Supreme Court, U.S.
FILED
OCT 31 2011
OFFICE OF THE CLERK

No. 11-551

In the Supreme Court of the United States

KENNETH L. SALAZAR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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.

PARTIES TO THE PROCEEDING

Petitioners are Kenneth L. Salazar, Secretary of the Interior; Larry Echo Hawk, Assistant Secretary—Indian Affairs, Department of the Interior; Mary L. Kendall, Acting Inspector General, Department of the Interior; and the United States of America.

Respondents are Ramah Navajo Chapter, the Oglala Sioux Tribe, and the Pueblo of Zuni, as representatives of a certified class of Indian tribes and tribal organizations that have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of the Interior, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-87a) is reported at 644 F.3d 1054. The opinion of the district court (App., *infra*, 90a-107a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2011. A petition for rehearing was denied on August 1, 2011 (App., *infra*, 108a-109a). On October 21, 2011, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including

November 14, 2011. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

Pertinent provisions of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, the Anti-Deficiency Act, 31 U.S.C. 1341 *et seq.*, and the Contract Disputes Act, 41 U.S.C. 7101 *et seq.*, are reproduced in the appendix to this petition (App., *infra*, 110a-131a).

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

[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*).

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 sometimes 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 tribe'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. See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2292 (25 U.S.C. 450j-1(a)(2)). Such costs may include certain direct costs of administering a program, such as costs of complying with 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 (f)(2)).

b. Federal funding under ISDA contracts, like funding for other federal programs, is contingent upon the availability of appropriations. Congress made that con-

tingency explicit in at least four places in the Act. First, the ISDA 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. See 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 that:

> 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 insufficient to fund the requests of all tribal contractors fully or equally.

c. In *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), this Court clarified that appropriations are not "unavailable" to satisfy contracts under the

ISDA simply because the Secretary has obligated for other purposes the funds in an unrestricted appropriation. In that case, the Indian Health Service (IHS), an agency of the Department of Health and Human Services, paid only a portion of the contract support costs that it had promised to two tribes in ISDA contracts for fiscal years 1994 through 1997. The tribes brought suit under the ISDA, see 25 U.S.C. 450m-1(a) and (d), 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 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. *Cherokee*, 543 U.S. at 641-642.

This Court rejected that argument and held that the Secretary could properly be held liable for 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" for the particular tribes before the Court, *id.* at 641. Consequently, the ISDA's proviso that all payments to tribes 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. 543 U.S. at 643.

2. This case presents an important question not resolved in *Cherokee*: whether the government must pay all of a tribal organization's contract support costs under the ISDA where Congress *has* imposed an explicit statutory cap on the appropriations authorized to pay such costs. The Secretary, through the Bureau of Indian Affairs (BIA) and other offices, provides a broad array of basic educational, economic, and social services to more than 1.9 million Native Americans and Alaska Natives. Nearly 40% of the BIA's annual funding for such services is administered directly by tribes and tribal organizations under ISDA self-determination contracts. All but 12 of the more than 550 federally recognized Indian tribes have at least one ISDA funding agreement with the Secretary.

The Secretary funds ISDA self-determination contracts, like other agency programs, from the lump-sum appropriation provided by Congress each year for the Department of the Interior. Until fiscal year (FY) 1994, Congress followed the same approach for the BIA that it did for the IHS, as described in *Cherokee*: while legislative committee reports discussed specific sums for ISDA contract support costs, see, *e.g.*, H.R. Rep. No. 901, 102d Cong., 2d Sess. 40 (1992), the appropriation acts themselves contained no relevant restrictions, see, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 102-381, 106 Stat. 1374.

For FY 1994, however, Congress imposed an express statutory cap on the appropriations available for the Secretary to pay contract support costs under the ISDA. Of a total appropriation in that year of approximately

$1.5 billion for the BIA, Congress specified that "*not to exceed $91,223,000* of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts" under the ISDA. Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, Tit. I, 107 Stat. 1390-1391 (emphasis added). The Conference Report accompanying the bill explained:

> The managers remain very concerned about the continued growth in contract support costs, and caution that it is unlikely that large increases for this activity will be available in future years' budgets. It is also a concern that significant increases in contract support [costs] will make future increases in tribal programs difficult to achieve.

H.R. Conf. Rep. No. 299, 103d Cong., 1st Sess. 28 (1993).

