No. 13-454

In the Supreme Court of the United States

QUANTUM ENTERTAINMENT LIMITED,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In opposition to certiorari, the government echoes the court of appeals' errors and commits several of its own. The government (1) denies that the case is significant; (2) insists that the contract in question was "absolutely void" under the version of 25 U.S.C. § 81 in effect at the contract's inception; (3) contends that *McNair v. Knott*, 302 U.S. 369 (1937), and *Ewell v. Daggs*, 108 U.S. 143 (1883), are distinguishable from the present case; (4) suggests that those precedents have been superseded by statute; and (5) ultimately endorses the court of appeals' holding that *McNair* and *Ewell* have been implicitly overruled by *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). In each respect, the government is wrong. Neither these arguments, nor any others that the government has advanced, should deter the Court from granting the petition.

I. THE CASE IS IMPORTANT.

Predictably the government attempts to reduce this case to a dispute about whether a pre-2000 tribal contract that failed to comply with the requirements of the original 25 U.S.C. § 81 ("Old Section 81") – but that would have been valid under the 2000 amendments to the statute ("New Section 81") – should be voided under the old statute when one of the parties first challenges the contract after enactment of the new statute. *See* Brief for the United States in Opposition (I), 14-15 [hereinafter Opp. Br.]. Similar scenarios, the government posits, will become increasingly rare as the year 2000 recedes further into the past. *Id.* 14-15. But the importance of the case at bar transcends the question whether the dead hand of Old Section 81 will

manage to throttle other long-term contracts with Indian tribes (even if, as the government appears to assume, that question is itself unimportant).

As Petitioner Quantum Entertainment Limited ("QEL") has demonstrated, Congress not infrequently liberalizes the law of contracts without bothering to specify the temporal scope of its handiwork. *See* Petition for Writ of Certiorari 13-20 [hereinafter Pet.]. In *McNair*, *Ewell*, and "numerous" cases of the same ilk, *Campbell v. Holt*, 115 U.S. 620, 627 (1885), this Court held that in such situations the new law serves to validate contracts that were illegal at the time of their execution, provided that the parties made no attempt to disavow them under the old law. But a highly influential appellate court, in a published opinion, has now rejected those precedents on the ground that they "conflict[] with" *Landgraf*. Petition Appendix 14 [hereinafter Pet. App.]. And it has done so despite the familiar principle that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *United States v. O'Brien*, 130 S. Ct. 2169, 2174 (2010) (internal quotation marks omitted).

It is true, as the government observes, that the courts of appeal do not appear to be "in conflict on the question presented." Opp. Br. 11. Instead, both appellate courts whose decisions have come to QEL's attention have answered the question incorrectly – the District of Columbia Circuit by misjudging the significance of *McNair* and *Ewell*, *see* Pet. App. 12-14,

and the Seventh Circuit by overlooking those decisions altogether, *see Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 295 (7th Cir. 2002) (Posner, J.). The "conflict" presented by QEL's petition is thus between the decision below and "relevant decisions of this Court." Sup. Ct. R. 10(c). It begs for review.

II. THE CONTRACT WAS NOT "ABSOLUTELY VOID."

"Under old Section 81," the government maintains, "the parties' agreement had no legal effect – it was void *ab initio* irrespective of the parties' later voluntary performance, because Interior did not approve it." Opp. Br. 10; *accord id.* 12 ("absolutely void"). On this ground the government seeks to distinguish *Ewell*, which concerned a contract that the Court considered "voidable" rather than "absolutely" void. *See* 108 U.S. at 149. And the government contends that validating an "absolutely void" contract would "increase a party's liability for past conduct[] or impose new duties with respect to transactions already completed," *Landgraf*, 511 U.S. at 280 – "precisely the sort of retroactive effect that *Landgraf* forbids in the absence of clear Congressional intent," Opp. Br. 13.

In making this argument, the government misses the point of *Ewell*. It also ignores the way Old Section 81 worked in the real world. The government does not address QEL's brief discussion of the latter issue, *see* Pet. 21 n.1, but merely continues to assert the contract's "absolute" voidness.

The repealed usury statute at issue in *Ewell* had provided that an agreement to pay more than 12%

interest would be "void and of no effect." 108 U.S. at 148. "But these words," the Court explained,

> are often used in statutes and legal documents ... in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it had never existed, incapable of giving rise to any rights or obligations under any circumstances.

Id. at 148-49.

And that was exactly the sense in which Old Section 81 made unapproved contracts relating to Indian lands "null and void": they were "voidable merely, that is, capable of being avoided." Thus, when the Tenth Circuit researched the applicability of Old Section 81 to unapproved bingo management contracts, it discovered that "[e]very case addressing the validity of [such a] contract under section 81 has *voided the contract at the request of the tribe*." *United States ex rel. Citizen Band Potawatomi Indian Tribe v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 890 (10th Cir. 1989) (emphasis added). Congress viewed the statute in the same light. *See* S. Rep. No. 106-150, at 14-15 (1999) ("Under current law, any contract that is subject to [Section 81] and is not approved by [the Secretary] *can be declared* null and void." (emphasis added)). Leading commentators criticized Old Section 81 as an escape hatch that empowered Indian tribes but ultimately impoverished them by "[creating] opportunities ... for tribes to void contracts [and thus] curtail[ing] prospects for business deals." Robert N. Clinton et al., *American Indian Law: Native Nations and the Federal System* 1411 (4th ed. 2003).

