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,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 *et seq.*) expressly requires the Secretary of Health and Human Services to approve and award a requested self-determination contract to a tribe unless one of five specific conditions is met. 25 U.S.C. § 450f(a)(2).

The question presented is whether the Secretary may refuse to award a contract (or may award zero dollars), even though none of these conditions is met, simply because the Secretary predicts that future appropriations may be inadequate.

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BRIEF IN OPPOSITION

The Southern Ute Indian Tribe respectfully submits this Brief in Opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

In addition to the opinions cited in the Petition, an earlier opinion of the court of appeals (App., *infra*) is reported at 564 F.3d 1198.

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant provisions of the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. § 450 *et seq.*, are reproduced in the appendix to the Petition at Pet. App. 70a-91a.

STATEMENT OF THE CASE

1a. In enacting and amending the ISDA, Congress repeatedly stripped the Secretary of Health and Human Services (Secretary), the Indian Health Service (IHS), and other federal agencies of discretion over contracting issues, largely because Congress concluded that the agencies were protecting their own

bureaucracies and budgets at the expense of tribal self-determination. *E.g.*, S. Rep. No. 100-274, at 6-7 (1987). Among other reforms, Congress mandated particular terms that must be included in a contract and that cannot be altered except by mutual agreement. 25 U.S.C. § 450*l*(a), (c). In addition, Congress specified the funding amount for each contract, *id.* § 450j-1(a), directing the Secretary to include the amount the agency would have spent to operate the program (subsection (a)(1), coined the "Secretarial amount"), plus certain "reasonable" "contract support costs" (subsections (a)(2), (3) and (5)). Once a proposed contract is approved, the Secretary "shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a)." *Id.* § 450j-1(g). See also *id.* § 450*l*(c) (statutory Model Agreement, which requires that the amount stated in each annual funding agreement associated with a contract "shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)]").

b. Most relevant for purposes of this case, Congress also limited the grounds on which the Secretary can decline to enter into a proposed contract with a tribe. See *id.* § 450f(a)(2). The ISDA authorizes the Secretary to reject a contract proposal on only five specific bases. *Id.* § 450f(a)(2)(A)-(E). One such basis – and the only one the Secretary invoked here – is if "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under § 450j-1(a) of this title." *Id.* § 450f(a)(2)(D). As noted, § 450j-1(a) sets the

funding level at the Secretarial amount plus "reasonable" contract support costs.

c. The Secretary's obligation to pay these amounts after entering into a contract is addressed in a separate portion of the Act. Section 450j-1(b) and section 1(b)(4) of the Model Agreement (§ 450*l*(c)) both state that payments of contract amounts are "subject to the availability of appropriations." The "availability of appropriations" language is not included anywhere in § 450f(a)(2), the provision at issue here governing the Secretary's authority to decline to enter into contracts.

2. On January 25, 2005, the Southern Ute Indian Tribe (Tribe) submitted a contract proposal to the Secretary to operate the IHS's Southern Ute Health Center. App., *infra*, 7a-8a. Initially, the Tribe proposed to operate the Health Center for a portion of fiscal year 2005. In the ensuing negotiations, the Secretary responded that fiscal year 2005 appropriations were not available to pay certain "pre-award" and "start-up" contract support costs. Pet. App. 8a; see 25 U.S.C. § 450j-1(a)(5) (describing these costs). Despite this payment issue, however, the Secretary stated that nothing warranted declination of the Tribe's contract proposal. Pet. App. 51a.

Things changed after this Court's decision in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). In *Cherokee*, this Court held that IHS was obligated to pay contract support costs specified in contracts with tribes even if Congress had not appropriated

sufficient funds. *Id.* at 647. In response to that decision, the agency declared that all tribes proposing new contracts must agree to language stating that the Secretary "'will not pay [contract support costs], does not promise to pay [contract support costs], that the tribes cannot rely on any promise to pay, and tribes cannot report a failure to receive [contract support costs] as a shortfall.'" Pet. App. 8a-9a, 53a; App., *infra*, 8a. The agency also informed the Tribe that its contract proposal would be declined if the Tribe refused to add the Secretary's language. Pet. App. 53a.

Because such language was inconsistent with the text of the ISDA, the Tribe did not accept it. The Tribe did, however, amend its contract proposal to (among other things) delay commencement until fiscal year 2006. Pet. App. 9a, 55a. Congress had not yet made an appropriation for that fiscal year, so there was no known shortfall. Nonetheless, the Secretary declined the Tribe's amended proposal, reasoning that, since the Tribe would not accept the Secretary's contract language, the Tribe was effectively proposing a funding amount in excess of the funding level specified in the Act, contrary to § 450f(a)(2)(D). Pet. App. 9a, 56a.