Congress has included a similar "not to exceed" cap for contract support costs in every annual appropriation for Interior since FY 1994.[2] See App., *infra*, 8a. It is undisputed that these statutory caps have restricted the

[2] Subsequent appropriations acts have used the phrase "contract support costs" rather than "indirect costs." See Pub. L. No. 103-332, Tit. I, 108 Stat. 2511 (FY 1995); Pub. L. No. 104-134, 110 Stat. 1321-170 (FY 1996); Pub. L. No. 104–208, 110 Stat. 3009-192 (FY 1997); Pub. L. No. 105-83, Tit. I, 111 Stat. 1554 (FY 1998); Pub. L. No. 105-277, 112 Stat. 2681–245 (FY 1999); Pub. L. No. 106–113, 113 Stat. 1501A–148 (FY 2000); Pub. L. No. 106–291, Tit. I, 114 Stat. 934 (FY 2001); Pub. L. No. 107-63, 115 Stat. 430 (FY 2002); Pub. L. No. 108-7, Div. F, Tit. I, 117 Stat. 231 (FY 2003); Pub. L. No. 108-108, Tit. I, 117 Stat. 1256-1257 (FY 2004); Pub. L. No. 108-447, 118 Stat. 3055 (FY 2005); Pub. L. No. 109-54, Tit. I, 119 Stat. 513-514 (FY 2006); Pub. L. No. 110-5, 121 Stat. 8-9, 27 (FY 2007) (continuing resolution); Pub. L. No. 110-161, Div. F, Tit. I, 121 Stat. 2110 (FY 2008); Pub. L. No. 111-8, 123 Stat. 713-714 (FY 2009); Pub. L. No. 111-88, 123 Stat. 2916 (FY 2010); Pub. L. No. 112-10, Div. B, Tit. VII, 125 Stat. 151 (FY 2011).

available funding at a level "well below the sum total" that would be required for the BIA to satisfy all tribes' requests.[3] *Id.* at 2a; see *id.* at 98a (noting facts not disputed by the parties). Instead, each year the BIA has distributed the available funding among tribal contractors on a "uniform, pro-rata basis," *id.* at 9a, according to plans published annually in the Federal Register. *Ibid.*; see, *e.g.*, *Distribution of Fiscal Year 1994 Contract Support Funds*, 58 Fed. Reg. 68,694 (Dec. 28, 1993).[4] In fiscal years 1994 through 2004, for example, tribal organizations contracting with the BIA were paid between 77% and 93% of their claimed contract support costs. See App., *infra*, 10a.

3. Respondent Ramah Navajo Chapter entered into multiple ISDA self-determination contracts with the BIA in the 1980s for the administration of federally funded law enforcement, water rights, and other programs. See *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1458 (10th Cir. 1997). Respondent originally filed this suit against the Secretary in 1990, on behalf of all BIA tribal contractors under the ISDA, to challenge the methodology that Interior's Office of the Inspector General used to set indirect cost rates. *Id.* at 1459; see

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[3] Since FY 1998, Congress has imposed similar statutory caps on contract support cost funding for IHS programs as well. See generally *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010) (holding that the government is not liable for contract support costs above the statutory cap), petition for cert. pending, No. 11-83 (filed July 18, 2011).

[4] In 2006, in consultation with tribes, the BIA adopted a new national policy for the equitable distribution of funding for contract support costs, eliminating the need for annual Federal Register notices. See U.S. Dep't of the Interior, Bureau of Indian Affairs, National Policy Memorandum, Contract Support Cost, NPM-SELFD-1 (May 8, 2006), http://www.bia.gov/idc/groups/public/documents/text/idc-000691.pdf.

1:90-cv-00957 Docket entry No. 96 (D.N.M. Oct. 1, 1993) (class certification order).[5] In 1999, however, the district court granted respondents leave to amend their complaint to add a new claim for the alleged "underpayment" of contract support costs due to insufficient appropriations. *Id.* No. 347 (Sept. 30, 1999); see C.A. App. 149-151.[6] The parties cross-moved for summary judgment, and the matter was stayed pending the outcome of the *Cherokee* litigation. See App., *infra*, 13a-14a.

Following this Court's decision in *Cherokee*, the district court granted summary judgment for the government. App., *infra*, 90a-107a. Noting that the D.C. and Federal Circuits had already rejected tribal demands for contract support costs in excess of the express statutory caps on the funds available to the BIA to pay such costs, see *id.* at 98a-101a (discussing *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000) (*Oglala Sioux*), and *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996)), the district court held that the "ISDA and its model contracts do not create enforceable obligations of the United States for payment of contract support costs in amounts in excess of capped contract support cost appropriations." *Id.* at 106a. The court explained that "Congress has the authority to determine the amount of appropriated funds the agency may obli-

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[5] The parties eventually settled respondents' claims concerning the indirect-cost rate formula, App., *infra*, 13a, and those claims are not at issue here.

