No. 06-260

In the Supreme Court of the United States

KIMBERLY J. GOODIN, PETITIONER

v.

UNITED STATES POSTAL INSPECTION SERVICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, which limits direct judicial review of certain government contract disputes to the Court of Federal Claims, precludes district court jurisdiction over such claims under the Postal Reorganization Act's sue-and-be-sued clause, 39 U.S.C. 401(1), 409(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 444 F.3d 998. The opinion of the district court (Pet. App. 7a-14a) is reported at 393 F. Supp. 2d 869.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2006. On July 5, 2006, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 17, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. On November 27, 2001, Michael Walter Schwartzbauer, a letter carrier for the United States Postal Ser-

vice, interrupted an armed robbery while delivering mail to a Hallmark store in Blaine, Minnesota. On December 7, 2001, a local newspaper reported a string of recent robberies and published a sketch of the man suspected of committing the robberies. The same article mentioned that because one of the robberies involved an assault on a postal worker, the United States Postal Inspection Service (USPIS) was offering a reward of "up to $50,000" for information leading to the arrest and conviction of the perpetrator. Gov't C.A. App. 7; Pet. C.A. App. 1-2, 8.

On December 8, 2001, petitioner called the local police department to report that she and her boyfriend saw the composite sketch in the newspaper and believed the suspect was Nathan Graves. According to a statement petitioner provided to the police two days later, petitioner learned of the newspaper article from a friend, Andrew Lien, who had told her he believed the sketch to be of Graves. On December 9, 2001, Lien telephoned the police department and provided specific information as to potential locations where Graves might be found and stated that Graves might be driving a green Jaguar. Lien also indicated his interest in the reward money. Gov't C.A. App. 8; Pet. C.A. App. 9-11, 55-57.

Graves was arrested and charged with four counts of aggravated robbery and one count of assault. He eventually pleaded guilty to one count of simple robbery and two counts of aggravated robbery, but he neither pleaded guilty nor was convicted of the charges arising from the November 27, 2002, robbery of the Hallmark store. Gov't C.A. App. 8-9; Pet. C.A. App. 60, 70-71.

On March 12, 2002, Postal Inspector Thomas R. Rucke wrote the police department a letter which noted his understanding that Lien was the informant responsi-

ble for identifying Graves and instructed that Lien should complete the enclosed Personal History Form and submit it with a personal photograph attached. The letter also stated that if there was another source of information, then that individual also had to come forward, complete the Personal History Form, and submit the form with a photograph. Gov't C.A. App. 9; Pet. C.A. App. 93-94.

On August 5, 2002, the police department submitted a recommendation for reward, listing both Lien and petitioner as potential claimants. Only Lien, however, submitted the Application for Reward accompanied by the required Personal History Form and photograph. Petitioner submitted an Application for Reward on August 8, 2002, but failed to include the required Personal History Form and photograph. On December 17, 2002, USPIS paid $5000 to Lien for the information he provided regarding Graves. Gov't C.A. App. 9-10; Pet. C.A. App. 97, 98-104, 149-150.

2. Petitioner brought suit against USPIS in the United States District Court for the District of Minnesota alleging, *inter alia*, breach of contract. On March 31, 2005, the district court dismissed the action for lack of subject matter jurisdiction, holding that petitioner's contract claim fell under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, which limits direct judicial review to the Court of Federal Claims. The district court explained that although the Postal Reorganization Act (PRA) contains a sue-and-be-sued clause that allows the United States Postal Service to be sued in its own name in federal district court, see 39 U.S.C. 401(1), 409(a), that clause is preempted by the "plain language of the CDA," which provides a "comprehensive system of remedies for resolving government contract disputes"

and "divest[s] district courts of jurisdiction in matters under its purview." Pet. App. 12a, 14a. In support of its holding, the district court noted that the CDA applies to express or implied contracts "entered into by an executive agency" and expressly identifies the United States Postal Service as an "executive agency" covered by the statute. *Id*. at 12a.

3. The court of appeals affirmed. Pet. App. 1a-6a. Applying the established rule that a "precisely drawn, detailed statute pre-empts more general remedies," *id.* at 4a (quoting *Brown* v. *GSA*, 425 U.S. 820, 834 (1976)), the court of appeals explained that the plain language of the CDA, which expressly divests district courts of jurisdiction over government contract disputes, must be read as preempting the more general jurisdictional grant contained in the PRA's sue-and-be-sued clause. The court recognized that the Ninth Circuit had held otherwise in an earlier case "devoid of analysis" of the issue, *id*. at 5a (quoting *Campanella* v. *Commerce Exch. Bank*, 137 F.3d 885, 891 (6th Cir. 1998)), but chose to join the Fifth, Sixth, and D.C. Circuits in concluding that Congress could not have intended for sue-and-be-sued clauses like the one in the PRA "to enable parties to escape the exclusive jurisdiction provided by the CDA," *id.* at 4a-5a.