3. On September 15, 2005, the Tribe filed suit in the United States District Court for the District of New Mexico, challenging the Secretary's declination of the Tribe's contract proposal. Pet. App. 9a; App., *infra,* 9; see C.A. App. 12-27. The Tribe contended that it had a right to a contract that recited "'the applicable amount'" of the Tribe's contract support

cost requirement, and that the Secretary could not lawfully decline the proposed contract on the asserted grounds.[1] Pet. App. 9a; C.A. App. 20, 24.

The Secretary defended her actions by insisting that Congress had not appropriated sufficient funds to pay the Tribe, even though the fiscal year 2006 appropriation had not yet been enacted. Pet. App. 61a. The Secretary added that awarding the contract would have violated the Appropriations Clause, art. I, § 9, cl. 7, and the Anti-Deficiency Act, 31 U.S.C. § 1341. The Secretary offered evidence that all fiscal year 2005 contract support cost funds had been spent, but offered nothing about appropriations for fiscal year 2006. Pet. App. 18a; see C.A. App. 233-36.

a. The district court's June 15, 2007 Memorandum Decision stated that the sole issue before the court was "whether [the Secretary] had discretion to decline [the Tribe's] proposal on the basis that [the Tribe] refused to include new [contract support costs] language developed by IHS in its [self-determination] contract." Pet. App. 57a. The district court granted the Tribe summary judgment, ruling that the Secretary "may not unilaterally amend the [ISDA] by

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[1] The Tribe also contended that (1) the Secretary's declination of the entire contract proposal violated the Secretary's duty under 25 U.S.C. § 450f(a)(4) to approve the severable portion of the contract proposal, and (2) the Secretary's adoption of the June 2005 contract support cost waiver policy violated the Administrative Procedure Act, 5 U.S.C. § 553. These claims are not at issue in this appeal.

altering the declination criteria in the [ISDA], eliminating an element of the funding scheme for Self-Determination contracts, or developing new contract language that contradicts the statutory model language developed by Congress." *Id.* at 66a.

b. Following the district court's decision, the Secretary continued to insist that non-statutory language be inserted into the contract to limit the Secretary's obligation to pay contract support costs. Specifically, the Secretary pressed for language stating that the agency currently owed the Tribe nothing ("$0") in contract support costs. Pet. App. 38a. Notwithstanding the district court's earlier decision, the court upheld the Secretary's suggested language, concluding that it was consistent with the ISDA's statutory requirements and the Model Agreement. *Id.* at 43a. In a second order, the court directed that the Tribe's self-determination contract must include language stating that the Tribe was entitled to nothing ("$0") in contract support costs. *Id.* at 44a.

c. The Tribe appealed this decision. Although the court of appeals dismissed the appeal for lack of a final judgment, it expressed concern over "the plight of the Tribe in securing its self-determination" and its "hope that the parties will come to an agreement quickly." App., *infra,* 21a-22a.

d. On remand, the district court entered a final order directing the parties to execute a self-determination contract and annual funding agreement, effective October 1, 2009 (fiscal year 2010),

which included the Secretary's language stating that the Secretary owed the Tribe $0 in contract support costs. Pet. App. 12a.

4. On appeal, the Tenth Circuit affirmed in part and reversed in part. Pet. App. 1a-27a.

a. The court of appeals agreed with the district court that the Secretary could not decline the Tribe's proposed contract based on the availability of appropriations. Such a position "belies the plain text of the statute." Pet. App. 16a (discussing 25 U.S.C. § 450f(a)(2)(D)). As the court explained, "[u]nder the ISDA, the Secretary may decline a contract if 'the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, *as determined under section 450j-1(a)* of [the ISDA].'" *Id.* (quoting 25 U.S.C. § 450f(a)(2)(D)). "Section 450j-1(a), in turn, does not mention appropriations." *Id.* Instead, with respect to contract support costs, the section simply mandates that the contract include "'an amount for the *reasonable costs* for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management. . . .'" *Id.* (discussing 25 U.S.C. § 450j-1(a)(2)) (emphasis added). As long as a tribe's proposal does not exceed such reasonable costs, the Secretary "may not decline a contract proposal for exceeding the 'applicable funding level.'" Pet. App. 17a (quoting 25 U.S.C. § 450f(a)(2)(D)). Thus, "[t]he applicable funding level for [contract support costs] must be evaluated irrespective of whether

