No. 15-23

In the Supreme Court of the United States

PRAIRIE COUNTY, MONTANA, AND GREENLEE COUNTY, ARIZONA, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the applicable prior version of the Payment in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*, limited payments to petitioners according to the amount appropriated by Congress for fiscal years 2006 and 2007.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 782 F.3d 685. The opinion of the United States Court of Federal Claims (Pet. App. 14a-33a) is reported at 113 Fed. Cl. 194.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2015. The petition for a writ of certiorari was filed on July 6, 2015. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Payment in Lieu of Taxes Act (PILT), 31 U.S.C. 6901 *et seq.*, in 1976, to "compensate[ ] local governments for the loss of tax revenues resulting from the tax-immune status of federal

lands located in their jurisdictions, and for the cost of providing services related to these lands." *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 258, 263 (1985).

The Department of the Interior (Interior) administers PILT and, pursuant to the statute, makes annual payments to each local government in which certain Federal lands, called "entitlement lands," are located.[1] 31 U.S.C. 6902. Payments to a local government under PILT are determined by the greater of the amounts calculated by applying two different formulas. One formula is based on the entitlement land acreage within a locality and a value-per-acre. The other formula is based on the entitlement land acreage and a greater value-per-acre, offset by revenues the local government received in the prior fiscal year from other enumerated Federal revenue-sharing programs. 31 U.S.C. 6903(b) (2006). PILT payments are further subject to specific dollar amount caps based upon the population of the jurisdiction. 31 U.S.C. 6903(c)(2).

The applicable 2006 version of PILT provided that "[n]ecessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter. Amounts are available only as provided in appropriation laws." 31 U.S.C. 6906. It is this last phrase that is at issue in this case.

2. In 2006 and 2007, Congress elected to appropriate only a percentage of the total funding authorized under the PILT per-acre formulas. Consistent with its regulations, in those years, the agency proportion-

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[1] Entitlement lands include lands that are part of the National Park and National Forest Systems and other Federal lands enumerated in the PILT. See 31 U.S.C. 6901(1)(A) (2006).

ally reduced payment amounts to all PILT-fund recipients, including petitioners, to reflect the lower appropriation level. Pet. App. 5a; see 43 C.F.R. 44.51.

Previously, petitioner Greenlee County had unsuccessfully filed suit seeking recovery for full PILT payments for fiscal years 1998-2004. *Greenlee County* v. *United States*, 487 F.3d 871 (Fed. Cir. 2007), cert. denied, 552 U.S. 1142 (2008). During the years at issue in *Greenlee County*, like the years at issue in this case, Congress elected not to appropriate funds sufficient to pay the full amount authorized by PILT, and petitioner Greenlee County received only proportional partial payments in those years. *Id.* at 874. The Federal Circuit upheld the dismissal of the suit, finding that "the language of [31 U.S.C.] 6906 limits the government's liability under PILT to the amount appropriated by Congress." *Id.* at 878. The court reasoned that, because PILT "involves a benefit program not a contract," "there is greater room * * * to find the government's liability limited to the amount appropriated." *Id.* at 879 (quoting *Star-Glo Assocs., LP* v. *United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005) (internal quotation marks omitted), cert. denied, 547 U.S. 1147 (2006)).

In this case, petitioners filed suit in the United States Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. 1491, alleging that, in 2006 and 2007, Interior failed to pay the full amount contemplated by PILT, and arguing that this Court's decision in *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012) (*Ramah*), effectively overturned the Federal Circuit's prior decision in *Greenlee County*. Pet. App. 3a-5a.

In *Ramah*, this Court held that the Government was bound, under the Indian Self-Determination and

Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, to fully pay its contractual obligations to an Indian tribe for contract support costs, even though ISDA and a contract provision made payment "subject to the availability of appropriations," and Congress appropriated insufficient funds to pay-in-full all ISDA contractors. 132 S. Ct. at 2186-2187, 2191; see 25 U.S.C. 450j-1(a)(2), (b), and (g) (2006), 25 U.S.C. 450*l* (2006). The Court in *Ramah* drew on what it identified as "well-established principles of Government contracting," 132 S. Ct. at 2189, to hold that the contracts were binding, "so long as Congress appropriates adequate legally unrestricted funds to pay the contracts at issue," "even if an agency's total lump-sum appropriation is insufficient to pay all the contracts the agency has made." *Ibid.* (quoting *Cherokee Nation of Okla.* v. *Leavitt*, 543 U.S. 631, 637 (2005)).