[6] The district court also granted the motion of respondent Oglala Sioux Tribe to intervene as a class representative. Docket entry No. 347 (Sept. 30, 1999); see App., *infra*, 13a; C.A. App. 152-156 (Oglala complaint). The district court subsequently granted respondent Pueblo of Zuni leave to intervene as well. Docket entry No. 633 (Mar. 27, 2002).

gate under self-determination contracts, and it has exercised that authority by providing that the amounts of such contracts are 'subject to the availability of appropriations,' and by placing caps in the BIA's appropriation statutes." *Ibid.*

4. A divided panel of the court of appeals reversed. App., *infra*, 1a-87a. The court acknowledged that the phrase "subject to the availability of appropriations" could be interpreted in the manner the government urged and the district court held, under which the total amount of funding for contract support costs available for all tribal contractors was subject to the statutory cap. *Id.* at 16a. But the court nevertheless held that the government could be required to pay *all* of the contract support costs requested by *every* tribal contractor—even though that total amount would exceed the statutory cap—because Congress appropriated sufficient funds to satisfy the demands of any *single* contractor considered in isolation. *Id.* at 29a-30a; see *id.* at 34a ("[T]he insufficiency of a multi-contract appropriation to pay all contracts does not relieve the government of liability if the appropriation is sufficient to cover an individual contract."). The court found no "meaningful distinction" between this case and *Cherokee*, in which there was no appropriations cap, because in both cases the funds "were similarly insufficient to cover all objects for which the appropriation was available." *Id.* at 29a n.8.

Nor, in the court's view, did the Appropriations Clause of the Constitution or the Anti-Deficiency Act, 31 U.S.C. 1341, warrant a different result. App., *infra*, 43a-47a. While the appropriations caps would prevent the Secretary himself from disbursing more than the appropriated sums, the court explained, tribal contractors could simply "recover[] from the Judgment Fund" any

unpaid balance. *Id.* at 45a. Although the court recognized that "Congress likely did not intend" for contractors to avoid the statutory cap by seeking any excess from the Judgment Fund, it reasoned that "we must consider the legal effect of Congress's intentional acts, and those acts compel [this] result. Congress passed the ISDA, guaranteeing funding for necessary [contract support costs], and its appropriations resulted in an ongoing breach of the ISDA's promise." *Ibid.*

In so concluding, the court of appeals expressly disagreed with the contrary holding of the Federal Circuit in *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (2010), petition for cert. pending, No. 11-83 (filed July 18, 2011) (*Arctic Slope*). See App., *infra*, 34a (recognizing that *Arctic Slope* addressed "the same issue we confront"). The court further acknowledged that its decision was in conflict with the Federal Circuit's earlier decision in *Oglala Sioux*, *supra*, as well as the D.C. Circuit's decision in *Ramah Navajo School Board*, *supra*. See App., *infra*, 37a n.12.

Judge Hartz dissented from the decision below (App., *infra*, 47a-87a), objecting that the majority had "render[ed] futile the spending cap imposed by Congress." *Id.* at 47a. There was no authority, the dissent maintained, for requiring the government to make payments in excess of a mandatory appropriations limit imposed by Congress: "If such payments are not barred by the Constitution's Appropriations Clause, then the Anti-Deficiency Act should do the trick." *Id.* at 60a. 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*"—to allocate among tribal contractors an appropriated sum that was too small to cover the contract sup-

port costs requested by all contractors—"is *compelled* here" by the appropriations cap. *Id.* at 80a. The dissent would have "adopt[ed] the more natural interpretation of the statutory scheme, which * * * has been adopted in three other circuit opinions," including in "a thoughtful opinion by the court most conversant with federal contract law." *Id.* at 75a (citing the Federal Circuit's decision in *Arctic Slope*, *supra*), 78a.

REASONS FOR GRANTING THE PETITION

In this nationwide class action, the Tenth Circuit ruled that the government's liability for contract support costs under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, is not bounded by the explicit statutory caps imposed by Congress on the annual appropriations authorized to pay such costs. That decision, which squarely conflicts with decisions of the Federal and D.C. Circuits, warrants this Court's review. Congress expressly reserved in the ISDA its constitutionally rooted authority to control the expenditure of funds from the Treasury in any fiscal year, "[n]otwithstanding any other provision" in the Act. 25 U.S.C. 450j-1(b). And in every fiscal year since 1994, Congress has exercised that expressly reserved authority, imposing statutory caps on the funds available for the Secretary to pay contract support costs at levels insufficient to satisfy all of respondents' requests. It is Congress's prerogative under the Appropriations Clause to impose such limits, and the Tenth Circuit erred in concluding that the government may be held liable for failing to pay sums that Congress has not authorized to be paid.

