No. 13-454

In the Supreme Court of the United States

QUANTUM ENTERTAINMENT LIMITED, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

For more than a century, 25 U.S.C. 81 (1994) deemed certain types of agreements between Indian tribes and third parties "null and void" absent approval by the United States Department of the Interior. In 2000, Congress amended the statute to narrow the class of agreements requiring federal approval. The question presented is whether the amendment retroactively validated an unapproved agreement that fell within the scope of the original statute but outside the scope of the revised statute.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 714 F.3d 1338. The opinion of the district court (Pet. App. 25-41) is reported at 848 F. Supp. 2d 30.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2013. A petition for rehearing was denied on July 10, 2013 (Pet. App. 201-202). The petition for a writ of certiorari was filed on October 7, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From 1871 to 2000, "[n]o agreement [could] be made by any person with any tribe of Indians * * *

for the payment or delivery of any money * * * in consideration of services for said Indians relative to their lands" without the written consent of the United States Department of the Interior (Interior). 25 U.S.C. 81 (1994) (originally enacted in Acts of May 21, 1872, ch. 177, § 1, 17 Stat. 136, and Mar. 3, 1871, ch. 120, sec. 3, § 1, 16 Stat. 570) (originally codified as tit. 28, ch. 2, § 2103, 1 Rev. Stat. 367 (2d ed. 1878)). Absent Interior's approval, 25 U.S.C. 81 (1994) (old Section 81) declared any such agreement "null and void."

Old Section 81 "emerged from a history of shameful misdeeds on the part of those dealing with Indian tribes." Pet. App. 13-14. The statute "was focused on ensuring the legal incapacity of the Indian tribes to contract on matters relative to their lands, a limitation informed by the belief that they were unable to resist the schemes of unscrupulous non-Indians seeking to swindle them out of their patrimony." *Id.* at 13. By voiding any agreement that lacked Interior's consent, the law "intended to protect the Indians from improvident and unconscionable contracts." *In re Sanborn*, 148 U.S. 222, 227 (1893); see Cong. Globe, 41st Cong., 3d Sess. 1483, 1483-1487 (1871).

In 2000, Congress amended Section 81 to narrow the class of agreements requiring Interior's approval. Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, sec. 2, § 81, 114 Stat. 46. Section 81 now provides that "[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior." 25 U.S.C. 81(b) (new Section 81). The parties stipu-

lated that the agreement at issue in this case falls outside the scope of the revised statute. Pet. App. 6.

2. In 1996, four years before Congress amended Section 81, petitioner executed an agreement with the Santo Domingo Pueblo—a federally-recognized Indian tribe—and Kewa Gas Limited, a tribal corporation owned by the Pueblo. Pet. App. 2-3. Under the agreement, petitioner managed, supervised, and operated Kewa's fuel-distribution business, including payment of petitioner's own management fees, in exchange for 49% of business income, along with performance bonuses. *Id.* at 4. The agreement capitalized on a state tax exemption available exclusively to tribally-owned fuel distributors operating on Indian lands. *Id.* at 5. The agreement "also effectively limited the Pueblo's right to engage in the same business on other Pueblo lands without [petitioner's] consent." *Id.* at 101. The agreement's initial term was 10 years, but petitioner had the option to extend the term for up to 20 additional years. *Id.* at 5.

As a matter of law, old Section 81 rendered the agreement null and void absent Interior's approval. Pet. App. 16-22; Pet. 3 (accepting that conclusion). The Pueblo's tribal council recognized that possibility. In its resolution approving the agreement, the tribal council empowered the tribal governor "to do any and all other things necessary so as to obtain the approval of the Secretary of the Interior to such Agreement (if such approval is required)." Pet. App. 147; see *id.* at 148 (resolution authorizing Kewa "to commence operation * * * in accordance with the terms of the Management Agreement, pending its approval by the Secretary of the Interior"). Neither petitioner nor the Pueblo, however, submitted the agreement to Interior

for approval. *Id.* at 46. The parties performed under the agreement for nearly seven years notwithstanding its invalidity. *Id.* at 29.

