No. 11-

IN THE

Supreme Court of the United States

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Petitioner,

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS
JONATHAN F. COHN
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LLOYD B. MILLER*
DONALD J. SIMON
ARTHUR LAZARUS, JR.
SONOSKY CHAMBERS SACHSE ENDRESON & PERRY LLP
1425 K Street, N.W.
Washington, D.C. 20005
(202) 682-0240
lloyd@sonosky.net

Counsel for Petitioner

* Counsel of Record

July 18, 2011

QUESTION PRESENTED

Whether the Federal Circuit erred in holding, in direct conflict with the Tenth Circuit, that a government contractor which has fully performed its end of the bargain has no remedy when a government agency overcommits itself to other projects and, as a result, does not have enough money left in its annual appropriation to pay the contractor.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

Arctic Slope Native Association, LTD., is a not-for-profit corporation organized under the laws of the State of Alaska.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITY

IN THE

Supreme Court of the United States

No. 11-

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Petitioner,

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Arctic Slope Native Association respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit opinion (App. 1a-17a) is reported at 629 F.3d 1296. The Federal Circuit's Order denying ASNA's petition for rehearing en banc (App. 47a-48a) is unreported. The opinions of the Civilian Board of Contract Appeals are reported at 09-2 BCA ¶ 34,281 (App. 18a-32a) and 08-2 BCA (CCH) ¶ 33,923 (App. 33a-46a).

JURISDICTION

The court of appeals entered judgment on December 15, 2010. App. 1a. The court of appeals denied ASNA's combined petition for panel rehearing and rehearing en banc on April 19, 2011. App. 47a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-458bbb-2) provides in relevant part as follows:

§ 450j-1(b):

> . . .
>
> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations * * *.

§ 450j-1(g):

> Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, * * *.

The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278 to -279 (1998), provides in relevant part as follows:

> INDIAN HEALTH SERVICES
>
> For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care

> Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,950,322,000, * * * Provided further, 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 contracts, grants, self-governance compacts or annual funding agreements between the Indian Health Service and a tribe or tribal organization pursuant to the Indian Self-Determination Act of 1975, as amended, prior to or during fiscal year 1999: * * *.

The Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181 to -182 (1999), contains materially identical language but appropriates different amounts: $2,078,967,000 in total, and $228,781,000 for contract or grant support costs.

Additional statutory provisions involved are set forth at App. 49a-83a.

STATEMENT

This case presents a square conflict among the circuits on a fundamental issue of government contract law: Is the Government liable when an agency signs a contract, receives the full benefit of the bargain, and then refuses to pay because it overcommitted itself on other projects and, as a result, simply ran out of money. The Federal Circuit held the Government is not liable, thus permitting the Government to overspend and breach its contracts with impunity. App. 1a-17a. The Tenth Circuit expressly disagreed with this holding, and said in identical circumstances the Government is

liable. *Ramah Navajo Chapter* v. *Salazar*, – F.3d – , No. 08-2262, 2011 WL 1746138 (10th Cir. May 9, 2011).

Because the two decisions are in irreconcilable conflict, because the Federal Circuit's decision cannot be squared with this Court's ruling in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005), and because the Federal Circuit's decision would disrupt long-settled expectations in government contract law, this Court's immediate review is warranted.

1. In 1999 and 2000, the Arctic Slope Native Association (ASNA) fully performed two successive one-year contracts with the Government to operate the U.S. Indian Health Service's (IHS) Samuel Simmonds Hospital in Barrow, Alaska. IHS had awarded the contracts under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-458bbb-2, which mandated that the contract cover in full both ASNA's direct hospital operational costs, *id.* § 450j-1(a)(1), and its associated indirect (or administrative) contract support costs, *id.* § 450j-1(a)(2). *Cherokee Nation*, 543 U.S. at 634-35 (discussing the Act's contract funding provisions).

The one-year contracts were awarded in advance of each fiscal year with all contract payments made "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b). Congress then made available to the agency appropriations for both direct costs and indirect costs; and each year these amounts were more than sufficient to pay ASNA in full. Congress appropriated approximately $2 billion per year for all costs and, out of this amount, directed that the agency's expenditures on indirect costs were "not to exceed" $203,781,000 (in FY1999) and $228,781,000 (in FY2000). Pub. L. No. 105-277, 112 Stat. 2681, 2681-278 to -279 (1998); Pub. L. No. 106-113, 113

Stat. 1501, 1501A-181 to -182 (1999). By comparison, in FY1999, ASNA's direct costs and indirect costs were only $5,789,000 and $3,306,506, respectively, and in FY2000 ASNA's direct costs and indirect costs were only $6,639,460 and $3,667,284.