Indeed, the government itself has traditionally taken the position that the tribe's own wishes with respect to an unapproved contract are entitled to decisive weight under Section 81. In this case, for example, the Bureau of Indian Affairs reviewed QEL's contract in response to a complaint from the Pueblo, and the Bureau's decision not to approve the contract retroactively was "[b]ased on [the Bureau's] understanding that the Pueblo did not want [the Bureau] to approve the Agreement." Pet. App. 198. (The government's statement that the Bureau "refused to approve the agreement because it was not in the Pueblo's best interest," Opp. Br. 4, is a half-truth at best. *See* Pet. App. 198 ("It is my understanding that *the Pueblo ... does not wish that I approve the* agreement retroactively. Among the concerns raised to me ... is that ... QEL is to receive 49% of the net income .... Based on these factors, I conclude that [the agreement] is not in the best interest of the Pueblo ....").)

And just as a tribe enjoyed the ability to avoid an unapproved contract under Old Section 81 by asking the court to strike it down, the tribe could *validate* such a contract by asking the Secretary to approve it retroactively – a request that the Secretary routinely obliged. *See, e.g.*, *United States ex rel. Buxbom v. Naegele Outdoor Advertising Co. of Cal., Inc.*, 739 F.2d 473, 473-74 (9th Cir. 1984) (Kennedy, J.), *cited in* Pet. 21 n.1. An unapproved contract can hardly be deemed "void *ab initio*" or "absolutely void" if the Secretary has the authority to backdate his endorsement of it, months or years after the parties have begun their performance of it.

In short, the contract at issue in this case was not "absolutely a nullity," *Ewell*, 108 U.S. at 149, but rather an imperfect contract that the Secretary – or Congress – could validate at a later date. The principles of *Ewell* and *McNair* therefore apply with full force to it. And the fact that Old Section 81 was "based on the premise that the tribe lacked legal capacity to contract, in order to prevent overreaching," Opp. Br. 12, does not call for a different conclusion. It does not suffice to distinguish Old Section 81 from the repealed usury statute in *Ewell* – which declared loan contracts calling for more than 12% interest "void and of no effect," 108 U.S. at 148 – or from the preexisting law in *McNair* that had rendered certain bank contracts "ultra vires," 302 U.S. at 373-74. In both cases the old law had circumscribed a party's contractual capacity in order to protect the party (or the party's shareholders) from financial exploitation. Yet in both cases the Court held that "[p]ublic policy cannot be made static by those who, for reasons of their own, make contracts beyond their legal powers." *McNair*, 302 U.S. at 373.

III. *MCNAIR* DID NOT INVOLVE AN EXPRESS CONGRESSIONAL COMMAND OF RETROACTIVITY.

Under *Landgraf*, a court's "first task is to determine whether Congress has expressly prescribed the statute's proper reach." 511 U.S. at 280. The government claims that the Court never went beyond this "first task" in *McNair*, because "[t]he Court concluded that the language of the statute 'le[d] irresistibly to the conclusion'" that Congress desired the new law to have retroactive effect. Opp. Br. 13

(quoting *McNair*, 302 U.S. at 371). Thus, the argument continues, the Court "resolved the retroactivity issue as a matter of statutory text, with 'no need to resort to judicial default rules.'" *Id.* (quoting *Landgraf*, 511 U.S. at 280).

But the Court's opinion in *McNair* tells a different story. The *text* of the National Bank Enabling Amendment was entirely silent about its temporal scope, *see* 302 U.S. at 370; the most that the Court could say about the statutory language was that it "d[id] not expressly exclude existing contracts from its field of operation," *id.* at 371. And while the Court apparently accorded weight to the legislative history – a Senate report noting that "millions of dollars worth of collateral had been pledged by national banks as security for public deposits," *id.* at 372 – that history was little different from the Senate report underlying New Section 81, which observed that Old Section 81 placed contracts between tribes and their business partners at risk and left interested parties "powerless to eliminate this uncertainty," S. Rep. No. 106-150, at 7. Hence *McNair*, like the present case, fundamentally concerns a court's second task under *Landgraf* – "determin[ing] whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 511 U.S. at 280. (As for the government's suggestion that the legislative history behind New Section 81 hints at Congress's intent to have the statute apply purely prospectively, Opp. Br. 9, that sort of argument has no role to play under *Landgraf*; only "clear congressional

intent favoring [retroactivity]" would be relevant. 511 U.S. at 280.)

IV. CONGRESS HAS NOT REVERSED THE RATIONALE OF *EWELL*.

In a footnote, the government questions whether *Ewell* "remains good law," independently of its alleged inconsistency with *Landgraf*. Opp. Br. 12. The government argues that "*Ewell* relied on a common-law presumption that the repeal of a penalty provision operated retroactively to release a party from losses and forfeitures incurred under the original statute," and the government observes that 1 U.S.C. § 109 has overturned that presumption. Opp. Br. 12 n.*. The argument would fail even if the government had not waived it. *See* Pet. App. 12 n.1. *Ewell* and *McNair* "rest upon solid ground":

> *Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act*, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, ... as long as it ... [has not] passed into a completed transaction, may, by a subsequent statute, be taken away.... The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur.