Finally, in 2003, the Pueblo's Governor submitted the agreement to Interior for review. Pet. App. 6. The Acting Director of the Southwest Region of the Bureau of Indian Affairs (Director) evaluated the agreement under old Section 81 and concluded that the agreement fell within the statute's terms. *Id.* at 190-200. The Director refused to approve the agreement because it was not in the Pueblo's best interest. *Id.* at 198. The parties immediately stopped performing under the agreement.

3. a. Petitioner appealed to the Interior Board of Indian Appeals (Board), which sustained the Director's decision. Pet. App. 137-189. The Board concluded that old Section 81 applied to the parties' agreement. *Id.* at 159-163. Citing this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the Board explained that "application of [n]ew Section 81 would significantly change the legal consequences of the 1996 Agreement by rendering valid an otherwise invalid contract" and was therefore impermissible. Pet. App. 162-163. The Board further concluded that the agreement fell within the scope of old Section 81 and was therefore invalid absent Interior's approval. *Id.* at 163-174.

b. Petitioner challenged the Board's decision in federal district court under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* As relevant here, the district court remanded to the Board for further explanation of whether application of new Section 81 to the agreement would have an impermissible retroactive effect. Pet. App. 118-134. The court stated that

although the Board had concluded that application of new Section 81 "would have a retroactive effect," the decision was "incomplete" because the Board "did not determine whether the retroactive effect would be impermissible." *Id.* at 131.

c. On remand, the Board further explained its conclusion that new Section 81 was not applicable to the parties' agreement. Pet. App. 44-102. Because the agreement was executed in 1996, the Board explained, "at least as long as [o]ld Section 81 was in effect (and regardless of the fact that the parties chose to follow the terms of the Agreement), it could not serve as the source of any legal and enforceable contractual obligations against the Pueblo and Kewa." *Id.* at 92. The Board further explained that "[i]f [n]ew Section 81 became applicable to the Agreement upon enactment, the previously null and void agreement would then be legal and valid without Secretarial approval." *Ibid.* If that were the case, "[i]t would give rise to legally enforceable contractual obligations * * * where none previously existed, based solely on an act completed before [n]ew Section 81 was enacted." *Ibid.* The Board concluded that such a retroactive effect was impermissible under the Court's decision in *Landgraf*. *Id.* at 90, 101-102.

4. The district court affirmed. Pet. App. 25-41. The court agreed with the Board that, under old Section 81, the agreement required Interior's approval. *Id.* at 35-37. The court further agreed with the Board that new Section 81 could not be applied retroactively to the parties' agreement. *Id.* at 38-41.

The district court explained that "[w]hen Congress does not expressly prescribe a statute's retroactive reach, courts must consider whether such retroactive

application would have an impermissible retroactive effect." Pet. App. 28 (citing *Landgraf*, 511 U.S. at 278). "A statute has an impermissible retroactive effect," the court explained, "when its retroactive application, 'would impair the rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* at 38 (quoting *Landgraf*, 511 U.S. at 280). The court concluded that because the agreement was void under old Section 81, yet would be enforceable without Interior's approval if new Section 81 applied, retroactive application of new Section 81 would "impose new contractual duties on the parties with respect to 'transactions already completed,'" and thus would be impermissible. *Id.* at 40 (quoting *Landgraf*, 511 U.S. at 269-270, 280).

5. The court of appeals affirmed. Pet. App. 1-22. The court held that new Section 81 could not be applied to the parties' agreement. *Id.* at 8-16. The court explained that "[q]uestions of statutory retroactivity are resolved under the two-part test established by" the Court in *Landgraf*. *Id.* at 8. First, the court must ask "whether Congress has expressly prescribed the statute's proper reach." *Ibid.* (quoting *Landgraf*, 511 U.S. at 280). Second, if Congress has not spoken to retroactivity, the court must determine "whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 9 (quoting *Landgraf*, 511 U.S. at 280). "If the statute would operate retroactively," the court explained, "[the] traditional presumption teaches that it does not govern absent clear

congressional intent favoring such a result." *Ibid.* (quoting *Landgraf*, 511 U.S. at 280).

