No. 11-83

In the Supreme Court of the United States

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

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

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the government is required to pay all of the contract support costs incurred by a tribal contractor under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, where Congress has imposed an express statutory cap on the appropriations available to pay such costs and the Secretary cannot pay all such costs for all tribal contractors without exceeding the statutory cap.

2. Whether the Secretary was required to pay petitioner more in contract support costs than the amounts specifically promised in the annual funding agreements between the parties.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 629 F.3d 1296. The opinion of the United States Civilian Board of Contract Appeals (Pet. App. 18a-32a) is reported at 2009-2 B.C.A. (CCH) P 34. An earlier opinion of the United States Civilian Board of Contract Appeals (Pet. App. 33a-46a) is reported at 2008-2 B.C.A. (CCH) P 33,923.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2010. A petition for rehearing was denied on April 19, 2011 (Pet. App. 47a-48a). The petition for a

writ of certiorari was filed on July 18, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal programs and services for Indians. 25 U.S.C. 450a(b). The Act "direct[s]" the Secretary of the Interior or the Secretary of Health and Human Services, as appropriate, to enter into a "self-determination contract" at the "request of any Indian tribe" to permit a tribal organization to administer federal programs that the Secretary would otherwise provide directly for the benefit of Indians.[1] 25 U.S.C. 450f(a). "Self-determination contracts with Indian tribes are not discretionary," S. Rep. No. 274, 100th Cong., 1st Sess. 3 (1987), and the Secretary must accept a tribe's request for a contract except in specified circumstances, see 25 U.S.C. 450f(a)(2). The Act thus generally permits a tribe, at its request, to step into the shoes of a federal agency and administer federally funded services.

The basic parameters of an ISDA contract are set out in the Act. See generally 25 U.S.C. 450*l*(c) (model agreement). As originally enacted in 1975, the ISDA required the Secretary to provide the amount of funding that the "Secretary would have otherwise provided for the operation of the programs" during the fiscal year in question. 25 U.S.C. 450j-1(a)(1). This amount is some-

[1] The Act defines the term "tribal organization" to include, *inter alia*, the governing body of an Indian tribe or any organization controlled or chartered by the tribe. See 25 U.S.C. 450b(*l*).

times called the "secretarial amount." In 1988, Congress amended the ISDA to require that, in addition to the secretarial amount, the Secretary must also provide an amount for the tribal organization's reasonable "contract support costs," which are costs that a tribe must incur to operate a federal program but that the Secretary would not incur. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2293 (1988 Act) (25 U.S.C. 450j-1(a)(2)). Such costs may include both the direct costs of administering a program, such as special audit and reporting requirements, and indirect costs, such as an allocable share of general overhead. See 25 U.S.C. 450j-1(a)(3)(A). Because this amount may vary from year to year, the sums to be provided are negotiated on an annual basis and memorialized in annual funding agreements. See 25 U.S.C. 450j(c)(2); 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and 1(f)(2)).

b. Federal funding under ISDA contracts, like funding for other federal programs, is contingent on the availability of appropriations. Congress made that contingency explicit in at least four places in the Act. First, the Act declares generally that "[t]he amounts of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c). Second, Congress directed that "[e]ach self-determination contract" must "contain, or incorporate by reference," certain standard terms. 25 U.S.C. 450*l*(a)(1). Those terms specify that a lack of sufficient appropriations may excuse performance by either party: the Secretary's obligation to provide the agreed sums is "[s]ubject to the availability of appropriations," and the tribal contractor's obligation to "administer the programs, services, functions, and activities identified in th[e] Contract" is likewise "[s]ubject to the

availability of appropriated funds." 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and (c)(3)). Third, the Act requires the Secretary to submit annual reports to Congress describing, *inter alia*, "any deficiency in funds needed to provide required contract support costs to all contractors" and "any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes" under the Act. 25 U.S.C. 450j-1(c).

Finally, in a provision entitled "Reductions and increases in amount of funds provided," Congress stipulated:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

25 U.S.C. 450j-1(b). The Act thus contemplates the possibility that the available appropriations may be inadequate to fund the requests of all tribal contractors fully or equally.

