]" the Secretary "to enter into a self-determination contract" at the request of an Indian

tribe, 25 U.S.C. 450f(a)(1), it provides that "[t]he *amounts* of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c)(1) (emphasis added). The Act thus contemplates that the initial determination of the government's financial obligation to a tribal contractor under an ISDA contract in a particular fiscal year—including any "amount for" the tribe's contract support costs under 25 U.S.C. 450j-1(a)(2)—will depend on the amounts made available to the Secretary for that fiscal year by Congress. Put simply, the Act does not require the Secretary to accept a contract that Congress has not provided sufficient funds to perform.

Respondent itself recognized in its briefs below that, where the available appropriations are inadequate, questions of contract formation and performance under the ISDA are inescapably intertwined. In the district court, for example, respondent contended that a lack of available appropriations was not a proper basis for the Secretary to decline its request for an ISDA contract precisely because the Secretary could invoke the insufficiency of appropriations as a defense to a claim for breach of contract based on the Secretary's failure to provide the promised funds. See, *e.g.*, C.A. App. 266 (Pl.'s Resp. to Defs.' Mot. for Summ. J.) ("Rather than supporting the declination of an entire contract proposal, the lack of sufficient appropriations from Congress would only support a refusal of the agency to pay [contract support costs] under the terms of an existing contract."); *id.* at 274 (Pl.'s Reply to Defs.' Mem. in Opp. to Pl.'s Mot. for a Preliminary Inj.) (urging that insufficient appropriations are irrelevant to contract formation under the ISDA because "the express terms of the ISDA and the model agreement * * * make the provision of

funds subject to Congressional appropriations"). Respondent thus justified its arguments about contract formation on the ground that the Secretary could rely, during contract performance, on the very defense that the Tenth Circuit later rejected in *Ramah Navajo*.

Respondent made the same argument in its appellate briefs, which were filed prior to the Tenth Circuit's decision in *Ramah Navajo*. In urging the court of appeals to direct the Secretary to accept a contract specifying the "full amount" of respondent's requested contract support costs notwithstanding a lack of available funds, respondent emphasized that the Secretary would not actually be required to *pay* money in excess of the available appropriations: "[A]lthough section 450j-1(a)(2) requires the Secretary to include the full amount of [contract support costs] in the self-determination contract, the Secretary is excused from *providing* those funds if appropriations are not available." Resp. C.A. Response/Reply Br. 3-4; see also Resp. C.A. Opening Br. 19 ("Under the Act, the full statutory amount [of funding] is added to the contract and payment is excused only if appropriations are subsequently found not to be legally available.").

Subsequently, in *Ramah Navajo*, the Tenth Circuit rejected the predicate for respondent's arguments, holding that the government may be required to pay all of a tribe's contract support costs, notwithstanding a statutory appropriations cap, as long as the appropriated sum is sufficient to cover any single contractor considered in isolation. See 644 F.3d at 1071 (asserting that "the insufficiency of a multi-contract appropriation to pay all contracts does not relieve the government of liability if the appropriation is sufficient to cover an individual contract"). Yet the Tenth Circuit *also* held, in the decision

below, that the Secretary must accept a tribe's proposal for a new ISDA contract—and must promise to pay all of the eligible contract support costs requested by the tribe—even if the Secretary lacks sufficient appropriations to fund the contract. See Pet. App. 23a-24a. As the petition for a writ of certiorari explains (at 15), the apparent effect of the two decisions, taken together, is to require the Secretary to enter into a contract to pay money that Congress has not authorized to be paid, yet to subject the government to immediate liability for breach of contract if the Secretary does not make the unauthorized payments. If that is the correct way to understand the interaction of the Tenth Circuit's rulings—and respondent does not suggest otherwise—the result is a scheme that Congress could not have intended, as the government's brief in *Ramah Navajo* demonstrates.[1] See Gov't Br. at 21-35, No. 11-551 (Feb. 17, 2012). This Court's decision in *Ramah Navajo* is thus likely to bear directly on the validity of the court of appeals' reasoning and decision below.