the appropriations available to HHS are sufficient to pay that amount." *Id.*

The court of appeals also noted that, in any event, the Secretary's arguments were based exclusively on evidence concerning the availability of appropriations in fiscal year 2005, and that this was "misguided" because "the Tribe's [contract] proposal depended entirely on appropriations for fiscal year 2006." *Id.* at 15a. The court concluded, however, that it "need not decide whether 'available' appropriations were, in fact, insufficient to cover the Tribe's [contract support costs] for fiscal year 2006 or any other year," because of the court's holding on the plain language of the statute. *Id.* at 17a & n.6.

b. The court of appeals rejected the Secretary's contention that the Anti-Deficiency Act permitted the Secretary to decline the Tribe's contract proposal. Pet. App. 18a; see 31 U.S.C. § 1341(a)(1). The court noted that the Secretary's argument focused exclusively on the availability of appropriations in fiscal year 2005, not fiscal year 2006 – the fiscal year for which the Tribe proposed the contract. Pet. App. 18a. According to the court, "[t]his oversight is fatal to [the Secretary's] argument." *Id.* at 18a. Further, the court explained that the government had no argument with respect to fiscal year 2006, for which appropriations had not yet been made when the Tribe sought the contract. The Anti-Deficiency Act permits contracts "for the payment of money before an appropriation is made" when "authorized by law," 31 U.S.C.

§ 1341(a)(1)(B), and the ISDA so authorizes. Pet. App. 19a.

c. The court next rejected the Secretary's contention that her actions were justified by the Appropriations Clause, both because of the agency's fatal evidentiary oversight in failing to proffer proof of the fiscal year 2006 appropriation, and because the Appropriations Clause does not prohibit an agency from entering into a contract when payment "under the contract would be 'subject to the availability of appropriations.'" Pet. App. 20a.

d. Finally, the Tenth Circuit reversed the district court's ruling requiring the Tribe to accept language providing for $0 in contract support costs. In the court's view, such language was erroneously based on the district court's concern about an appropriations cap in effect during fiscal year 2005, not fiscal year 2006. Pet. App. 22a. The court also stated that the proposed language violated the ISDA's express requirement that every self-determination contract must state the full amount of contract support cost funds as calculated pursuant to the ISDA. *Id.* at 22a-23a. The court stated that "[u]nder the plain text of the statute, [the contract support costs amount specified in a contract] is not, and can never be, '$0.'" *Id.* at 23a.

REASONS FOR DENYING THE PETITION

In its petition, the government does not contend that the Court should grant certiorari. Instead, the government argues only that its petition should be held pending this Court's decision in *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054 (10th Cir. 2011), *cert. granted*, No. 11-551, 2012 WL 28948 (U.S. Jan. 6, 2012), because, the government states, that decision "would likely require reconsideration or reversal of the Tenth Circuit's decision in this case." Pet. 15. The government's premise is erroneous, however, because *Ramah* presents an entirely different question, the answer to which should not affect the decision below. Accordingly, the Court should deny the petition and end this dispute without further delay.

1. As the Tenth Circuit recognized, this case presents an issue that is distinct from the one to be addressed in *Ramah*. *Ramah* concerns "the Secretary's obligation to pay [contract support costs] to tribes under *existing* contracts in the face of chronic shortfalls in [contract support cost] funding." Pet. App. 7a. "This appeal, by contrast, requires us to consider the Secretary's obligations in deciding whether and how to enter into *new* contracts." *Id.* Such obligations are "set forth in a different part of the ISDA," separate from those sections concerning the provision of funds to existing tribal contractors. *Id.* at 17a. There is thus no reason to expect that the Court's decision in *Ramah* will impact the case at hand. See *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (noting that a GVR

is potentially appropriate when "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation").

Indeed, the provision in the ISDA addressing the Secretary's authority to decline to enter into contracts, 25 U.S.C. § 450f(a)(2)(D), is not at issue in *Ramah*. And, here, the Tenth Circuit simply applied the plain meaning of that provision in rejecting the Secretary's argument that the predicted unavailability of a future appropriation is a basis to refuse a contract. As the court explained, the Secretary may decline a contract under § 450f(a)(2)(D) only if "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, *as determined under section 450j-1(a)* of [the ISDA]." Pet. App. 16a. Section 450j-1(a), in turn, does not even mention appropriations, let alone suggest that the unavailability of appropriations reduces the "funding level." See *id.* Instead, § 450j-1(a) sets the funding level for contract support costs at a "reasonable" amount, and the government has never contended that the respondent's request for contract support costs was "unreasonable." *Id.* at 16a-17a. *Ramah* is thus inapposite and should not affect the Tenth

Circuit's decision that the Secretary was required to enter into a contract with the Tribe.[2]

2. Likewise, it is difficult to conceive how *Ramah* could call into question the court of appeals' decision rejecting the government's proposal that the Secretary "'currently owe[s] the Tribe $0 in [contract support costs].'" Pet. App. 21a-22a.