The Tenth Circuit's decision rests on the fundamentally mistaken notion that Congress, through the exer-

cise of its expressly reserved appropriations power, "breach[ed]" a statutory "guarantee[]" to tribes regarding contract support cost funding. App., *infra*, 45a. Tribally administered federal programs are not uniquely immune from the appropriations process. Congress's refusal for more than 15 years to write a blank check for ISDA contract support costs does not reflect a "breach" of any legal duty, but rather rests on a congressional judgment that the important federal policies served by underwriting such costs do not justify the unlimited disbursement of public funds at the expense of other priorities for the public welfare, including other programs benefitting Indians and Indian tribes. It is difficult to posit a judgment more firmly committed to Congress, as confirmed in the Appropriations Clause, see U.S. Const. Art. I, § 9, Cl. 7, and the Tenth Circuit had no warrant to set it aside. The accumulated tribal demands for unfunded contract support costs are already estimated to exceed $1 billion, and the problem grows worse with each federal budget cycle. This Court's intervention is necessary to correct the Tenth Circuit's erroneous interpretation of the ISDA and resolve this recurring problem of nationwide importance.

A. The Courts of Appeals Are Divided Over Congress's Authority To Limit The Expenditure Of Public Funds Under The ISDA

As the Tenth Circuit itself acknowledged, see App., *infra*, 34a, 37a n.12, the decision below directly conflicts with prior decisions of the D.C. and Federal Circuits, both of which have held that the government is not liable for ISDA contract support costs in excess of a statutory appropriations cap. See *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), petition for

cert. pending, No. 11-83 (filed July 18, 2011); *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). Until the Tenth Circuit's decision below, no court of appeals had refused to give effect to Congress's express assertion of control over the expenditure of public funds under the ISDA.

In *Ramah Navajo School Board*, the plaintiff tribal organizations challenged the Secretary's plan for allocating funding for ISDA contract support costs among tribal 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 preferred method for distributing the available funds was subject to judicial review at all, the panel unanimously agreed that the government had no obligation to pay contract support costs beyond the statutory appropriations limit. As the court explained, "if the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds." 87 F.3d at 1345; see also *id.* at 1353 (Silberman, J., dissenting) (Congress "unequivocally stated that any tribes' legal entitlement to funds * * * was dependent on Congress making full appropriations" (emphasis omitted)).

Subsequently, in *Oglala Sioux*, *supra*, a tribal contractor under the ISDA brought suit against the Secretary claiming, like respondents here, an entitlement to "full" funding of its contract support costs, notwithstanding statutory appropriations limits. 194 F.3d at 1376. The Interior Board of Contract Appeals agreed with the contractor, but the Federal Circuit reversed, explaining: "the ISDA explicitly makes funding of ISDA contract indirect costs subject to the availability of ap-

propriations," and "Interior had no choice but to comply with the statute." *Ibid.* The language of 25 U.S.C. 450j-1(b), the court explained, is "clear and unambiguous; any funds provided under an ISDA contract are 'subject to the availability of appropriations.'" 194 F.3d at 1378. This "unequivocal statutory language prevents [a tribal contractor] from asserting that it was entitled to full funding as a matter of right." *Id.* at 1380. To hold that a tribal contractor may recover its "full" costs notwithstanding an express appropriations cap, the court concluded, would permit "the general intent underlying the ISDA to trump the express language of the statute" and would "render the subject-to-appropriations language of [Section] 450j-1(b) meaningless." *Id.* at 1378.

Most recently, in *Arctic Slope*, the Federal Circuit reaffirmed its view in the wake of this Court's decision in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005). The plaintiff in *Arctic Slope* entered into an ISDA self-determination contract with the Indian Health Service for the operation of a hospital in Alaska. The agency paid the tribal organization all of the contract support costs specifically promised in the annual funding agreements, but the organization nonetheless brought suit on the theory that the ISDA guaranteed additional funding of tribal contract support costs. 629 F.3d at 1300-1301. The Civilian Board of Contract Appeals rejected that claim, and the Federal Circuit affirmed. *Id.* at 1298, 1306. "In stark contrast to *Cherokee*," the court explained, "here there is a statutory cap on funding for contract support costs." *Id.* at 1301. The court reasoned that Congress's explicit statement 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 [in the appropriation acts,] 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 1304. To accept the contractor's argument, the court concluded, would "effectively defeat the statutory cap." *Ibid.*

These decisions squarely conflict with the decision below, which rejected the views of the Federal Circuit on "the same issue." App., *infra*, 34a; see *id.* 34a-38a (discussing *Arctic Slope*). Moreover, because the decision below encompasses a nationwide class of all tribes and tribal organizations that have entered into ISDA contracts with the Secretary, see Docket entry No. 96, the likelihood of further legal developments in the courts of appeals is substantially diminished. This Court's review is warranted.