The court of appeals examined the text and legislative history of new Section 81 and found no "express prescription by Congress that new [Section] 81 applies to existing agreements." Pet. App. 11. The court further concluded that applying new Section 81 to otherwise void agreements "would attach new legal consequences to the Agreement * * * by removing the impediment to its validity—*i.e.*, the need for Secretarial approval." *Ibid.* Thus, the court agreed with the Board that, under *Landgraf*, new Section 81 could not be applied to agreements formed before the statute was amended in 2000. *Id.* at 15.

The court of appeals rejected petitioner's argument that *Ewell* v. *Daggs*, 108 U.S. 143 (1883), and *McNair* v. *Knott*, 302 U.S. 369 (1937), compelled the application of new Section 81 to preexisting agreements. Pet. App. 12-14. The court explained that the agreement in *Ewell* was "voidable merely," whereas old Section 81 deemed the agreement between petitioner and the Pueblo "absolutely a nullity." *Id.* at 13 (quoting *Ewell*, 108 U.S. at 149-150). The court further explained that this Court's "comprehensive examination of its prior cases [in *Landgraf*] did not result in a test that recognized an exception to the presumption against retroactivity where a new statute would, if applied to preexisting agreements, create new legal duties and obligations." *Id.* at 14. Accordingly, in the court's view, *Landgraf* provides the controlling retroactivity test. *Ibid.*

The court of appeals further reasoned that, "[t]o the extent considerations of fair notice, reasonable reliance, and settled expectations remain relevant to

the retroactivity analysis," those considerations did not favor application of new Section 81 to preexisting agreements. Pet. App. 15. The court explained that "the plain text of old [Section] 81 is addressed to 'any person' and gives fair warning of the risk for 'any person,' such as [petitioner], who fails to obtain Secretarial approval." *Ibid.* The court further reasoned that any concerns about unfairness "are ameliorated by the possibility that [petitioner] may recover in *quantum meruit*, a question the Board did not resolve." *Id.* at 16.

ARGUMENT

Petitioner contends (Pet. 12-24) that new Section 81, which was enacted in 2000 and under which the parties' agreement, if entered into today, would be valid without Interior's approval, should apply retroactively to validate the unapproved agreement that petitioner entered into with the Pueblo in 1996. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. In *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), this Court set out a two-part test for determining whether "a federal statute enacted after the events in the suit" applies retroactively to those events. *Id.* at 280. "[T]he court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Ibid.* If the statute does not expressly address retroactivity, "the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with

respect to transactions already completed." *Ibid.* "If the statute would operate retroactively," the Court explained, "[the] traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Ibid.*; see also *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1484 (2012) (referring to the "deeply rooted presumption against retroactive legislation"). In formulating the two-part test, the Court reconciled two canons of interpretation that were in "apparent tension" with one another: first, the rule that "a court is to apply the law in effect at the time it renders its decision," and second, "the axiom that retroactivity is not favored in the law." *Landgraf*, 511 U.S. at 264 (alteration, and citations omitted).

The court of appeals correctly applied *Landgraf*'s test to the facts of this case. Congress did not expressly state that new Section 81 should apply retroactively to agreements formed before the statute was revised. See Pet. App. 9-11; see also *id.* at 98-101, 161 n.14 (Board decisions concluding that Congress did not indicate that new Section 81 should be applied retroactively). Petitioner does not contend otherwise. If anything, the legislative history reveals that Congress intended to limit new Section 81 to future agreements. See S. Rep. No. 150, 106th Cong., 1st Sess. (1999) (Senate Report) (explaining that new Section 81 "will allow tribes and their contracting Partners to determine whether Section 81 applies *when they form an agreement*") (emphasis added); *id.* at 9-10 (new Section 81 "is concerned with the reasonable expectations of the parties *when they enter an agreement*") (emphasis added). Application of new Section 81 in this case would not and could not occur

when the parties actually purported to enter an agreement. See *ibid.*

Applying new Section 81 to the parties' agreement also fails the second step of *Landgraf*. Under old Section 81, the parties' agreement had no legal effect—it was void *ab initio* irrespective of the parties' later voluntary performance, because Interior did not approve it. If new Section 81 applied, in contrast, the agreement would be valid. Applying new Section 81 to the agreement would therefore have a retroactive effect because it would "increase [each] party's liability for past conduct" and "impose [legal] duties with respect to" an agreement that was formed before the statute's enactment. *Landgraf*, 511 U.S. 280. Under *Landgraf*, the traditional presumption against retroactivity applies in these circumstances. *Ibid.*