For both years, the Government paid ASNA its direct costs for operating the Hospital, but it paid only a portion of ASNA's indirect costs. Because the IHS had overextended itself and entered into too many contracts with too many tribal contractors, the agency did not have sufficient funds to pay all of the contractors' indirect costs. The Government then decided to underpay ASNA $1,912,941 on the FY1999 contract and $489,182 on the FY2000 contract. Cir. J.A. 253-54 (IHS data recording underpayments).

The Government never alerted ASNA that it was not going to pay these sums until after ASNA completed performance and the Government received the benefit of the bargain. To the contrary, the Government repeatedly notified ASNA in advance of performance that it would fully pay these costs. Cir. J.A. 161 n.5, 740, 867. ASNA also had no notice that the Government would decide to fully pay some contractors' indirect costs, and actually overpay other contractors, all out of the same appropriation. Indian Health Serv., *Contract Support Cost Data* 21 (Sept. 17, 1999), *available at* http://www.ncai.org/fileadmin/contract_support/IHS_Contract_Support_Data_FY1999.pdf. All ASNA knew was that each $200 million appropriation for indirect costs was ample to satisfy ASNA's contract.

2a. In 2005, this Court held in *Cherokee* that the Government is liable under materially identical contracts. Just as happened here, the Government had contracted with two Indian tribal contractors to provide health services under the ISDA but "refused

to pay the full amount" of indirect costs "because, the Government s[aid], Congress did not appropriate sufficient funds." 543 U.S. at 635. To justify its non-payment, the Government invoked the same "subject to the availability of appropriations" clause at issue here in ASNA's contract. *Id.* at 643-44. Rejecting the Government's interpretation, this Court ruled that the provision did not absolve the agency of its contractual responsibilities. *Id.* at 646-47. A deal is a deal, and the Government has to pay for the services it received, even if it has overspent on other contracts. *Id.* at 641-42.

b. In light of *Cherokee*, ASNA filed timely contract claims under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (formerly codified at §§ 601-613). Cir. J.A. 37, 42. After eleven months of inaction, the claims were deemed denied by operation of law. 41 U.S.C. § 7103(f)(5) (formerly § 605(c)(5)); 25 C.F.R. § 900.224. ASNA then filed appeals with the Interior Board of Contract Appeals (Cir. J.A. 661, 667), which transferred the appeals to the new Civilian Board of Contract Appeals (CBCA). See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391-95.

c. The CBCA dismissed ASNA's claim,[1] and the Federal Circuit affirmed. App. 1a-17a. According to

---

[1] Initially, the CBCA concluded that ASNA could recover damages for contract underpayments only if the agency had leftover unspent funds from 1999 and 2000. App. 44a (1999); 45a-46a (2000). Additional record development showed that the agency had leftover funds, but that those funds had later lapsed to the Treasury ($179,539 for FY1999 and $137,013.51 for FY2000). *Id.* at 30a; 31 U.S.C. §§ 1552(a), 1553(a). The CBCA then dismissed ASNA's claims anyway, reasoning that ASNA's

the Federal Circuit, *Cherokee* was distinguishable because, here, "[t]he availability of funds provision" in the contract was "coupled with" language in the statutory appropriation providing that total contract support expenditures—for all contractors—were "not to exceed" a certain amount. *Id.* at 14a. In the panel's view, that "not to exceed" language "limits the Secretary's obligation to the tribes to the appropriated amount." *Id.* The panel asserted that a recovery of contract damages by ASNA would either "defeat the statutory cap" or require an impermissible "reallocation" of payments among hundreds of contractors, *id.* at 13a-14a (even though an award of damages for the Government's breach would actually do neither and would instead come from the Judgment Fund, 31 U.S.C. § 1304, as this Court recognized in *Cherokee*, 543 U.S. at 642-43). ASNA petitioned for en banc review, but the petition was denied.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision directly conflicts with the Tenth Circuit's decision in *Ramah Navajo Chapter* v. *Salazar*, – F.3d – , No. 08-2262, 2011 WL 1746138 (10th Cir. May 9, 2011). Both courts addressed the same question, and they reached diametrically opposite results. Whereas the Tenth Circuit held that the contractor can sue the Government to enforce the contract despite the statutory cap on overall appropriations, the Federal Circuit ruled that the contractor is without a remedy. Because the two courts are in irreconcilable conflict with regard to identical contract language, and