B. The Tenth Circuit's Decision Depends On The Mistaken Premise That The Appropriations Caps Constituted A "Breach" By Congress Of A Legal Duty To Tribal Contractors

The Tenth Circuit declared that the government is liable for the contract support costs requested by every tribal contractor, notwithstanding the appropriations caps, because "Congress passed the ISDA, guaranteeing funding for necessary [contract support costs], and its appropriations resulted in an on-going breach of the ISDA's promise." App., *infra*, 45a. That mismatched combination of statutory and contractual concepts does not provide a coherent basis for requiring the government to disburse public funds in excess of express statutory caps imposed by Congress.

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).

In this case, Congress has expressly imposed such a "valid reservation"—a cap on the availability of appropriated funds for ISDA contract support costs—in every appropriation for the Department of the Interior since fiscal year 1994. As respondents do not dispute, in the parlance of federal appropriations law, the phrase "not to exceed" in these appropriations acts denotes Congress's intent to designate a maximum amount of funding available for the specified purpose. See 2 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 6-32 (3d ed. 2006); see also 64 Comp. Gen. 263, 264 (1985) ("not to exceed" is "susceptible of but one meaning"); *Arctic Slope*, 629 F.3d at 1301. 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 the Anti-Deficiency Act, 31 U.S.C. 1341, 1350).

Congress has thus imposed a firm ceiling on the amount of money that may be drawn from the Treasury for ISDA contract support costs each year for more than

15 years. See note 2, *supra*. It is undisputed that all of that money has long since been spent. See App., *infra*, 98a (district court's finding, as an undisputed fact, that "[i]n every fiscal year since 1994, BIA has distributed to tribal contractors the full amount of [contract support cost] funding appropriated for that purpose"). Unlike in *Cherokee*, therefore, there are no "unrestricted funds * * * sufficient to pay the claims at issue." 543 U.S. at 641. Nor has the government allocated elsewhere funds that would otherwise be available to respondents. Cf. *ibid.* While Congress in *Cherokee* "unambiguously provided unrestricted lump-sum appropriations," *id.* at 646-647, here Congress has expressly capped the appropriations available to the Secretary to meet respondents' demands. The BIA is "without power to make a contract binding the Government to pay more than the amount appropriated." *Sutton* v. *United States*, 256 U.S. 575, 579 (1921).

The Tenth Circuit concluded that neither the Appropriations Clause nor the Anti-Deficiency Act was implicated by its decision because the Judgment Fund is available to pay tribal requests in excess of the appropriations caps. App., *infra*, 43a-47a. That notion is untenable. 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. The Judgment Fund exists solely to pay "final judgments, awards, compromise settlements, and interest and costs" when "payment is not otherwise provided for." 31 U.S.C. 1304(a).

Here, the appropriations "provided for" the payment of respondents' ISDA contract support costs were those specifically provided in the annual appropriations for the Department of the Interior. The restrictions that Congress imposed on those sums may not be circumvented by seeking additional amounts from the Judgment Fund. By virtue of the statutory caps on the availability of appropriations for contract support costs, the United States is not liable for any costs in excess of those caps. And because there is no liability, there is no basis for a judgment against the United States that could be paid out of the Judgment Fund.

2. Against this background, the court of appeals identified no plausible theory on which the government may be held liable under the ISDA for failing to pay amounts that Congress has forbidden to be paid. The court of appeals suggested at points (*e.g.*, App., *infra*, 2a, 4a-8a, 45a-46a) that tribes' purported entitlement to "full funding" of contract support costs irrespective of the appropriations caps springs from the ISDA itself, and at other points that such an entitlement flows from principles of contract law (*e.g.*, *id.* at 21a-34a). Neither theory has merit. The ISDA does not confer on tribal contractors an unqualified "guarantee[]" (*id.* at 45a) of full funding for contract support costs, especially in the face of express limitations imposed in subsequent Acts of Congress—*i.e.*, the annual appropriations acts. Nor did Congress or the BIA "breach" any "promise" (*ibid.*) when Congress exercised its constitutional authority to control federal spending.

a. As originally enacted, the ISDA required the Secretary to provide only the amount of funding that the "Secretary would have otherwise provided for the operation of the programs" in question during the fiscal year.