2. The Indian Health Service (IHS), an agency within the Department of Health and Human Services, provides health care services for approximately 2 million American Indians and Alaska Natives belonging to more than 500 tribal entities. According to agency data, more than half of the IHS's funding for Indian health programs is administered directly by tribal organizations under ISDA self-determination contracts. The Secretary funds such contracts, like other agency programs, from the lump-sum appropriation provided for the Department each year by Congress.

a. In *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005), the IHS paid only a portion of the contract support costs that it had promised to two tribal contractors in fiscal years 1994 through 1997. The tribes brought suit against the Secretary under the ISDA, see 25 U.S.C. 450m-1(a), and the Contract Disputes Act of 1978, 41 U.S.C. 7101 *et seq.* (formerly codified at 41 U.S.C. 601 *et seq.*), to recover the unpaid balance. The government argued, *inter alia*, that it had no further obligation to the tribes because the Secretary had obligated the remaining funds from the unrestricted appropriation for other tribes and for other important administrative purposes. See *Cherokee*, 543 U.S. at 641-642.

This Court rejected those arguments and held that the Secretary could properly be held liable for breach of contract in the amount of the promised but unpaid costs. See *Cherokee*, 543 U.S. at 636-647. Noting that the IHS did "not deny that it promised to pay the relevant contract support costs," *id.* at 636, this Court agreed with the tribes that the government "normally cannot back out" of a contract on the basis of insufficient appropriations "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue." *Id.* at 637. The appropriations for the fiscal years in question, the Court emphasized, "contained no relevant statutory restriction," *ibid.*, and the agency had available "*other* unrestricted funds, small in amount but sufficient to pay the claims at issue," *id.* at 641. Consequently, the ISDA's proviso that all payments are "subject to the availability of appropriations," 25 U.S.C. 450j-1(b), could not excuse the government's breach: "Since Congress appropriated adequate unrestricted funds here," that contingency was irrelevant. *Cherokee*, 543 U.S. at 643; see Pet. App. 3a-5a.

b. After the contract years at issue in *Cherokee*, Congress began to impose in each year's appropriation for the IHS an express statutory cap on the funds available to pay contract support costs under the ISDA. See Pet. App. 5a-6a & n.2. In fiscal year 1999, for example, from a total appropriation of $1.95 billion for the IHS, Congress specified that, "*notwithstanding any other provision of law*, of the amounts provided herein, *not to exceed $203,781,000* shall be for payments to tribes and tribal organizations for contract or grant support costs associated with" ISDA contracts. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-278 to 2681-279 (emphasis added). Likewise, for fiscal year 2000, Congress provided that, from a total appropriation of approximately $2.08 billion, "*notwithstanding any other provision of law*, of the amounts provided herein, *not to exceed $228,781,000*" would be available for the IHS to pay contract support costs. See Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501A-181 to 1501A-182 (emphasis added).

3. Petitioner entered into a self-determination contract with the IHS in 1996 to operate a hospital in Barrow, Alaska. Pet. App. 38a. Since FY 1998, petitioner has operated that hospital pursuant to a self-governance compact among the Secretary and 13 Alaskan tribes.[2] *Ibid.* The compact expressly recognized that the IHS's budget would be "inadequate," see *id.* at 22a, and provided that the IHS's duty to provide funding was subject

[2] A self-governance "compact" permits certain tribes additional freedom in reallocating federal funding among programs. See generally 25 U.S.C. 458aaa *et seq.* The distinction under the ISDA between contracts and compacts, which are subject to the same funding requirements, is not relevant here. See Pet. App. 21a n.2.

"to the appropriation of funds by the Congress of the United States," *id.* at 21a.

At issue in this litigation are petitioner's claims for contract support costs for fiscal years 1999 and 2000.[3] In each of these years, the IHS obligated to tribes and tribal organizations the entire amount that Congress authorized for contract support costs under the applicable statutory caps. See Pet. App. 17a, 28a-32a. As to petitioner, the 1999 annual funding agreement initially signed by petitioner and the Secretary allocated zero funding for contract support costs. *Id.* at 22a. A footnote, however, stated that petitioner would receive a minimum of $500,000 for such costs. *Ibid.* The agreement was eventually amended to provide for approximately $1.29 million in contract support costs. *Id.* at 7a & n.3. Similarly, in fiscal year 2000, the IHS ultimately agreed to provide petitioner approximately $3 million for such costs. *Id.* at 7a & n.4.