Ewell, 108 U.S. at 151 (emphasis added).

Nor does "the right of a defendant to avoid his contract," 108 U.S. at 151, constitute a "penalty, forfeiture, or liability incurred" by the other contracting party under the repealed statute that provided for the right, within the meaning of 1 U.S.C. § 109. Section 109 is "a careful provision of Congress, keeping a repealed statute alive for a precise purpose." *De la Rama S.S. Co. v. United States*, 344 U.S. 386, 389 (1953). A "penalty" or "forfeiture" signifies a punishment over and above the mere inability to vindicate a reliance interest. And a "liability" is the very antithesis of a judgment of unenforceability. In civil cases, in other words, § 109 preserves rights to exact penalties, collect forfeitures, and enforce liabilities – the kinds of rights that courts commonly describe as "vested." *See, e.g.*, *United States v. Obermeier*, 186 F.2d 243, 253-55 (2d Cir. 1950) (Frank, J.). But "[n]o person has a vested right to be permitted to evade contracts which he has illegally made." *McNair*, 302 U.S. at 373.

V. *LANDGRAF* DID NOT OVERRULE *MCNAIR* AND *EWELL*.

In support of the court of appeals' central holding – that *McNair* and *Ewell* "conflict[] with" *Landgraf* and were therefore overruled by it, Pet. App. 14 – the government offers two complementary arguments. *See* Opp. Br. 13-14. One is that *Landgraf* "did not indicate that its retroactivity analysis should not be applied to contract cases"; the other is that *Landgraf* did not mention "statutes that permit parties to enter into the sort of contracts that were previously considered void" when it described "several categories of later-enacted

statutes that could be applied under the two-part test it announced." *Id.* 14. But *Landgraf*'s omission of *McNair* and *Ewell* from its supposedly "comprehensive" catalog of retroactivity precedents, Pet. App. 14, does not begin to demonstrate that the Court meant to disown those decisions, *see, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (per curiam), particularly in light of *Landgraf*'s own recognition that "[a]ny test of retroactivity ... is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity," 511 U.S. at 270. In any event, if any inference can be drawn from *Landgraf*'s silence about *McNair* and *Ewell*, this Court alone has authority to draw it. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Nor can special significance be attached to *Landgraf*'s observation that "[t]he largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights." Opp. Br. 14 (quoting 511 U.S. at 271). The Court was referring to the classic subject of the anti-retroactivity presumption – new statutes that *impair* contractual obligations. None of the cited cases involved statutes aimed at legitimizing contracts that prior law had jeopardized. *See* 511 U.S. at 271 n.25.

VI. THE EQUITIES CATEGORICALLY FAVOR ENFORCEMENT OF VOLUNTARY AGREEMENTS THAT CONFORM WITH CURRENT LAW.

The government additionally contends that "the equities weigh against" retrospective validation of QEL's contract, because Old Section 81 "put [QEL] on

notice of the substantial risk of entering into an unapproved service agreement with an Indian tribe." Opp. Br. 10-11. But *McNair* and *Ewell* demonstrate that equitable considerations *always* favor the enforcement of a contract under contemporary law if the parties were content to perform it throughout and beyond the time when the contract was illegal – no matter how clear the earlier illegality may have been. "[T]he common law private right of contract in a sense trump[s] the more aleatory statutory impediment to recovery." Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 Geo. L.J. 1015, 1037 (2006); *cf. also, e.g.*, *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 583 (2013) ("In all but the most unusual cases, ... 'the interest of justice' is served by holding parties to their bargain.").

VII. *QUANTUM MERUIT* RECOVERY WOULD BE UNCERTAIN AND INADEQUATE.

The court of appeals fleetingly suggested that "[c]oncerns about unfairness that may arise from a retroactive determination that the 1996 Agreement was void *ab initio* are ameliorated by the possibility that [QEL] may recover in *quantum meruit*." Pet. App. 16. The government parrots that Latinate afterthought. Opp. Br. 15. It is no more fully baked here than it was in the court below. The applicability of quantum meruit principles to contracts struck down under Old Section 81 is fraught with doubt. *See, e.g.*, *Barona Grp. of Capitan Grande Band of Mission Indians v. Am. Mgmt. & Amusement, Inc.*, 840 F.2d 1394, 1397-98 (9th Cir. 1987) (affirming summary judgment in favor of tribe despite quantum meruit counterclaim). Because the avoidance of substantive

contractual obligations typically entails avoidance of the contractual waivers of tribal sovereign immunity that accompany them, quantum meruit remedies in this context are particularly difficult to pursue. *See, e.g., A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986). And even if quantum meruit recovery were available, it would be limited to the reasonable value of services previously rendered; it would do nothing to protect the expectancy interests that the parties' bargain engendered.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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