25 U.S.C. 450j-1(a)(1). In 1988, Congress amended the ISDA to require that, in addition to that sum, the Secretary must also provide an amount for the tribal organization's reasonable "contract support costs." Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2292 (25 U.S.C. 450j-1(a)(2)). That provision does not, even on its face, create an unqualified right to "full" federal funding of contract support costs: "*an amount for* the [contractor's] reasonable costs," 25 U.S.C. 450j-1(a)(2) (emphasis added), is not naturally read to mean "*all* reasonable costs."[7] And in any event, the ISDA as a whole clearly does not "guarantee[]" (App., *infra*, 45a) to a tribal contractor any particular level of federal funding. The Act specifically contemplates that actual funding will be contingent on subsequent appropriations laws, and thus on any restrictions contained in those appropriations laws. Indeed, as noted above (see pp. 3-4, *supra*), Congress made clear in at least four places in the Act that it intended to exercise complete control over the disbursement of funds from the Treasury for federal programs administered by tribes under the ISDA, just

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[7] The court of appeals also relied on 25 U.S.C. 450j-1(g) for its belief that "Congress has mandated that all self-determination contracts provide full funding of [contract support costs]." App., *infra*, 2a. But that provision merely provides that, when an ISDA contract is approved, the Secretary "shall add to the contract the full amount of funds to which the contractor is entitled *under subsection (a) of this section*," 25 U.S.C. 450j-1(g) (emphasis added)—that is, the secretarial amount, 25 U.S.C. 450j-1(a)(1), plus "an amount for" the contractor's reasonable contract support costs, 25 U.S.C. 450j-1(a)(2). The Act nowhere guarantees that every dollar requested by a tribal organization in contract support costs will be paid, let alone that such an entitlement exists irrespective of appropriations. See 25 U.S.C. 450j(c), 450j-1(b).

as it would if the same programs were administered by the Secretary directly.

First, the ISDA 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 stipulated 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 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 containing, *inter alia*, an accounting of "any deficiency in funds needed to provide required contract support costs to all contractors," 25 U.S.C. 450j-1(c), a provision that would be wholly superfluous if, as the Tenth Circuit believed, Congress had "mandated that all self-determination contracts provide full funding" of contract support costs. App., *infra*, 2a.

Finally, in the same 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 § 205, 102 Stat. 2292. The "subchapter" to which this provision refers is Title 25 ("Indians"), Chapter 14 ("Miscellaneous"), Subchapter II ("Indian Self-Determination and Education Assistance"). It therefore encompasses all relevant provisions of the ISDA, including the contract support cost provisions of 25 U.S.C. 450j-1(a)(2).

As the D.C. and Federal Circuits have both recognized, the "unequivocal statutory language" of Section 450j-1(b) forecloses any contention that the ISDA guarantees full funding of contract support costs "as a matter of right." *Oglala Sioux*, 194 F.3d at 1380; see *Arctic Slope*, 629 F.3d at 1304 (Section 450j-1(b) "limits the Secretary's obligation to the tribes to the appropriated amount"); *Ramah Navajo Sch. Bd., Inc.*, 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."). See also App., *infra*, 82a (Hartz, J., dissenting) ("[T]he ISDA does not require full payment. Full payment is conditioned on the availability of funds.").

The court of appeals was therefore mistaken in its essential premise that Congress "guarantee[d] funding" for all contract support costs. App., *infra*, 45a. The Tenth Circuit has since reaffirmed this erroneous interpretation of the ISDA, holding that an Indian tribe is "entitled to a contract specifying the full statutory amount" of contract support costs, and that the government is forbidden even from negotiating for the tribe's agreement to accept a lower sum in light of the lack of available appropriations. *Southern Ute Indian Tribe* v. *Sebelius*, Nos. 09-2281 & 09-2291, 2011 WL 4348299, at *11 (10th Cir. Sept. 19, 2011) (*Southern Ute*). The court

of appeals declared in *Southern Ute* that "[a] tribe cannot be forced to enter into a self-determination contract waiving its *entitlement* to full [contract support cost] funding." *Ibid.* (emphasis added).

As the statutory provisions discussed above make clear, the ISDA creates no such unqualified "entitlement." To the contrary, the ISDA expressly reserves Congress's authority to control the expenditure of public funds "[n]otwithstanding any other provision" of the Act, including the provisions governing contract support costs. 25 U.S.C. 450j-1(b). Congress consequently did not "breach" any statutory "promise" to respondents (App., *infra*, 45a) by exercising its statutorily reserved and constitutionally rooted authority to limit the amount of funds in the Treasury available to pay such costs. Because the ISDA itself did not mandate payment in these circumstances, respondents have no right to recover under the terms of the Act. See *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1555 (2009); *United States* v. *Navajo Nation*, 537 U.S. 488, 506 (2003).