It is undisputed that the Secretary paid all of the contract support costs specifically promised in the agreements, as well as the required secretarial amounts. See Pet. App. 6a-7a. Nonetheless, petitioner filed administrative claims demanding approximately $2.6 million in contract support cost "shortfall[s]"—that is, the difference between the sums promised (and paid) under the funding agreements and the amounts that petitioner allegedly spent. *Id.* at 7a. The Civilian Board of Contract Appeals (Board) initially denied the government's motion to dismiss petitioner's claims, noting that the record did not reflect whether the IHS had exhausted all of the appropriations available for contract support

[3] Petitioner also filed claims for allegedly unpaid contract support costs in fiscal years 1996-1998. Those claims were dismissed as untimely, see Pet. App. 39a-43a, and are not before this Court.

costs in fiscal years 1999 and 2000. See *id.* at 43a-46a. After the IHS submitted evidence demonstrating that "no unexpended funds remained in the fiscal year accounts" at issue, *id.* at 29a, the Board granted summary judgment for the government, *id.* at 32a.

4. The court of appeals affirmed. Pet. App. 1a-17a. The phrase "not to exceed" in the annual appropriations acts, the court explained, is "a standard phrase used to express Congress's intent to designate a given amount as the maximum available amount for a particular purpose." *Id.* at 8a (citing 2 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 6-32 (3d ed. 2006) (GAO Redbook)). It thus imposes a "binding statutory cap." *Id.* at 9a. The court reasoned that Congress's explicit directive in the ISDA that the provision of funds under a self-determination contract is subject to the availability of appropriations, "coupled with the 'not to exceed' language[,] limits the Secretary's obligation to the tribes to the appropriated amount. The Secretary is obligated to pay no more than the statute appropriates." *Id.* at 14a. The court added that the agency's method of allocating that total amount of available funds among tribal contractors "is not at issue" in this case. *Ibid.*

The court of appeals rejected petitioner's reliance on this Court's decision in *Cherokee*. "In stark contrast to *Cherokee*," the court explained, "here there is a statutory cap on funding for contract support costs." Pet. App. 8a; see *id.* at 13a-14a. The court likewise rejected petitioner's contention that there is "no limit" to the Secretary's liability for contract support costs because the appropriation for such costs was sufficient to satisfy any given tribe's claim, "even though insufficient to satisfy the combined obligations to all the tribes." *Id.* at 10a

(citing *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892)). The court explained that "[t]here are important differences between this case and *Ferris*," *id.* at 11a, including the existence of an explicit statutory cap on appropriations, *id.* at 13a, and the ISDA's proviso that the Secretary is not required to reduce funding for one tribe in order to make funds available for another, *id.* at 13a-14a (citing 25 U.S.C. 450j-1(b)). Petitioner's approach, the court concluded, "would effectively defeat the statutory cap because the Secretary would be obligated to pay a total amount of tribal obligations exceeding the cap."[4] *Id.* at 13a.

ARGUMENT

The court of appeals correctly held that petitioner has no contractual or statutory right to receive payment for its asserted contract support cost "shortfalls." The Indian Health Service never promised to pay those amounts, and it could not lawfully pay them in light of the binding statutory caps on the appropriations authorized for that purpose. Congress expressly reserved in the ISDA its constitutionally rooted authority to control the expenditure of funds from the Treasury, "[n]otwithstanding any other provision" in the Act, 25 U.S.C. 450j-1(b), and in fiscal years 1999 and 2000 Congress chose to cap the funds available to pay contract support costs at levels that even petitioner does not suggest were suffi-

[4] The court of appeals noted that petitioner had argued before the Board that unexpended funds from fiscal years 1999 to 2000 remained available to IHS, but that the Board had ruled that the amounts in question were not available because they had been returned to the Treasury. Pet. App. 17a n.11. Because that issue was not argued in petitioner's briefs before the court of appeals, however, the court declined to consider it. *Ibid.*

cient to meet all tribes' demands. As the court of appeals correctly recognized, the government had no authority or obligation to make payments in excess of the limits imposed by Congress, Pet. App. 9a, 14a, and the ISDA specifically provides that the Secretary was not required to take money from other tribes to satisfy petitioner's demands, see 25 U.S.C. 450j-1(b). Petitioner's arguments to the contrary ignore the clear text of the ISDA and, if accepted, would "effectively defeat" (Pet. App. 13a) Congress's exercise of its plenary power to control federal spending.