ARGUMENT

The decision below is correct, and is consistent with the decisions of the Fifth, Sixth, and D.C. Circuits, each of which has also held that the CDA precludes district court jurisdiction over contract claims within its scope, notwithstanding the existence of a general sue-and-be-sued clause. Although the Ninth Circuit has held to the contrary, this Court's review is not warranted. The

Ninth Circuit's reasoning was cursory at best, and that court has not had occasion to revisit the question since the other courts of appeals have addressed it and explained why the CDA precludes district court jurisdiction. Moreover, the question presented has little continuing importance in light of recent amendments to the CDA, and this case is not a good vehicle for such review in any event. Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals applied settled principles of statutory interpretation in determining that the CDA displaces the PRA's general sue-and-be-sued clause. This case falls squarely under the well-established rule that "a precisely drawn, detailed statute preempts more general remedies." *Brown* v. *GSA*, 425 U.S. 820, 834 (1976). Under the jurisdictional scheme set out by Congress in the CDA, "[a]ll claims by a contractor against the government relating to a contract" covered by the Act must be submitted first to the contracting officer. 41 U.S.C. 605(a). If a claimant wishes to appeal a contracting officer's decision, the CDA authorizes her to seek either (1) administrative review in the appropriate agency board of contract appeals, or (2) judicial review directly in the Court of Federal Claims. 41 U.S.C. 606, 609(a)(1) and (3). With the exception of those two avenues for review, "[t]he contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency." 41 U.S.C. 605(b). In other words, the CDA lays out a specific process for resolving disputes over certain government contracts and expressly limits direct judicial review of such disputes to the Court of Federal Claims.

Petitioner does not argue before this Court that her contract claim falls outside the scope of those provisions.

Rather, petitioner argues that she may nonetheless bring suit in federal district court because the PRA provides that the Postal Service may "sue and be sued" in district court. 39 U.S.C. 401(1), 409(a). As the D.C. Circuit has observed, however, the CDA is "the paradigm of a 'precisely drawn, detailed statute' that preempts more general jurisdictional provisions," including a general sue-and-be-sued clause. *A&S Council Oil Co.* v. *Lader*, 56 F.3d 234, 241 (D.C. Cir. 1995) (quoting *Brown*, 425 U.S. at 834).[1]

Although petitioner asserts that no "irreconcilable conflict" exists between the CDA's detailed remedial scheme and the general jurisdictional grant of the PRA, Pet. 12 (quoting *Lockhart* v. *United States*, 126 S. Ct. 699, 704 (2005) (Scalia, J., concurring)), the language of the CDA expressly precludes direct judicial review of covered contract disputes by any court other than the Court of Federal Claims. 41 U.S.C. 605(b) ("The contracting officer's decision on the claim shall be final and

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[1] While petitioner claims that this result is contrary to the CDA's legislative purpose, see Pet. 14-15 (asserting that the CDA "was in fact enacted to provide government contractors with *expanded* access to judicial review"), numerous courts have concluded that Congress enacted the CDA in order to "centraliz[e] the process of contract-dispute resolution" by limiting judicial review of government contract disputes to a specific forum with unique expertise, *i.e.*, the Court of Federal Claims. *Campanella* v. *Commerce Exch. Bank*, 137 F.3d 885, 890 (6th Cir. 1998); see, *e.g.*, *Quality Tooling, Inc.* v. *United States*, 47 F.3d 1569, 1580 (Fed. Cir. 1995) (referring to "the interest expressed by the CDA in resolving government contract claims in familiar, and expert, fora"); *Ingersoll-Rand Co.* v. *United States*, 780 F.2d 74, 78 (D.C. Cir. 1985) (explaining that government contract issues "are within the unique expertise of the Court of Claims" and that "we must implement the congressional intent to provide a single, uniquely qualified forum for the resolution of contractual disputes").

conclusive and *not subject to review by any forum, tribunal, or Government agency*, unless * * * authorized by this chapter.") (emphasis added). To allow district court review of such claims under the PRA's sue-and-be-sued clause would directly contradict the CDA's explicit mandate that its remedial scheme be both final and exclusive.

Moreover, the CDA expressly identifies the Postal Service as an executive agency within its purview. 41 U.S.C. 601(2). This provision would have little meaning if, as petitioner argues, the PRA's jurisdictional grant extends to all contract claims against the Postal Service regardless of whether the CDA prohibits such judicial review, because claimants could always avoid the CDA's jurisdictional restrictions by filing suit under the PRA. In addition, although the Tennessee Valley Authority (TVA) Act of 1933 includes a sue-and-be-sued clause identical to that in the PRA, see 16 U.S.C. 831c(b), the CDA explicitly exempts certain TVA contract claims from its scope, 41 U.S.C. 602(b). As the D.C. Circuit has noted, this exemption "would have been wholly unnecessary unless Congress assumed that a sue-and-be-sued clause would not trump the CDA's exclusivity provisions." *A & S Council*, 56 F.3d at 242.