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[2] The government does not challenge the court of appeals' ruling on the Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.*, and the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7. This is understandable because the court's decision was based on a "fatal" factual "oversight" by the government. Pet. App. 18a. The government had argued that accepting the Tribe's proposal would have violated the Anti-Deficiency Act and the Appropriations Clause "by obligating HHS to pay the Tribe an amount of [contract support costs] in excess of appropriations available for *fiscal year **2005**.*" *Id.* (addressing Anti-Deficiency Act) (emphasis added); see also *id.* at 20a (addressing Appropriations Clause). But, as the court of appeals noted, "the Tribe's proposal did not request *any* amounts for [contract support costs] in fiscal year 2005," so "HHS cannot plausibly contend that accepting the Tribe's proposal would have obligated it to make payments of [contract support costs] in *excess* of appropriations available for that fiscal year." *Id.* at 18a; see also *id.* at 20a.

Further, the court of appeals explained that the government had no basis to refuse the contract based on a shortfall in fiscal year 2006 appropriations because, at the time the Tribe sought the contract, Congress had not yet even made fiscal year 2006 appropriations. And, the Anti-Deficiency Act expressly permits contracts "for the payment of money before an appropriation is made" when "authorized by law." 31 U.S.C. § 1341(a)(1)(B). Because the ISDA so authorizes, the Secretary could have entered into the contract. Pet. App. 19a. Similarly, the Appropriations Clause did not prohibit the agency from entering into a contract for future fiscal years. *Id.* at 20a.

That decision was fact-bound and based on the "evidence" in the "record," not the legal issues raised in *Ramah*. Pet. App. 22a. As the court of appeals explained, the "only evidence HHS presented" that available appropriations were insufficient to pay any contract support costs was "an affidavit discussing the congressional cap on [contract support costs] appropriations for fiscal year 2005." *Id.* That cap, however, "had nothing to do with HHS's ability to pay [contract support costs] upon execution of the contract at issue here," which "would not be executed until *after* the court issued its ruling in October 2007 and which did not seek funds for fiscal year 2005." *Id.* This factual basis for rejecting the government's position should stand regardless of the outcome in *Ramah*.

In addition, the court provided an alternative basis for its conclusion: "Even assuming *arguendo*, that HHS lacked funds to pay any [contract support costs] upon execution of the contract," the government's $0 proposal was improper because it conflicted with the ISDA, which requires that each contract include the "'amount for the reasonable costs for activities which must be carried on by' the Tribe." Pet. App. 23a (quoting 25 U.S.C. § 450j-1(a)(2)). Under the plain text of § 450j-1(a)(2), which the government does not even quote, let alone discuss, this amount "is not, and can never be, '$0.'" *Id.* This alternative holding, too, should not be affected by *Ramah*; but, even if it were, the court of appeals' primary basis for rejecting the government's proposal

– namely, the lack of "evidence" in the "record" – would be an independent ground to sustain the decision below. Accordingly, there is no reason to hold this case for *Ramah*.

3. At bottom, this case concerns solely the government's duties to enter into contracts under the ISDA, and says nothing about the government's payment obligations under existing contracts. The government is thus incorrect that the decision below rests on *Ramah*'s premise "that the ISDA guarantees 'full' funding of a tribe's contract support costs." Pet. 15. The decision below relied on no such premise. Instead, the court expressly recognized that the Tribe's entitlement to "the full statutory amount of [contract support costs]" is limited by "the required caveat that 'the provision of funds . . . is subject to the availability of appropriations.'" *Id.* at 24a (quoting 25 U.S.C. § 450j-1(b)). Further, the court did not address the question "whether funds are, in fact, available," and made clear that this issue – which is addressed in *Ramah* – "remain[s] open and litigable." *Id.*

Because the decision below left open the issue in *Ramah*, the outcome in *Ramah* cannot affect the actual holding of the court of appeals. Resolution of this six-year old dispute should not be needlessly delayed any longer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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