Although the decision below is correct, the courts of appeals are divided on the question whether the government is required to fund all of a tribal organization's contract support costs in circumstances when—unlike in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005)—Congress has expressly capped the appropriations authorized to pay such costs and the Secretary cannot pay all of one tribal contractor's costs without reducing the funding available under the cap for others. The Federal Circuit and the D.C. Circuit have both resolved that question in the government's favor. See Pet. App. 1a-17a; *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996); see also *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000). By contrast, in a nationwide class action against the Department of the Interior affecting hundreds of Indian tribes and tribal organizations, a divided panel of the Tenth Circuit recently ruled that tribal contractors are entitled under the ISDA to recover their entire contract support costs, irrespective of the statutory appropriation limits. *Ramah Navajo Chapter* v. *Salazar*, 644 F.3d 1054 (2011) (*Ramah Navajo*). Simultaneously with the filing of this

response, the Solicitor General is filing a petition for a writ of certiorari to review the Tenth Circuit's decision in *Ramah Navajo*. Although that case presents the better vehicle for this Court's resolution of the question presented, the Court may wish to grant the petition for a writ of certiorari in this case as well and consolidate the cases for briefing and argument.

1. The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, Cl. 7. This Court has explained that the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM* v. *Richmond*, 496 U.S. 414, 427-428 (1990). The authority of Executive officials to administer the laws enacted by Congress is accordingly "limited by a valid reservation of congressional control over funds in the Treasury." *Id.* at 425; see *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1851). The court of appeals therefore correctly held that the government's obligation to fund contract support costs under the ISDA does not extend beyond the express statutory cap that Congress has imposed on the appropriations authorized for that purpose. Pet. App. 14a.

a. Although the ISDA generally requires the Secretary to pay "an amount for" a tribal organization's reasonable contract support costs, see 25 U.S.C. 450j-1(a)(2), that obligation is expressly made "subject to the availability of appropriations." 25 U.S.C. 450j(c)(1); see also 25 U.S.C. 450j-1(b); 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4)). Indeed, in the 1988 amendments that

added the ISDA's provision concerning contract support costs, Congress simultaneously enacted the Act's most explicit reservation of Congress's appropriations authority:

> *Notwithstanding any other provision in this subchapter*, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

25 U.S.C. 450j-1(b) (emphasis added); see 1988 Act, § 205, 102 Stat. 2293. The "subchapter" to which this provision refers is Title 25 ("Indians"), Chapter 14 ("Miscellaneous"), Subchapter II ("Indian Self-Determination and Education Assistance"), and it encompasses all relevant provisions of the ISDA, including the contract support cost provisions of 25 U.S.C. 450j-1(a)(2). The obvious conclusion is that, although Congress wished to support tribes' efforts to supply federally funded services to Indians, it did not thereby intend to forfeit its fundamental authority over federal spending. See H.R. Conf. Rep. No. 479, 106th Cong., 1st Sess. 495 (1999) ("[T]he law unequivocally makes contracts providing such costs subject to the availability of appropriations * * * . Any shortfall does not create an unfunded liability for the Federal government.").

In the 1999 and 2000 appropriations acts for the IHS, Congress exercised the authority that it had expressly reserved for itself in the ISDA to limit the expenditure of public funds under Indian self-determination contracts. See Pet. App. 5a-6a. As petitioner does not dispute, see *id.* at 10a, the phrase "not to exceed" in the

parlance of federal appropriations law unambiguously denotes Congress's intent to specify a maximum amount of funding available for a particular purpose. See GAO Redbook 6-32; see also 64 Comp. Gen. 263, 264 (1985) ("not to exceed" is "susceptible of but one meaning"). And as Congress surely understood, "[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. at 430 (citing 31 U.S.C. 1341 and 1350). Congress thus imposed a firm ceiling on the amount of money that could be withdrawn from the Treasury to fund tribal contract support costs in fiscal years 1999 and 2000.