The Court of Federal Claims rejected petitioner's contention that *Ramah* overturned *Greenlee County* and granted the United States' motion to dismiss. Pet. App. 20a-29a. The court held that *Ramah* "involved breach of contract, not a benefits program," *id.* at 24a, and that "the contractual relationship between the tribes and the United States in *Ramah* was fundamental to the Supreme Court's decision," *id.* at 29a. The court found the "difference between a benefits program and a contractually based program" to be "significant, if not determinative," *id.* at 26a, because it is that "distinction which defines the parties' relationship to the government," *id.* at 27a (internal quotation marks omitted).

3. Petitioners appealed and the Federal Circuit affirmed. Pet. App. 1a-13a. The court of appeals agreed with the Court of Federal Claims that *Ramah* did not

overturn *Greenlee County* because *Ramah* hinged on contractual obligations under ISDA, while PILT "does not involve a contract," nor does it "require the local governments to provide particular services in return for receiving PILT payments." *Id.* at 10a-11a.

The court of appeals further concluded that PILT's "plain language" "indicates that Congress intended to limit the government's obligation to the amount appropriated," as the applicable version Section 6906 stated that "[a]mounts are available *only* as provided in appropriations laws." Pet. App. 11a (quoting 31 U.S.C. 6906 (2006)).

This result was bolstered, the court of appeals noted, by the original version of Section 6906, which provided that "no funds may be made available except to the extent provided in advance in appropriation Acts." Act of Oct. 20, 1976 (Act of 1976), Pub. L. No. 94-565, § 7, 90 Stat. 2665-2666. The original version was reworded during the 1982 recodification of Title 31 of the United States Code resulting in the version of Section 6906 applicable here—but that recodification was not intended to make a "substantive change in the laws." Act of Sept. 13, 1982, Pub. L. No. 97-258, § 4(a), 96 Stat. 1067. See Pet. App. 11a-12a. The court observed that the "original version clearly authorizes payments to local governments only to the extent appropriated by Congress." *Id.* at 12a.

ARGUMENT

Petitioner incorrectly asserts (Pet. 8-25) that the court of appeals' decision below and its decision in *Greenlee County* v. *United States*, 487 F.3d 871 (Fed. Cir. 2007), conflict with the decisions of this Court in *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181

(2012) (*Ramah*), and *Cherokee Nation of Okla.* v. *Leavitt*, 543 U.S. 631, 639 (2005) (*Cherokee Nation*).

Cherokee Nation and *Ramah* pose no conflict with the decision of the court of appeals. The Payment In Lieu of Taxes Act (PILT), 31 U.S.C. 6901 *et seq.*, provides for unilateral and gratuitous payments to localities, and thus is wholly unlike the contractual obligations that were at issue in *Ramah* and *Cherokee Nation*. The court of appeals correctly distinguished *Ramah* and *Cherokee Nation* on that basis, and applied PILT's plain language to conclude that Congress intended PILT payments to localities to be contingent upon on the availability of sufficient annual appropriations. See Pet. App. 6a-13a. Further review by this Court is therefore unwarranted.

1. *Cherokee Nation* and *Ramah* focused exclusively on the contractual relationship between the government and Indian tribes, and considered the effect of a subject-to-appropriations clause in contracts with the government. The Court in those decisions emphasized the importance of protecting "the expectations of Government contractors," by interpreting contracts entered pursuant to ISDA in accordance with "ordinary Government contracting principles." *Ramah*, 132 S. Ct. at 2189, 2192-2194 & n.6; see *id.* at 2188 (citing *Cherokee Nation*'s observation "that ISDA uses the word 'contract' 426 times to describe the nature of the Government's promise") (citation and internal quotation marks omitted). In the realm of government contracting, the Court determined, a "subject to the availability of appropriations" clause is a "commonplace" contract provision that is "ordinarily satisfied so long as Congress appropriates adequate legally unrestricted funds to pay the contracts at

issue," even if the lump sum would be insufficient to pay all contracts in full. *Id.* at 2188-2189.