---

exclusive remedy for any underpayments was an action to seize the specific unobligated funds before they lapsed. App. 31a-32a.

because the Federal Circuit's ruling contradicts this Court's teachings in *Cherokee* and would wreak havoc on well-established government contract law, this Court should grant review. *See*, *e.g.*, *Cherokee*, 543 U.S. at 636 (granting certiorari when the same two circuit courts were in conflict over a comparable issue).

I. THE DECISION BELOW CONFLICTS WITH THE CONTRARY HOLDING OF THE TENTH CIRCUIT.

In *Ramah*, the Tenth Circuit addressed the very same question presented here. Tribal contractors sued to recover indirect costs that the Government refused to pay on grounds that Congress's appropriation was inadequate and the agency had run out of money. 2011 WL 1746138, at *6-7. The Tenth Circuit ruled in favor of the contractors, holding that "[i]f more than one contractor is covered by an appropriation, the failure to appropriate funds sufficient to pay all such contractors does *not* relieve the government of liability." *Id.* at *15 (emphasis added). Because the appropriation was sufficient to pay the plaintiff contractors' costs, the Government was liable. *Id.* at *18. By contrast, in the decision below, the Federal Circuit reached precisely the opposite result, finding for the Government even though the appropriation was more than sufficient to pay the tribal contractor's indirect costs. The decisions diverge at every turn and cry out for this Court's intervention.

A. The Tenth Circuit based its holding on foundational principles of government contract law. A pair of venerable Court of Claims cases—*Ferris* v. *United States*, 27 Ct. Cl. 542 (1892) and *Dougherty* v. *United States*, 18 Ct. Cl. 496 (1883)—establish that a "'contractor who is one of several persons to be paid

out of an appropriation is not chargeable with knowledge of its administration.'" *Ramah*, 2011 WL 1746138, at *11 (quoting *Ferris*, 27 Ct. Cl. at 546). The appropriation "'merely imposes limitations upon the Government's own agents,'" and an insufficient appropriation does not "'cancel its obligations, nor defeat the rights of other parties.'" *Id.* at *11 (quoting *Ferris*, 27 Ct. Cl. at 546). In sum, the parties are entitled to be paid even if the Government overspent, which of course is what would happen if the Government were a private party.

In sharp contrast, the Federal Circuit mistakenly held that the *Ferris* rule does not apply here. App. 14a. The court reasoned that the contract provision making payment "subject to the availability of appropriations" was enough to "overcome the *Ferris* rule by providing notice to the contractors of the limitation on funding." *Id.* at 12a (citation omitted). The Federal Circuit reached this conclusion even though—as the Tenth Circuit recognized—the same "subject to the availability of appropriations" provision was at issue in *Cherokee* and this Court still applied *Ferris*. See *Ramah*, 2011 WL 1746138, at *10-11. The reality is that, when there is a lump sum appropriation that covers hundreds of contracts, the contractor does *not* have notice that it will be underpaid because it does not know whether the Government will overcommit itself and sign too many contracts. *Cherokee*, 543 U.S. at 638-40. To the contrary, the private party would assume that if it fulfills its end of the bargain, the Government will do the same. That is why the risk of underfunding falls on the Government. *Id.* at 640.