Those statutory caps reflect Congress's judgment that the important federal policies that are served by funding tribes' contract support costs under the ISDA do not warrant the unlimited disbursement of public money at the expense of other priorities for the public welfare. As the court of appeals noted (Pet. App. 16a), the House Report for the original version of the 2000 appropriation bill explained that "contract support costs * * * have outpaced available funding" and that Congress could not "afford to appropriate 100% of contract support costs at the expense of basic program funding for tribes." H.R. Rep. No. 222, 106th Cong., 1st Sess. 112-113 (1999). Likewise, the Conference Report accompanying the appropriations act for the Department of the Interior in fiscal year 1994—the first year in which Congress imposed a statutory cap on contract support costs under the ISDA for any agency—explained that it was necessary for Congress to impose a firm limit on contract support cost expenditures because "significant increases in contract support will make future increases

in tribal programs difficult to achieve." H.R. Conf. Rep. No. 299, 103d Cong., 1st Sess. 28 (1993).[5] It is exactly such "difficult judgments reached by Congress as to the common good" that the Appropriations Clause exists to protect. *OPM* v. *Richmond*, 496 U.S. at 428. And Congress anticipated the potential need for such "difficult judgments" under the ISDA when it made clear that all funding for tribal contractors under self-determination contracts is "subject to the availability of appropriations," "[n]otwithstanding *any* other provision" of the Act. 25 U.S.C. 450j-1(b) (emphasis added).

b. Against this background, petitioner identifies no legal basis for its insistence that it was entitled to recover additional contract support costs despite the appropriations caps. Petitioner does not contend that the Act *itself* grants to tribal contractors an unqualified right to the complete funding of such costs irrespective of the amount of (or limitations on) the available appropriations. Nor could it plausibly make such a claim, given the ISDA's explicit reservation of Congress's authority to limit appropriations for ISDA contracts. 25 U.S.C. 450j-1(b); see also 25 U.S.C. 450j(c). By their express terms, moreover, the appropriations caps imposed by Congress apply "notwithstanding any other provision of law." Pub. L. No. 105-277, 112 Stat. 2681-278 to 2681-279; Pub. L. No. 106-113, 113 Stat. 1501A-181 to 1501A-182. Because the ISDA does not mandate payment in these circumstances, petitioner has no right to recover

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[5] Although Congress did not begin limiting the appropriations available to the IHS for ISDA contract support costs until 1998, Congress has imposed a similar "not to exceed" cap in the annual appropriation for the Interior Department since 1994. See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 103-138, Tit. I, 107 Stat. 1390-1391.

based on the ISDA itself. See *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1555 (2009); *United States* v. *Navajo Nation*, 537 U.S. 488, 506 (2003).

Instead, petitioner frames the question in this case as whether a "government contractor which has fully performed its end of the bargain has no remedy" when the government "does not have enough money left in its annual appropriation to pay the contractor." Pet. i. Yet petitioner received the entire sum that the Secretary specifically promised to pay as the government's "end of the bargain": the IHS paid petitioner for approximately $1.29 million in contract support costs in FY 1999 and $3 million in FY 2000, as the agency promised in the applicable funding agreements. See Pet. App. 6a-7a (noting that petitioner "does not claim that the Secretary failed to pay the secretarial amount, or the contract support costs specified in the Annual Funding Agreements"). As this Court held in *Cherokee*, self-determination agreements under the ISDA are, at least "in respect to the binding nature of a promise," no different from "ordinary contractual promises." 543 U.S. at 639 (emphasis omitted). In that case, the government did not contest that it had "promised to pay the relevant contract support costs" that remained unpaid. *Id.* at 636. Here, by contrast, the government paid the sums specifically identified in the contract. See Pet. App. 6a-7a. Thus, petitioner seeks to recover, over and above what was provided for in the annual agreements, an asserted contract support cost "shortfall"—the difference between what the government promised to (and did) pay under the contract and what petitioner claims to have spent. *Id.* at 7a. Petitioner identifies no legal basis, under the ISDA or otherwise, for such a claim.