b. The court of appeals also sought to justify its decision in terms of contract law. *E.g.*, App., *infra*, 26a-34a. But the Secretary did not promise to pay respondents' contract support costs irrespective of available appropriations. Indeed, the Secretary could not have bound the government to pay costs in excess of the amounts appropriated by Congress. See *Sutton*, 256 U.S. at 579. Consistent with the model agreement in the ISDA, the Secretary's contracts with respondents specified that all funding was "[s]ubject to the availability of appropriations." 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4)); see App., *infra*, 10a-11a. This Court held that equivalent language in the contracts at issue in *Cherokee* did not relieve the government of liability because, in

that case, "Congress appropriated adequate unrestricted funds" to pay the tribes' claims. 543 U.S. at 643. Here, by contrast, the relevant appropriations are both inadequate and expressly restricted.

Moreover, as the dissent below explained, other provisions in the parties' agreements "recognized that contract-support costs might not be fully paid." App., *infra*, 51a (Hartz, J., dissenting). For example, the Oglala Sioux annual funding agreement for 2001 provided that the tribe's indirect cost recovery would be calculated by multiplying the amount that the tribe would otherwise receive by a "percentage of rate funded by BIA"—*i.e.*, a rate tied to the available appropriations. See *id.* at 51a-53a; see also *id.* at 51a (quoting contract language providing that funding for contract support costs "shall be provided by the Bureau of Indian Affairs, subject to the availability of funding"); *id.* at 12a-13a (majority opinion) (noting that annual funding agreements for Ramah Navajo and Oglala Sioux reflected "uncertainty" about the contract support cost funding rate because the BIA did not determine the rate until the fiscal year was underway). Like the ISDA itself, therefore, the parties' contractual agreements recognized that funding for all contract support costs was *not* guaranteed, but was instead contingent upon the availability of appropriations.

The Tenth Circuit nonetheless believed that the government could properly be held liable under the rationale of *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892), which the court of appeals construed to establish a "bright-line" rule 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." App., *infra*, 31a-32a.

Because Congress here appropriated sufficient funds to meet the contract support funding needs of any *one* tribal contractor considered in isolation, the court reasoned, the government is required to pay *all* of the contract support costs of *every* tribal contractor. *Id.* at 29a-30a.

As the Federal Circuit recognized in rejecting the same contention, that approach would "effectively defeat" Congress's invocation of its expressly reserved authority under the Appropriations Clause to impose binding limits on the disbursement of public funds from the Treasury. *Arctic Slope*, 629 F.3d at 1304; see also App., *infra*, 47a (Hartz, J., dissenting) (explaining that the majority's reasoning "renders futile the spending cap imposed by Congress"). The manifest purpose of Congress in enacting the appropriations caps was to limit the use of public funds for the payment of ISDA contract support costs. The court of appeals' theory, under which *every* tribal contractor could recover its reasonable 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 has limited authority under the ISDA 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*, 2011 WL 4348299, at *8 (holding that the government could not decline a new ISDA contract requested by a tribe on the ground that the available appropriations were insufficient to pay the tribe's contract support costs). Congress's only conceivable purpose in enacting the appropriations caps was therefore to limit the amounts distributed by the Secretary under existing self-determination contracts—an

outcome that the text of the ISDA expressly permits. 25 U.S.C. 450j-1(b).

The rationale of *Ferris*, on which the court of appeals relied, is entirely inapposite in this context. *Ferris*, like *Cherokee*, involved a government promise made against the backdrop of an unrestricted, lump-sum appropriation. See *Arctic Slope*, 629 F.3d at 1304. Here, by contrast, "there is a statutory cap and no ability to reallocate funds from non-contract uses." *Ibid.* Moreover, unlike the contractor in *Ferris*, which operated under a general appropriation and was "not chargeable with knowledge of its administration," 27 Ct. Cl. at 546, respondents here have been well aware since FY 1994 of the insufficiency of available appropriations to pay all contract support costs. For more than a decade, the BIA published a notice in the Federal Register each year describing the shortfalls in funding for contract support costs and the methodology the agency would use to allocate the available money. App., *infra*, 9a (collecting citations); see, *e.g.*, 58 Fed. Reg. at 68,694. As the dissent below explained, the "very purpose" of these notices was to "warn[] tribal organizations of the possibility of insufficient funding." App., *infra*, 50a. In 2006, in consultation with tribes, the agency adopted an explicit nationwide policy for the equitable distribution of funding for contract support costs in light of the recurring shortfalls. See note 4, *supra*. And each year the BIA has developed its budget requests—including any requests for additional contract support cost funding—in consultation with the tribes. See 25 U.S.C. 450j-1(i). The inadequacy of available appropriations, in short, has been "no secret." App., *infra*, 49a (Hartz, J., dissenting). The animating concerns of *Ferris* are thus absent here.