Petitioner contends (Pet. 24) that considerations of reliance and fair notice favor application of new Section 81 to its agreement with the Pueblo, given that the parties performed under the agreement for a number of years. But equitable considerations alone cannot justify application of new statutes to past conduct. See *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 310-311 (1994). And in any event, the equities weigh against petitioner here. Pet. App. 15-16. When the parties entered into the agreement in 1996, Section 81 provided that unapproved contracts falling within the statute's scope were "null and void," and it authorized *qui tam* suits brought in the name of the United States to recover "all money or other thing of value paid to any person by any Indian or tribe" under an unapproved agreement. 25 U.S.C. 81 (1994). That provision put petitioner on notice of the substantial risk of entering into an unapproved service agreement

with an Indian tribe. Pet. App. 15; see Senate Report 5 (discussing the "severity of [old Section 81's] penalty for noncompliance borne by the party contracting with the tribe"). Moreover, as the Board explained, petitioner "easily could have prevented the risk by conditioning its performance on [Interior's] approval of the Agreement." Pet. App. 94 n.24. Petitioner opted not to take that precaution.

2. Petitioner does not contend that the courts of appeals are in conflict on the question presented. Rather, petitioner contends (Pet. 13-19) that the court of appeals' decision conflicts with this Court's decisions in *Ewell* v. *Daggs*, 108 U.S. 143 (1883), and *McNair* v. *Knott*, 302 U.S. 369 (1937). Petitioner's contention rests on a misunderstanding of those decisions.

In *Ewell*, the Court considered whether an amendment to the Constitution of the State of Texas that repealed all state usury laws applied to a contract with a usurious interest rate that was formed before the usury statutes were repealed. 108 U.S. at 148. Although the relevant statute provided that loan contracts with an interest rate greater than 12% were "void and of no effect" as to the interest portion of the loan, *ibid.*, the Court stated that those words were "often used in statutes and legal documents * * * in the sense of voidable merely, * * * not as meaning that the act or transaction is absolutely a nullity," *id.* at 148-149. After concluding that contracts with usurious interest rates were "voidable" rather than "void," the Court explained that the right taken away by the constitutional amendment was "the right in the party to avoid his contract," which "is usually unjust to insist upon." *Id.* at 151. The Court

concluded that the anti-usury defense was eliminated by the constitutional amendment. *Ibid.*

To the extent that *Ewell* remains good law,[*] it applies only to provisions of a valid contract that are voidable at one party's option, as opposed to "absolutely void" agreements like the one between petitioner and the Pueblo. *Ewell*, 108 U.S. at 150-151; see *Campbell* v. *Holt*, 115 U.S. 620, 627 (1885) ("In all [the *Ewell*] class of cases the ground taken is that there exists a contract."). Retroactivity is not implicated in such cases because the relevant event—the party's exercise of the option to void the contract—occurs *after* the new law is enacted. In contrast, in the case of a contract that is absolutely void, the contract is invalid from the outset, and neither party can assert any rights under it. See Pet. App. 14, 95-97. Moreover, as the court of appeals pointed out (*id.* at 13-14), old Section 81 rendered the contract void based on the premise that the tribe lacked legal capacity to contract, in order to prevent overreaching. There is no reason to suppose that Congress, in enacting new Section 81, intended to validate contracts that had those basic defects when entered into. Accordingly,