Furthermore, even if petitioner could point to a contractual basis for its purported entitlement, it could not escape the explicit proviso in the ISDA and in the contract itself that all funding was subject to the availability of appropriations. See 25 U.S.C. 450j-1(b); 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4)); see also Pet. App. 21a-22a. Although petitioner now contends (Pet. 5) that it had no advance notice of any funding deficiency, the contract itself "expressly warned of the risk that funding would be inadequate." Pet. App. 17a; see *id.* at 22a. Indeed, the 1999 funding agreement between the parties initially allocated *zero* dollars for petitioner's contract support costs, noting: "The Secretary is unwilling to cite a sum certain * * * because the exact sources of funds is unknown." Pet. C.A. App. 161 n.5. By knowingly consenting to a contract that was expressly conditioned on the availability of adequate appropriations, petitioner accepted the risk that adequate appropriations might *not* be available. See *Sutton* v. *United States*, 256 U.S. 575 (1921); *Bradley* v. *United States*, 98 U.S. 104 (1878). The Secretary thus breached no duty to petitioner by paying less than all of petitioner's alleged costs in order to comply with the statutory cap on the use of appropriations for contract support costs, just as petitioner would have breached no duty to the government if it had suspended its own performance for the same reason. See 25 U.S.C. 450*l*(c) (model agreement § 1(c)(3)) (tribal contractor's duty to administer federal programs is "[s]ubject to the availability of appropriated funds"); see also *ibid.* (model agreement § 1(b)(5)) (contractor "shall not be obligated to continue performance" if its expenses exceed the amount provided under the contract and the Secretary declines to provide more funds).

c. Petitioner contends (Pet. 11) that the court of appeals' decision conflicts with this Court's decision in *Cherokee*. As already noted, see p. 15, *supra*, *Cherokee* involved the government's admitted failure to pay costs that it had contractually promised to pay, while here petitioner has received all of the funding the government specifically promised to provide under the annual funding agreements. But more fundamentally, *Cherokee* held that the government was responsible for the tribes' unfunded contract support costs because the governing appropriation acts "contained no relevant statutory restriction." 543 U.S. at 636-637. The Court explained that, in those circumstances, the ISDA's "subject to the availability of appropriations" proviso was irrelevant because "Congress appropriated adequate unrestricted funds" there. *Id.* at 643.

In this case, by contrast, Congress imposed a firm statutory cap on the appropriations available to pay contract support costs—the very restriction that this Court found lacking in *Cherokee*. See, *e.g.*, 543 U.S. at 646-647 (rejecting the government's reliance on restrictive language contained only in legislative committee reports and stressing that the "appropriations statutes unambiguously provided unrestricted lump-sum appropriations"). Indeed, in urging that the Secretary could not make appropriations unavailable under the ISDA by unilaterally allocating the money to other purposes, the tribal contractors in *Cherokee* effectively conceded that an appropriations cap imposed by Congress *would* limit the Secretary's obligation to pay their costs. See *Cherokee*, Nos. 02-1472 & 03-853, Pet. Reply Br. 6-7 (contending that "*only* Congress, acting through annual Appropriations Acts, can alter the Secretary's duty to pay

ISDA contracts at the full amounts required by that Act").

Petitioner argues (Pet. 8-9) that the government is liable under the rationale of *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892), because the appropriation to the IHS was at least sufficient to pay petitioner's requested costs and petitioner had no reason to suspect that the Secretary might obligate the money elsewhere. That argument fails in multiple respects. First, the premise is mistaken: as already noted, see p. 16, *supra*, petitioner was expressly warned that appropriations might be inadequate to cover its claimed contract support costs, and the government in fact paid the amounts promised in the annual funding agreements. Unlike the claimant in *Ferris*, therefore, petitioner had fair notice of the risk that further payments would not be forthcoming. See Pet. App. 11a-12a. More fundamentally, *Ferris*, like *Cherokee*, involved a government promise made against the backdrop of an unrestricted lump-sum appropriation. See *id.* at 12a-13a. Here, by contrast, "there is a statutory cap and no ability to reallocate funds from non-contract uses." *Ibid.* As the court of appeals recognized, the logical implication of petitioner's argument based on *Ferris* is that there is "no limit" to the Secretary's liability for contract support costs under the ISDA, notwithstanding the express appropriations cap imposed each year by Congress, because the amount appropriated each year has always been large enough to satisfy the requests of any individual contractor in isolation. *Id.* at 10a.