The Court in *Ramah* also closely examined the ISDA's particular statutory features to find that no other ISDA provision "warrant[ed] a special rule" that would disturb the ordinary interpretation of a subject-to-appropriations clause in a government contract. 132 S. Ct. at 2188; see *id.* at 2191. To the contrary, the Court found specific provisions of ISDA demonstrated Congress' intent to pay ISDA contracts in full. For example, ISDA obligated the government to pay the "full amount of funds to which the contractor [was] entitled," 25 U.S.C. 450j-1(g); ISDA stated that the contracts it authorized should be "liberally construed for the benefit of the Contractor," 25 U.S.C. 450*l*(c); and ISDA afforded the agency sufficient discretion to redirect funds in order to pay each individual contractual obligation, 25 U.S.C. 450j-1(b). See *Ramah*, 132 S. Ct. at 2190-2191; see also *Cherokee Nation*, 543 U.S. at 639-640 (finding that ISDA's statutory language "strongly suggests that Congress, *in respect to the binding nature of a promise*, meant to treat alike promises made under [ISDA] and ordinary contractual promises") (emphasis original).

The underlying policy rationales cited in *Ramah* were also specific to its contracting context. The Court observed that its holding, binding the government to existing contractual obligations, would "safeguard[]" "the expectations of Government contractors" by allowing them to "trust that the Government will honor its contractual promises," and would "further[] the Government's own long-run interests as a reliable contracting partner." 132 S. Ct. at 2184 (citation and internal quotation marks omitted); see *id.* at

2190 ("If the Government could be trusted to fulfill its promise to pay only when more pressing fiscal needs did not arise, would-be contractors would bargain warily—if at all—and * * * contracting would be become more cumbersome and expensive for the Government.") (internal citation omitted).

Only after considering ISDA's particular statutory features, and "ordinary" and "well-established" principles and policies of government contracting law, did the Court in *Ramah* conclude that ISDA did not require the tribe to "bear the risk that a total lump-sum appropriation * * * will not prove sufficient," and thus, "when an agency makes competing contractual commitments with legally available funds and the fails to pay, it is the Government that must bear the fiscal consequences, not the contractor." 132 S. Ct. at 2192. Accordingly, the Court in *Ramah* held that ISDA's subject-to-appropriations language was insufficient to allow the government to "back out of its contractual promise to pay each Tribe's full contract support costs." *Id.* at 2191; see *Cherokee Nation*, 543 U.S. at 640-641 (a subject-to-availability-of-appropriations clause does not "render [the government's] promises nonbinding").

b. Ignoring the clear distinction between the ISDA contracts in *Ramah* and PILT's provision for unilateral payments, petitioners contend (Pet. 27-28) that a "promise to pay" should be equally "binding" whether it is statutorily or contractually created, and that the government "should be required to make good on the obligation it has made to each [p]etitioner." See Pet. 8 (characterizing PILT as creating, by statute, "a valid and binding obligation to make a payment"). But petitioners' reasoning begs the question in this case,

which is whether "the statute reflects congressional intent to limit the government's liability for PILT payments, or whether PILT imposes a statutory obligation to pay the full amounts according to the statutory formulas regardless of appropriations by Congress." Pet. App. 11a. The court of appeals correctly recognized that it is very different for the government to invoke a subject-to-appropriations clause to avoid an *existing, binding* contractual obligation, than for a court to interpret language in a statutory provision of unilateral and gratuitous payments, in accordance with its plain meaning, to condition future payments on sufficient annual appropriations.[2] See *id.* at 10a-11a.