Furthermore, as the Federal Circuit observed, *Ferris* is particularly irrelevant in this context because the ISDA relieves the Secretary of any obligation to reallocate available funds among tribes and tribal organizations. 25 U.S.C. 450j-1(b); see *Arctic Slope*, 629 F.3d at 1304. As the majority below acknowledged, allocating inadequate funds under a capped appropriation is inescapably a zero-sum endeavor: "the Secretary *necessarily* takes from one tribe to pay another whenever funding falls short of total need." App., *infra*, 21a. Yet the court declared the government liable for all tribes' costs under *Ferris* precisely because the Secretary *could* have paid the entire amount requested by any individual tribal organization, to the detriment of the others. See *id.* at 30a (asserting that "there is no statutory restriction that would preclude the Secretary from using appropriated funds to pay full [contract support cost] need to the individual contractors bringing suit"). Section 450j-1(b) frees the Secretary to distribute the available funds among contractors in an equitable fashion by making clear that the Secretary is not required to prefer one tribe or tribal organization over another in that manner.

C. The Question Presented Is Important

The Tenth Circuit's decision vitiating limits imposed by Congress on the expenditure of funds from the Treasury warrants this Court's review. The Court has not previously considered 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*, *supra*. Particularly in an era of increasing federal budgetary pressure, the authority of Congress to impose—and the obligation

of federal courts to respect—mandatory ceilings on the expenditure of appropriated funds for designated purposes is a question of great prospective importance.

As this Court explained in *OPM* v. *Richmond*, the Appropriations Clause ensures "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." 496 U.S. at 427-428. The appropriations caps imposed in this case reflect a judgment by Congress that, although the federal policies that are served by funding contract support costs under the ISDA are important, those policies do not warrant the unlimited disbursement of public money at the expense of other priorities, including other programs benefitting Indians and Indian tribes. Thus, the Conference Report accompanying the first capped appropriation for the BIA in FY 1994 explained that it was necessary to impose a limit 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). Likewise, legislators explained their decision to continue limiting the appropriations available to the Indian Health Service for contract support costs in FY 2000 on the ground that Congress "cannot afford to appropriate 100% of contract support costs at the expense of basic program funding for tribes." *Arctic Slope*, 629 F.3d at 1306 (quoting H.R. Rep. No. 222, 106th Cong., 1st Sess. 112 (1999)).

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. Congress in the ISDA explicitly reserved its prerogative to make such judgments, see 25 U.S.C.

450j(c), 450j-1(b), and it has expressed its intent to limit federal spending on contract support costs with unmistakable clarity in the annual appropriation acts for the Department of the Interior each year for more than 15 years. Yet even this was not enough for the court of appeals. In the court's view, if Congress wished to cap federal spending on contract support costs without amending the substantive provisions of the Act, it was required to "limit appropriations on a contract-by-contract basis" for hundreds of tribal organizations nationwide. App., *infra*, 46a. That extraordinary conclusion should not be permitted to stand.

This Court's intervention is additionally appropriate because of the importance of the question presented to the uniform and effective administration of the ISDA. According to agency data, nearly 40% of the BIA's annual budget for social and economic programs for Indian tribes is administered directly by tribal organizations under ISDA self-determination contracts. The decision below has left federal and tribal officials alike uncertain of their respective financial obligations for the maintenance of important federal programs. Meanwhile, the accumulated tribal requests for unfunded contract support costs are estimated to exceed $1 billion, and the problem grows worse with each federal budget cycle. This Court's review is needed.

D. This Case Provides The Preferable Vehicle For The Court's Review

The Solicitor General is filing, simultaneously with this petition, the government's response to the petition for a writ of certiorari in *Arctic Slope*, No. 11-83. The Tenth Circuit's decision below presents a better vehicle for the Court's resolution of the question presented for

at least two reasons. First, because it involves a nationwide class action, the decision below starkly illustrates 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 respondent class in any fiscal year without exceeding the statutory appropriations cap imposed by Congress for that year. Granting review in this case 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, the plaintiff contractor in *Arctic Slope* received all of the funding for contract support costs specifically contemplated in its annual funding agreements, entirely apart from any question of the sufficiency of appropriations. See 639 F.3d at 1300-1301 (noting that the contractor "does not claim that the Secretary failed to pay the secretarial amount, or the contract support costs specified in the Annual Funding Agreements"). That fact furnishes an additional basis on which the government would be entitled to prevail in *Arctic Slope* that is not necessarily present with respect to the contracts at issue here. The decision below thus presents a better vehicle for the Court to reach and decide the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2011

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