The court of appeals properly rejected that argument, which would "effectively defeat" Congress's reservation of its authority over the disbursement of funds from the Treasury. Pet. App. 13a. Congress's manifest

purpose in enacting the appropriations caps was to limit the use of public funds for the payment of ISDA contract support costs in order to protect Congress's ability to fund other priorities, including program funding for Indian tribes. See pp. 13-14, *supra*. Petitioner's theory, under which every tribe could recover its requested costs from the Treasury irrespective of the total sum, is fundamentally inconsistent with that intent and would render the appropriations caps meaningless. Significantly, the Secretary under the ISDA has limited authority to decline to enter into additional contracts as a means of controlling costs. See 25 U.S.C. 450f(a)(1) and (2); see also *Southern Ute Indian Tribe* v. *Sebelius*, Nos. 09-2281 & 09-2291, 2011 WL 4348299 (10th Cir. Sept. 19, 2011) (holding that the government could not decline a tribe's request for a new ISDA contract based on a lack of appropriations available to pay contract support costs). Congress consequently must have understood that, to comply with the appropriations caps, the Secretary would have no choice but to pay only a portion of tribal requests for contract support costs. And Congress anticipated that possibility by providing in the ISDA that all funding for tribal contractors under self-determination contracts is "subject to the availability of appropriations," "[n]otwithstanding any other provision" of the Act. 25 U.S.C. 450j-1(b).

Petitioner contends (Pet. 10) that, although the appropriations caps may limit the Secretary's ability to fund contract support costs directly, the "Government can still satisfy its liabilities in other ways, namely through the Judgment Fund, 31 U.S.C. § 1304." That argument is without merit. As an initial matter, the government has no "liabilit[y]" for petitioner's contract support cost shortfalls, both because the Secretary paid the

contract support costs specifically promised in the annual funding agreements and because the ISDA expressly makes the government's responsibility for such costs contingent on the availability of appropriations. 25 U.S.C. 450j-1(b). There is, consequently, no basis for a judgment against the United States that could be paid out of the Judgment Fund. And in any event, the Judgment Fund is not a back-up source of agency appropriations. Nor is it an invitation to litigants to circumvent express restrictions imposed by Congress on the expenditure of funds from the Treasury. As this Court explained in *OPM* v. *Richmond*, *supra*, "[t]he general appropriation for payment of judgments * * * does not create an all-purpose fund for judicial disbursement." 496 U.S. at 432. There is no reason to think that Congress imposed binding limits on the Secretary's ability to expend public funds on contract support costs, only to let tribes recover the same costs from the Judgment Fund.

Finally, petitioner objects (Pet. 10-11) that the court of appeals "treat[ed] all tribal contractors as a single entity" by permitting the government to consider all tribes' claims when determining how best to allocate contract support funding. As the court of appeals recognized (Pet. App. 13a-14a), however, Congress specifically provided in the ISDA that the Secretary "is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." 25 U.S.C. 450j-1(b). The distribution of inadequate funds under a capped appropriation is inescapably a zero-sum endeavor, and Congress made clear that nothing in the ISDA requires the Secretary to take money from one tribe to give it to another in making those difficult choices. Cf. *Lincoln* v. *Vigil*, 508 U.S.

182, 193 (1993) (the allocation of appropriated funds for permissible statutory objectives is committed to agency discretion by law). Indeed, the clear implication of Section 450j-1(b) is that different tribes' claims may be funded unequally. In any event, as the court of appeals also recognized, petitioner has not challenged in this case the IHS's specific methodology for distributing contract support funding among tribal contractors. See Pet. App. 14a & n.8.

2. Although the decision below is correct, the courts of appeals are divided on the question whether the government is obligated to fund all of a tribe's claimed contract support costs under the ISDA when, unlike in *Cherokee*, Congress has expressly capped the appropriation authorized to pay such costs and the Secretary cannot pay all of one tribe's costs without reducing the funding available under the cap for others.

a. In addition to the Federal Circuit, the D.C. Circuit has ruled in the government's favor on this question. In *Ramah Navajo School Board* v. *Babbitt*, *supra*, the plaintiff tribal organizations challenged the Secretary of the Interior's plan for allocating ISDA contract support funding among contractors in the face of a statutory appropriations cap in FY 1995. Although the D.C. Circuit panel divided on the question whether the Secretary's methodology was subject to judicial review, all members of the panel agreed that the government had no obligation to pay contract support costs beyond the statutory appropriations limit. See, *e.g.*, 87 F.3d at 1345 ("[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."); *id.* at 1353 (Silberman, J., dissenting) (Congress "unequivocally stated that any tribes' *legal enti-*

tlement to funds * * * was dependent on Congress making full appropriations").