Here there are no reasons, analogous to the binding contracts at issue in *Cherokee Nation* and *Ramah*, to avoid the plain meaning of PILT, which subjects payments to localities to the availability of appropriations. As the court of appeals correctly observed, PILT "does not involve a contract," nor does it involve

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[2] Petitioners err in arguing (Pet 13-15) that PILT's "subject to the availability of appropriations" language means only that "Congress did not intend to invoke the exception to the Anti-Deficiency Act's prohibition on creating any valid obligation prior to the existence of an appropriation." Pet 14. Although *Cherokee Nation* cited the Anti-Deficiency Act, 31 U.S.C. 1341, it did so only to explain that subject-to-appropriations clauses are frequently included "with respect to Government contracts" because "a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations." 543 U.S. at 643 (emphasis added). The Court did not suggest that the phrase "subject to the availability of appropriations" must be interpreted in a statute, like PILT, to mean that beneficiaries of a payment program would be entitled to the full amount of authorized payments as long as Congress appropriated *some* funds.

mutual obligations akin to contractual duties. Pet. App. 10a. PILT "does not require the local governments to provide particular services in return for receiving PILT payments," but rather allows the governments to "use the payment for *any* governmental purpose." *Id.* at 10a-11a (quoting and adding emphasis to 31 U.S.C. 6902(a)(1)). These gratuitous features of PILT undermine petitioners' claim (Pet. 10-11), that PILT creates a statutory "annual obligation" to "make a yearly payment to each of the [p]etitioners in a specified amount."

The history of Section 6906 further supports the court of appeals' interpretation of PILT. The original version of Section 6906 stated, in unambiguous terms, that "*no* funds may be made available except to the extent provided in advance in appropriation Acts." Act of 1976, § 7, 90 Stat. 2665-2666 (emphasis added). While the legislative history reflects some concern that PILT give localities greater predictability in federal payment levels, the history provides no indication that, notwithstanding the explicit limitation quoted above, PILT was intended to establish a fully-funded annual obligation irrespective of Congressional appropriations.[3] See also *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 262-266

[3] Petitioners contend (Pet. 22) that PILT was enacted "to provide a predictable annual amount of money to local counties containing federal land," and "[f]or that reason" Congress failed to enact the Senate version of the bill, which allowed for proportional reductions in payments in the event of appropriation shortfalls. See S. Rep. No. 1262, 94th Cong., 2d Sess. 22 (1976). The legislative history does not reflect why that language was not enacted into law, but there is no support for petitioners' claim (Pet. 22) that Congress considered and rejected the proportional reduction provision in order to guarantee annual payments to localities.

(1985) (explaining that PILT addressed a "number of flaws in the existing program" including a desire to directly fund localities, instead of funding States, and to give localities "flexibility to allocate in-lieu payments"); S. Rep. No. 1262, 94th Cong., 2d Sess. 8-10 (1976) (enumerating eight defects in the pre-PILT revenue-sharing system that PILT was intended to remedy).

In 2008, Congress modified Section 6906 to provide full funding for PILT payments between 2008 and 2012.[4] Emergency Economic Stabilization Act of 2008 (Emergency Act), Pub. L. No. 110-343, § 601(c)(1), 122 Stat. 3911. Although it could have done so, Congress did not act to apply the 2008 amendments retroactively to prior years, notwithstanding the court of appeals' decision in *Greenlee County* holding that PILT limited funds to the amounts appropriated by Congress. 487 F.3d at 878-880; *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (Congress presumed to be aware of an administrative or judicial interpretation of a statute).

In addition, the Department of Interior has consistently interpreted the statute to require reduced funding when Congress elects to appropriate less than the full amount of funding authorized by statute. 43 C.F.R. 44.51.[5] Interior promulgated that provision for

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[4] That modification was subsequently extended to include 2013 and then to include 2014. Moving Ahead for Progress in the 21st Century Act (Moving Ahead Act), Pub. L. No. 112-141, § 100111, 126 Stat. 906; Agricultural Act of 2014 (Ag. Act of 2014), Pub. L. No. 113-79, § 12312, 128 Stat. 992.