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[*] *Ewell* relied on a common-law presumption that the repeal of a penalty provision operated retroactively to release a party from losses and forfeitures incurred under the original statute. 108 U.S. at 150 (explaining that the repealed anti-usury statute had imposed a penalty on lenders). A week before enacting old Section 81, Congress reversed that presumption by statute. 1 U.S.C. 109 (originally enacted as Act of Feb. 25, 1871, § 4, 16 Stat. 432); see *Landgraf*, 511 U.S. at 271. The court of appeals in this case noted that the government had not relied on 1 U.S.C. 109, and the court therefore considered such an argument waived. See Pet. App. 12 n.1. The government cites Section 109 here, however, simply to explain that *Ewell* is distinguishable for this reason as well.

unlike in *Ewell*, applying new Section 81 to validate a void agreement years after its formation would increase the parties' liability for past conduct and impose legal duties that the contract did not impose when it was formed, and do so without the special protections Congress intended to apply at the time the contract was entered into—precisely the sort of retroactive effect that *Landgraf* forbids in the absence of clear Congressional intent.

In *McNair*, the Court considered whether the Act of June 25, 1930, ch. 604, 46 Stat. 809, which "granted power to National Banks to secure deposits of public funds," validated or made enforceable "pledge agreements made to protect such funds deposited before the [act] became effective." 302 U.S. at 369. The Court concluded that the language of the statute "leads irresistibly to the conclusion that Congress did intend to make existing pledges enforceable." *Id.* at 371; see *id.* at 372 ("The Senate and House Committee reports show that the sponsors of the amendment desired * * * to assure that [existing] agreements * * * would be enforceable."). The Court thus resolved the retroactivity issue as a matter of statutory text, with "no need to resort to judicial default rules." *Landgraf*, 511 U.S. at 280.

Furthermore, *Ewell* and *McNair* predate the Court's decision in *Landgraf*, which sets out a general test for evaluating the retroactivity of an intervening statute. Petitioner suggests (Pet. 18) that *Landgraf* devised a retroactivity test that applies only to "new legal duties or liabilities imposed exclusively and out of the blue by * * * new legislation itself," and not for "duties willingly undertaken by contracting parties in the first instance." That is incorrect.

Although *Landgraf* addressed the retroactivity of certain damages and trial provisions authorized by Congress in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072, the Court did not indicate that its retroactivity analysis should not be applied to contract cases. Indeed, in discussing the competing retroactivity presumptions that the decision undertook to reconcile, see p. 9, *supra*, the Court noted that "[t]he largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights." *Landgraf*, 511 U.S. at 271.

Furthermore, the Court in *Landgraf* described several categories of later-enacted statutes that could be applied under the two-part test it announced, even without explicit direction from Congress. For example, the Court explained that application of an intervening statute may be warranted when the statute "authorizes or affects the propriety of prospective relief" (such as a preliminary injunction), "confer[s] or oust[s]" a court's jurisdiction, or changes a procedural rule. *Landgraf*, 511 U.S. at 273-275. As the court of appeals explained (Pet. App. 14-15), the Court did not recognize any similar category for later-enacted statutes that permit parties to enter into the sort of contracts that were previously considered void. Under the Court's decision in *Landgraf*, such statutes should not be applied to preexisting agreements without express congressional direction because they "increase [a] party's liability for past conduct" and "impose legal duties with respect to" an agreement already made. See 511 U.S. at 280.

3. Other considerations counsel against further review. First, the question presented is of greatly

diminishing importance. Section 81 was amended 14 years ago, and the more limited scope of new Section 81 will govern whether Interior's approval is required for contracts with Indian tribes going forward, as it has for the past 14 years. The issue in this case could only arise in a small subset of cases where a party entered into a contract with an Indian tribe before 2000, the contract required approval under old Section 81, the contract was never approved by Interior, and one of the parties now seeks to stop performing under the contract. The number of cases presenting those narrow circumstances will continue to diminish and will eventually no longer exist. Furthermore, the court of appeals left open the possibility (Pet. App. 16) that petitioner may be able to pursue recovery from the Pueblo under a *quantum meruit* theory, a remedy that the Board's decision did not foreclose. See *id.* at 185.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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