b. In contrast, in a nationwide class action affecting hundreds of Indian tribes and tribal organizations, a divided panel of the Tenth Circuit recently held that tribal organizations that enter into self-determination contracts with the Department of the Interior are entitled to recover their contract support costs each year, irrespective of an express cap imposed by Congress on the appropriations authorized to pay such costs. *Ramah Navajo Chapter* v. *Salazar*, *supra*. Expressly rejecting the reasoning of the Federal Circuit in this case, see 644 F.3d at 1071-1072, the Tenth Circuit held that the Secretary was required to pay all of the contract support costs of *every* tribal contractor because the available appropriations were sufficient to satisfy the demands of any *single* tribal contractor in isolation—a result the court believed was compelled by this Court's decision in *Cherokee*. See *id.* at 1069 & nn.7-8. Although the court agreed that the appropriations caps prevented the Secretary from paying more than the appropriated sum in any fiscal year, it concluded that the tribal contractors could simply "recover[] from the Judgment Fund" any unpaid balance. *Id.* at 1076. The court believed that result was called for because Congress "passed the ISDA, guaranteeing funding for necessary [contract support costs], and its appropriations resulted in an ongoing breach of the ISDA's promise." *Id.* at 1077.

Judge Hartz dissented in *Ramah Navajo*, contending that the majority had "render[ed] futile the spending cap imposed by Congress." 644 F.3d at 1078. The dissent found no authority for requiring the government to pay claims in excess of a specific statutory appropriations limit: "If such payments are not barred by the Con-

stitution's Appropriations Clause, then the Anti-Deficiency Act[, 31 U.S.C. 1341,] should do the trick." *Id.* at 1084. Nor, the dissent continued, was the majority's result required by this Court's decision in *Cherokee*, because "what the Secretary sought *discretion* to do in *Cherokee Nation* is *compelled* here." *Id.* at 1093.

3. In light of the square conflict among the circuits on an important question concerning Congress's control over the payment of funds from the Treasury, the government agrees that this Court's review of the legal issues is warranted. The Court has not previously addressed the application of Appropriations Clause principles to government contracts in circumstances akin to those at issue here. Indeed, it appears that the Court has not addressed the subject at any length since its 1921 decision in *Sutton* v. *United States*, *supra*. The subject is ripe for the Court's consideration.

This Court's review is additionally appropriate because of the importance of the questions presented to the effective administration of federal programs and services for the benefit of American Indians and Alaska Natives—both by the federal government directly and by tribal organizations acting under ISDA contracts. The Tenth Circuit's decision in *Ramah Navajo* has left federal and tribal officials alike uncertain of their respective financial obligations for the maintenance of important federal programs. We are informed that, in the immediate wake of the *Ramah Navajo* decision, the Indian Health Service and the Bureau of Indian Affairs have already received a substantial number of new tribal claims for unpaid contract support costs, in addition to those already pending. According to agency estimates, if the Tenth Circuit's decision is upheld, those agencies

may face total claims for unpaid contract support costs exceeding $1 billion, not including interest.

Accordingly, simultaneously with the filing of the government's response in this case, the Solicitor General is filing a petition for a writ of certiorari in *Ramah Navajo*. For at least two reasons, that decision presents the better vehicle for the Court's review. First, because it involves a nationwide class action, *Ramah Navajo* starkly illustrates in one case the fundamental flaw in the tribes' position in these cases: the Secretary could not satisfy the contract support cost demands of all members of the class in any fiscal year without exceeding the statutory appropriations cap imposed by Congress for that fiscal year. Granting review in *Ramah Navajo* would thus permit the Court to resolve the question presented in a factual context that appropriately tests the limits of each party's legal theory. Second, petitioner in this case received all of the contract support costs specifically identified in its annual funding agreements with the Secretary, entirely apart from any question of the sufficiency of appropriations. See Pet. App. 6a-7a. That fact furnishes an additional basis on which the government would prevail in this case that is not necessarily present with respect to the contracts at issue in *Ramah Navajo*. The Tenth Circuit's decision thus presents a better vehicle for the Court to reach and decide the question presented. Nonetheless, because of the particular features of this case, including the full payment of the contract support costs promised in the annual funding agreements, the Court may wish to grant the petition for certiorari in this case as well and consolidate the two cases for briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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