[5] This regulation, moreover, addresses petitioners' concern (Pet. 17) that a shortfall in PILT appropriations could have arbitrary consequences for local governments if the agency dispersed funds

proportional payment in 1977, shortly after PILT's passage, following notice and comment. See 42 Fed. Reg. 51,580 (Sept. 29, 1977). This Court has long recognized, and reiterated specifically with respect to PILT, that "[t]he interpretation of an agency charged with the administration of a statute is entitled to substantial deference, * * * if it is a sensible reading of the statutory language and if it is not inconsistent with the legislative history." *Lawrence County*, 469 U.S. at 262.

There is therefore no merit to petitioners' assertion (Pet. 9) that the court of appeals accorded "a statutorily-created obligation" "lesser dignity than a contractually-created one." Instead, the court of appeals determined, after examining PILT's text, purpose, and history, that PILT did not create a binding obligation in the first instance, but rather, made future payments contingent on sufficient appropriations.

2. The court of appeals' decision does not conflict with the decision of any other court of appeals. Indeed, petitioners do not point to any conflict with the decisions of another circuit. Rather, petitioners implicitly point (Pet. 24-25) to the decision of the Tenth Circuit decision underlying *Ramah*. But, as discussed above, that decision is not in conflict with the decision of the court of appeals in this case.

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on a rolling or a first-come, first-serve basis. By providing for proportionate reduction in funding, 43 C.F.R. 44.51 avoids the hypothetical posed by petitioner (Pet. 17) in which some localities are fully paid at the start of a fiscal year, leaving subsequent localities to "get nothing" once the fund is exhausted. It also relieves localities of the need to "monitor agency spending" (Pet. 17-18), because localities will be informed of the funding levels at the time of Congress' annual appropriation.

In addition, the court of appeals' decision does not conflict with the Government Accountability Office's *Principles of Federal Appropriations Law* (3d ed. 2004 & Supp. 2015) (GAO Redbook). In accord with the court's holding, the GAO Redbook emphasized that Congress is "free to appropriate less than an amount authorized," and even where "the amount authorized to be appropriated is mandatory rather than discretionary, Congress can still appropriate less." GAO Redbook 2-47 to 2-48; see *id.* at 2-49 (citing *In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013), for the proposition that an appropriation of less than the "amount of a nonvested mandatory authorization * * * will be effective under the 'last in time rule' as long as the intent to suspend or repeal the authorization is clear").

Consistent with the court of appeals' decision, the GAO Redbook also distinguishes between Congress's authority to "reduce or eliminate a nonvested mandatory authorization," from its "diminished" latitude to withhold funding "with respect to entitlements that have already vested." See GAO Redbook 2-48 to 2-49. The GAO Redbook, for example, quotes this Court's opinion in *United States* v. *Larinoff*, 431 U.S. 864 (1977):

> No one disputes that Congress may prospectively reduce the pay of [armed service members], even if that reduction deprived members of benefits they had expected to be able to earn . . . It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed but still owing.

Id. at 879. As explained above, petitioners had no vested entitlement to PILT funding, and thus were

subject to Congress' decision to reduce appropriations for the program in the years at issue.

3. The decision of the court of appeals focuses on a statute-specific analysis of PILT's particular language and scheme. And because the statutory provision at issue, 31 U.S.C. 6906 (2006), was subsequently amended in 2008 (and further amended in 2012 and 2013[6]), this case is of limited and uncertain prospective importance. Accordingly, this case does not warrant this Court's review.

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[6] See Emergency Act, § 601(c)(1), 122 Stat. 3911; Moving Ahead Act, § 100111, 126 Stat. 906; Ag. Act of 2014, § 12312, 128 Stat. 992.

PILT currently provides for fiscal years 2008 through 2014 that eligible localities "shall be entitled to payment" and that such "sums shall be made available to the Secretary of the Interior for obligation or expenditure in accordance with this chapter." 31 U.S.C. 6906.

This provision has not been amended to address subsequent fiscal years. For fiscal year 2015, Congress appropriated PILT funds in two separate measures, without amendment to Section 6906. See Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3096, 128 Stat. 3882; Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 11, 128 Stat. 2135.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2015