B. The Tenth Circuit also disagreed with the Federal Circuit's view that the "not to exceed" statutory cap on expenditures excused the

Government's breach. *Ramah*, 2011 WL 1746138, at *13; *contra* App. 12a-14a. That language, the Tenth Circuit explained, imposed a restriction on the agency, but it did not shift the risk of underfunding to the contractors. 2011 WL 1746138, at *14. Contrary to the Federal Circuit's holding, the Tenth Circuit reasoned that the funds are still "legally available" to pay each individual contractor, and the Government must therefore honor its contractual commitments. *Id.*

Put another way, although "the appropriations bills prohibit the Secretary from paying the sum total of all" indirect costs, "the United States' liability is not coterminous with the Secretary's ability to pay." *Id.* at *20. The Government can still satisfy its liabilities in other ways, namely through the Judgment Fund, 31 U.S.C. § 1304. *Id.* at *21. Thus, a cap on the agency's appropriation does not "'affect the rights . . . of the citizen honestly contracting with the Government.'" *Id.* at *20 (quoting *Dougherty*, 18 Ct. Cl. at 503).

C. The basic flaw in the Federal Circuit's reasoning is that it treats all tribal contractors as a single entity. As the Tenth Circuit pointed out, the Federal Circuit incorrectly "analyzed the issue as the Secretary's ability to pay *all* contractors." *Id.* at *16 (citing *ASNA*, 629 F.3d at 1304 (App. 14a)). In the Federal Circuit's view, because the Secretary's total obligations to all contractors exceeded the statutory cap, the agency could avoid payment on any particular contract, including ASNA's contract. App. 14a. Under this view, the Secretary has discretion to underpay some contractors, fully pay others, or even overpay some, without regard to his contract obligations.

By contrast, the Tenth Circuit held that a contractor's claim must be assessed on a contract-by-contract basis. This makes sense because "[t]he tribes and tribal contractors . . . are independent entities with independent rights and entitlements." *Ramah*, 2011 WL 1746138, at *10. "They are not a single conglomerated entity simply because each lays claim to a portion of the same appropriation any more than all federal highway contractors represent a single, undifferentiated mass." *Id.* They share no collective knowledge, and they should not be held responsible for, or deemed aware of, the Government's overspending.

The Tenth Circuit and Federal Circuit reached diametrically opposite results on exactly the same contract language. Accordingly, as in *Cherokee*, this Court should grant certiorari and resolve the conflict.

II. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S *CHEROKEE* DECISION.

The Federal Circuit's decision conflicts directly with *Cherokee*, in which this Court reviewed the same provisions of the ISDA and soundly rejected the assertion that the tribal contractors "should bear the risk." 543 U.S. at 638-39. The Court found "no indication that Congress believed" there was "mutual self-awareness among tribal contractors," *id.* at 640, to justify forgoing the "normal[]" *Ferris* rule. Because the Government "cannot back out of a promise to pay on grounds of 'insufficient appropriations,'" the Government was held to its contractual obligations. *Id.* at 637 (citing *Ferris*, 27 Ct. Cl. at 546).

There is no reason to depart from *Cherokee*'s holding here. The tribal contractors still have no way of knowing how many contracts the Government will

enter into, or how the agency will allocate funds among contractors. The Federal Circuit's contrary decision—asserting that *Ferris* does not control after this Court cited *Ferris* repeatedly, *Cherokee*, 543 U.S. at 637, 640, 641, 643—is indefensible.

To be sure, the appropriation at issue here dictates that total expenditures for indirect costs were "not to exceed" a sum certain, whereas the appropriation in *Cherokee* did not contain that clause. App. 9a. But this distinction makes no difference. The appropriation in *Cherokee*, too, provided a finite amount of funds for several purposes, one of which was indirect costs, and thus the appropriation there likewise capped the amount the Government could spend on indirect costs. See *Ramah*, 2011 WL 1746138, at *13. Congress did not write the agency a blank check. Like any appropriation, the appropriation in *Cherokee* prevented the agency from spending in excess of a discrete amount, just as much as the "not to exceed" language did here. *Id.*

Moreover, as in *Cherokee*, the Judgment Fund is available here to pay contract damages. *Cherokee*, 543 U.S. at 642-43. *Cherokee* recognized that the Judgment Fund is an "appropriate legal remed[y]" when "the Government br[eaks] its contractual promise." *Id.* at 642. Thus, regardless of the "not to exceed" clause, the Government can—and must—pay what is owed ASNA, which fully performed its end of the bargain. As *Cherokee* explained, "'the contractor is entitled to payment *even if the agency has allocated the funds to another purpose* or assumes other obligations that exhaust the funds.'" *Id.* at 641 (emphasis added by Court).

Because the decision below is in conflict with this Court's decision in *Cherokee*, certiorari should be granted.