2. Respondent argues (Br. in Opp. 14) that the court of appeals purported to leave open the question whether "funds are, in fact, available to pay" respondent's contract support costs. Pet. App. 24a. But as the petition makes clear (at 15), that reservation was meaningless in light of *Ramah Navajo*, which held that appropriations are *always* available to pay a tribe's requested contract support costs under the ISDA, irrespective of any statutory cap, as long as Congress has appropriated sufficient funds to pay any single contractor considered in isola-

[1] Respondent thus errs (Br. in Opp. 12 n.2) in suggesting that the government "does not challenge" the court of appeals' rulings concerning the Anti-Deficiency Act, 31 U.S.C. 1341 *et seq.*, and the Appropriations Clause of the Constitution, U.S. Const. Art. I, § 9, Cl. 7.

tion. See 644 F.3d at 1071. The practical consequences of the decision below, like the validity of the panel's reasoning, will thus depend entirely on this Court's ruling in *Ramah Navajo*.

3. Finally, respondent argues (Br. in Opp. 12-13 & n.2) that the petition should be denied for "fact-bound" reasons related to the particular fiscal years at issue in this case. That argument is without merit. The court of appeals concluded that the Secretary could not properly decline respondent's contract proposal based on a lack of available appropriations in fiscal year (FY) 2005 because respondent had submitted an amended proposal with an effective date of October 1, 2005—*i.e.*, the first day of FY 2006. Pet. App. 15a-16a. For this reason, the court asserted that respondent "did not seek funds for fiscal year 2005." *Id.* at 22a. At the same time, however, the court declared that it "need not decide" whether the appropriations provided by Congress in FY 2006 (or any subsequent fiscal year) were sufficient to support respondent's amended proposal in light of the panel's holding that—as a matter of law—the Secretary is without authority to decline an ISDA contract because of insufficient appropriations. *Id.* at 17a n.6.

In fact, the expressly capped sum that Congress appropriated in FY 2006 for ISDA contract support costs was not sufficient to allow the Secretary even to satisfy the needs of existing tribal contractors, let alone to accept respondent's proposal for a new contract.[2] Cf.

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[2] In FY 2006, the Indian Health Service (IHS) received a net appropriation of not to exceed $264,730,028 for ISDA contract support costs. See Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-54, 119 Stat. 539-540; see *id.* § 439, 119 Stat. 559 (0.476% rescission); Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf

25 U.S.C. 450j-1(b)(2) (prohibiting the Secretary from reducing funding under existing contracts except in specified circumstances). That is presumably why respondent never argued in the courts below that the expiration of fiscal year 2005 had any legal significance. The court of appeals drew that conclusion on its own, without the benefit of briefing, and it was mistaken.[3] For this reason as well, it would be appropriate for the court of appeals to reconsider its reasoning in light of this Court's decision in *Ramah Navajo*.

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of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, § 3801, 119 Stat. 2791 (government-wide 1.0% rescission). That sum represented an increase of only $1.047 million over the IHS's net appropriation for contract support costs in FY 2005, which was $263,683,179. See Pet. 7-8 & n.4. Even aside from the unfunded requests of existing contractors, therefore, the Secretary could not have accepted respondent's proposal, which sought $1.26 million in annual contract support costs, without diminishing the funding available to existing contractors. See Pet. App. 12a. As the government has explained in *Ramah Navajo*, the ISDA specifically relieves the Secretary of any obligation to favor certain tribes over others in that manner. 25 U.S.C. 450j-1(b); see Gov't Br., *Ramah Navajo*, No. 11-551, at 51-52.

[3] Similarly mistaken is respondent's argument (Br. in Opp. 12 n.2) that the Secretary "had no basis to refuse the contract based on a shortfall in fiscal year 2006 appropriations because, at the time [respondent] sought the contract, Congress had not yet even made fiscal year 2006 appropriations." In fact, respondent first proposed its contract in FY 2005, at a time when the agency's FY 2005 appropriations for contract support costs had already been fully obligated. Pet. App. 8a. Respondent subsequently amended its contract proposal to begin in FY 2006. On August 2, 2005, the President signed into law the IHS's appropriations act for FY 2006. See Pub. L. No. 109-54, 119 Stat. 499. The Secretary declined respondent's contract proposal two weeks later, on August 15, 2005. See Pet. App. 9a.

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For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be held pending the Court's decision in *Salazar* v. *Ramah Navajo Chapter*, No. 11-551, and then disposed of as appropriate.

Respectfully submitted.

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