2. The circuit conflict asserted by petitioner does not warrant this Court's review. Consistent with the reasoning above, the Fifth, Sixth, Eighth, and D.C. Circuits have all concluded that a general sue-and-be-sued clause cannot provide a basis for district court jurisdiction over contract disputes that must be brought in the Court of Federal Claims under the CDA. See Pet. App. 4a-5a; *Hayes* v. *USPS*, 859 F.2d 354, 356 (5th Cir. 1988); *Campanella*, 137 F.3d at 890-891; *A & S Council*, 56 F.3d at 241-242. The Fourth Circuit has held more

broadly that federal district courts lack jurisdiction over any contract claim covered by the CDA's remedial scheme. See *United States* v. *J & E Salvage Co.*, 55 F.3d 985, 987 (4th Cir. 1995).

Only one federal court of appeals—the Ninth Circuit—has adopted a different position.[2] But as the Sixth Circuit explained, the Ninth Circuit's decision, *In re Liberty Construction*, 9 F.3d 800, 802 (1993), is "devoid of analysis" and fails to justify the result reached. *Campanella*, 137 F.3d at 891. The Ninth Circuit based its holding on its pre-CDA precedent holding that the Tucker Act did not preclude concurrent jurisdiction in district courts under the Small Business Act's sue-and-be-sued clause. *Liberty Constr.*, 9 F.3d at 801-802. The correct question, however, focuses not on the Tucker Act, but on whether in passing the CDA Congress created an exclusive remedial scheme, which is the only vehicle through which a plaintiff can seek a remedy.

Neither the Ninth Circuit nor any court outside the Ninth Circuit has applied *Liberty Construction* in the years since the D.C. Circuit issued its thorough analysis in *A & S Council*, 56 F.3d at 241-242, which explains in detail why well-established rules of statutory interpretation require the conclusion that the CDA's remedial scheme preempts district court jurisdiction granted by a sue-and-be-sued clause. Although petitioner characterizes the circuit split as "growing more entrenched with time, as [more] courts * * * follow the majority

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[2] Petitioner cites *Marine Coatings of Alabama, Inc.* v. *United States*, 932 F.2d 1370 (11th Cir. 1991) for the proposition that the Eleventh Circuit has also taken a position on the issue presented here. Pet. 8-9. That decision, however, addressed only the CDA's impact on the Suits in Admiralty Act and Public Vessels Act, which are structured quite differently than the PRA.

rule" of the D.C. Circuit, Pet. 10, the split is entirely one-sided, and it is certainly possible that if the Ninth Circuit is presented with the issue again, it will recognize the strength of the legal argument that the CDA's remedies are exclusive and the great weight of judicial authority rejecting its position, and reconsider its position, dissolving the conflict altogether.

In addition, any holding by this Court regarding the CDA's impact on petitioner's contract claim against the Postal Service would have very limited future relevance, because Congress recently amended the CDA as it applies to the Postal Service. Effective January 6, 2007, the amendment deletes the Postal Service from the definition of executive agencies subject to the CDA and expressly authorizes contractors to appeal adverse decisions by Postal Service contracting officers to either the Court of Federal Claims or alternatively to the Postal Service Board of Contract Appeals and then to the Federal Circuit. See Act of Jan. 6, 2006, Pub. L. No. 109-163, Div. A, Tit. VIII, Subtit. E, § 847(d)(1)(A), (d)(2)(B) and (g), 119 Stat. 3393, 3395. Accordingly, the question presented—*i.e.*, whether the CDA's pre-2007 jurisdictional provisions preclude district court jurisdiction over contract disputes with the Postal Service under the PRA's sue-and-be-sued clause—is of no continuing importance. Although petitioner responds that the amendment "has no effect on the question presented with regard to other claims against executive agencies," Pet. 15 n.9, the impact of the CDA's jurisdictional provisions on suits brought against other agencies under different statutes should be determined in a case involving one of those statutes.

3. In any event, review should be denied because this case is an inappropriate vehicle for addressing the

question presented, because the facts petitioner alleges demonstrate that no contract existed in the first place. Under basic principles of contract law, USPIS's offer to reward "up to $50,000" for information leading to an arrest cannot constitute an implied-in-fact-contract. As the Court of Federal Claims explained in a similar case:

> [T]he fact remains that the poster only offered a reward "up to" $2.2 million. The quoted phrase has been construed to include zero as its lower limit. See *Application of Mochel*, 470 F.2d 638, 640 (C.C.P.A.1972); *Arness v. Franks*, 31 C.C.P.A. 737, 138 F.2d 213, 216 (1943); *see also Public Service Comm'n of Md. v. City of Annapolis*, 71 Md. App. 593, 526 A.2d 975, 981 (1987) ("the statement of a maximum does not imply the existence of a minimum"). Words such as this give rise only to an illusory promise, or more accurately, no promise at all.

Cornejo-Ortega v. *United States*, 61 Fed. Cl. 371, 375 (2004). As the Restatement (Second) on Contracts explains:

> Words of promise which by their terms make performance entirely optional with the "promisor" whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise. Although such words are often referred to as forming an illusory promise, they do not fall within the present definition of promise. They may not even manifest any intention on the part of the promisor.

Restatement (Second) of Contracts § 2, cmt. e (1981); see *United States* v. *Winstar Corp.*, 518 U.S. 839, 921 (1996) (Scalia J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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