III. THE DECISION BELOW NEEDLESSLY DISRUPTS SETTLED EXPECTATIONS IN GOVERNMENT CONTRACT LAW.

Finally, if not corrected, the Federal Circuit's decision would have a dramatic destabilizing effect on government contracting. For well over a century, it has been settled law that the Government is liable for any damages caused by an agency's underpayment when a capped appropriation is sufficient on its face to pay the contract in full, even if it is insufficient to satisfy all of the Government's obligations to other contractors. See *Ferris*, 27 Ct. Cl. at 546; *Dougherty*, 18 Ct. Cl. at 503; *see also Ramah*, 2011 WL 1746138, at *10-11 (discussing *Ferris*, the "venerable" decision that sets out the "traditional rule regarding the effect of insufficient appropriations," and *Dougherty*, the case on which *Ferris* relies).

In affirming these bedrock principles in *Cherokee*, this Court squarely rejected the notion that the Government can shift the risk of non-payment to a contractor either by invoking a "normal[]" "availability of appropriations" clause, 543 U.S. at 643, or by claiming "mutual self-awareness" among hundreds of contractors that a limited appropriation might prove insufficient to pay them all. *Id.* at 640. Instead, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private parties." *Franconia Assocs.* v. *United States*, 536 U.S. 129, 141 (2002) (quoting *Mobile Oil Exploration & Producing Se., Inc.* v. *United States*, 530 U.S. 604, 607 (2000) (internal quotations omitted)). The general law of contracts undeniably entitles a party to damages when another party to an agreement breaches the contract, even if

the reason for the breach is that the defaulting party has run out of money.

The decision below rejected these foundational principles, and held that a contractor does bear the risk of underpayment. Left uncorrected, the Federal Circuit's ruling will have broad effect. The clause "subject to the availability of appropriations" appears in scores of statutory regimes that regulate government contracts. See App. 84a-95a. And, because the Federal Circuit has exclusive jurisdiction to review appeals from the Court of Federal Claims, its decisions control a high proportion of government-contract disputes. See 28 U.S.C. § 1295(a)(3).

The undeniable consequence of the Federal Circuit's decision is to inject "legal uncertainty [that will] undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services." *Cherokee*, 543 U.S. at 644. Under the decision below, it is not enough that Congress appropriates ample funds from which the agency can pay the contractor. Now, the contractor must also monitor the agency's daily expenditures and implore it to honor its contract before spending its monies on other contracts. Even then, the contractor can have no assurance that it will not be left holding the bag at the end of the year if all the money is gone. Indeed, if the Federal Circuit's decision stands, it would be "'madness'" to contract with the Government, *United States* v. *Winstar Corp.*, 518 U.S. 839, 864 (1996) (plurality opinion) (quoting *In re Binghamton Bridge*, 70 U.S. 51 (1865)), for every appropriation is capped at some level, every contractor faces the risk that the agency may overcommit itself, and thus every contract presents the risk that the agency may choose to underpay its contractual obligation.

Such a sweeping rule is "at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Id.* at 913. Permitting a government agency to avoid paying one contract simply by choosing to pay another and then claiming poverty frustrates the "[p]unctilious fulfillment of contractual obligations [which] is essential to the maintenance of the credit of public as well as private debtors." *Id.* at 884-85 (quoting *Lynch* v. *United States*, 292 U.S. 571, 580 (1934)). This result defies the whole concept of a contract. "'A [government's] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.'" *Id.* at 918 (Breyer, J., concurring) (quoting *Murray* v. *Charleston*, 96 U.S. 432, 445 (1877)). It is the ultimate "illusory promise." *Id.* at 921 (Scalia, Kennedy & Thomas, J.J., concurring). The magnitude of these implications necessitates this Court's immediate review.

CONCLUSION

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

Respectfully submitted,

CARTER G. PHILLIPS
JONATHAN F. COHN
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LLOYD B. MILLER*
DONALD J. SIMON
ARTHUR LAZARUS, JR.
SONOSKY CHAMBERS
SACHSE ENDRESON &
PERRY LLP
1425 K Street, N.W.
Washington, D.C. 20005
(202) 682-0240
lloyd@sonosky.net

Counsel for Petitioner

July 18, 2011

* Counsel of Record