No. 22-70013

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMUEL JAMES KENT,

Petitioner,

v.

DARRYL LACOUNTE, Director of the
United States Bureau of Indian Affairs, et al.,

Respondents.

Petition for Review of a Final Decision of the Department of the Interior

BRIEF FOR RESPONDENTS

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STATEMENT OF JURISDICTION

On January 5, 2022, the Department of the Interior issued a decision denying petitioner Samuel Kent's complaint and request for relief pursuant to 41 U.S.C. § 4712(c)(1). 1-ER-2 (Final Agency Decision). Petitioner invokes this Court's jurisdiction under 41 U.S.C. § 4712(c)(5), which permits any person "adversely affected or aggrieved" by an order issued under Section 4712(c)(1) to "obtain review of the order[] . . . in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred." Petitioner filed a petition for review in this Court on January 24, 2022, within the 60 days provided under Section 4712(c)(5).

STATEMENT OF THE ISSUE

Whether the agency correctly dismissed petitioner's whistleblower-retaliation complaint because the whistleblower-protection provision in 41 U.S.C. § 4712 does not apply to funds provided under the Indian Self-Determination and Education Assistance Act.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. The Indian Self-Determination Assistance and Education Act (Indian Self-Determination Act or ISDEAA) directs the Secretary of the Interior to contract with

Indian tribes to manage programs for the benefit of Indians that federal agencies would otherwise administer directly. *See* 25 U.S.C. § 5301 *et seq.*; *Miller v. United States*, 992 F.3d 878, 882 (9th Cir. 2021).

The Indian Self-Determination Act embraces autonomy for Indian tribes in administering federal programs. *See* 25 U.S.C. § 5302(a) ("The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in . . . Federal services to Indian communities . . . ."). To that end, the Indian Self-Determination Act creates special rules for agency contracts with tribes, with the aim of facilitating tribal provision of services with minimal federal interference or oversight. *See* 140 Cong. Rec. 28,631 (1994) ("[Indian] Self-Determination Act contracts should be guided by the principle that [they] . . . should be free of all unnecessary federal administrative oversight."). Tribal agreements administered under the Act are called "self-determination contracts." *See* 25 U.S.C. § 5304(j) (defining "self-determination contract"); *id.* § 5308 (permitting "a grant agreement or a cooperative agreement" to "be utilized in lieu of a contract"); *see also Shirk v. United States ex rel. Dep't of Interior*, 773 F.3d 999, 1002 (9th Cir. 2014) ("These contracts are commonly called '638 contracts,' in reference to the public law number of the" Indian Self-Determination Act).

The Indian Self-Determination Act exempts self-determination contracts from all federal contracting and procurement laws, with only narrow exceptions.

Specifically, the Act provides that self-determination contracts are not "subject to Federal contracting or cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes." 25 U.S.C. § 5324(a)(1). The exemption from federal contracting law applies "[n]otwithstanding any other provision of law," subject to a provision governing construction contracts. *Id.* § 5324(a). The Act also provides that self-determination contracts are "subject to the condition that[] . . . no contract [with specific rules applicable to construction agreements] . . . shall be—(1) considered to be a procurement contract; or (2) . . . subject to any Federal procurement law (including regulations)" except certain rules promulgated for limited purposes such as Federal Tort Claims Act (FTCA) procedures. 25 U.S.C. § 5304(j); *see also Miller*, 992 F.3d at 882 (considering FTCA wrongful termination claim arising out of tribal self-determination contract).

2. Congress has created a comprehensive set of laws that govern federal contracting and procurement. *See generally* Title 41, U.S. Code. To protect federal contracts and grants from waste, fraud, and abuse, Congress mandated certain requirements applicable to all federal contractors and grantees that encourage whistleblowers to report misuse of federal funds. Section 4712 is titled "Enhancement of contractor protection from reprisal for disclosure of certain information" and applies to "contractor[s], subcontractor[s], grantee[s], subgrantee[s], or personal services contractor[s]" of the federal government. *See* 41 U.S.C. § 4712. Section 4712 was originally enacted as Pilot Program for Enhancement of Contractor

Protection from Reprisal for Disclosure of Certain Information. *See* Pub. L. No. 112-239, 126 Stat. 1632, 1837 (2013). The program was made permanent in 2016. *See* Pub. L. No. 114-261, 130 Stat. 1362 (2016). Section 4712 appears in title 41 of the U.S. Code, the title devoted to public contracts, within subtitle I, "Federal Procurement Policy," and Division C, "Procurement." Title 41, including the titles, was enacted into positive law in 2011. *See* Pub. L. No. 111-350, 124 Stat. 3677 (2011). Section 4712 is also included in the Federal Acquisition Regulation for inclusion in all government contracts above a certain threshold. *See* Federal Acquisition Regulation 3.908-9.

Section 4712 prohibits federal contractors and grantees from "discharg[ing], demot[ing], or otherwise discriminat[ing] against" an employee in reprisal for making disclosures described in the Act. 41 U.S.C. § 4712(a)(1). To obtain relief under Section 4712, an employee must have (1) made a protected disclosure (2) to a qualifying person and (3) suffered a reprisal for making that protected disclosure. The employee must then "demonstrate[] that a disclosure or protected activity . . . was a contributing factor in the personnel action which was taken." *See* 5 U.S.C. § 1221(e)(1); 41 U.S.C. § 4712(c)(6) (adopting the "legal burdens of proof specified in section 1221(e) of title 5," the Whistleblower Protection Act). To avoid liability, the federal contractor must "demonstrate[] by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." *See* 5 U.S.C. § 1221(e)(2).

If an employee believes that they have suffered an unlawful reprisal for making a protected disclosure, the employee may submit a complaint to the office of the inspector general (OIG) of the agency involved. 41 U.S.C. § 4712(b)(1). The inspector general will investigate the complaint and submit a report of findings to the head of the agency, as well as to the complainant and the contractor or grantee. *Id.* The head of the agency then determines whether the contractor or grantee has violated Section 4712. The agency head must either "issue an order denying relief" or take action to remedy the reprisal. *Id.* § 4712(c)(1). Section 4712 provides for certain remedies, including monetary damages, to redress a complainant's injury.

If the agency denies relief to a complainant or has not issued a decision within the deadline set by the statute, "the complainant may bring a de novo action at law or equity against the contractor[] . . . in the appropriate district court of the United States." 41 U.S.C. § 4712(c)(2). Alternatively, "[a]ny person adversely affected or aggrieved by an order issued under [Section 4712(c)(1)] may obtain review of the order[] . . . in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred." *Id.* § 4712(c)(5). Review in the court of appeals "shall conform to chapter 7 of title 5," *i.e.*, the judicial review provisions of the Administrative Procedure Act. *Id.*

B. Factual Background

1. a. The Housing Improvement Program (HIP) is a safety net program targeting the neediest individual Indians residing within approved service areas. *See* 25

C.F.R. § 256.5; *see also* U.S. Dep't of the Interior, *Bureau of Indian Affairs Budget Justifications and Performance Information Fiscal Year 2022*, at App. 8-1. The HIP aims to improve the lives of qualified Indians by eliminating substandard housing and homelessness on or near federally recognized reservation communities. *Id.* The HIP is administered either by the Bureau of Indian Affairs or by a tribe pursuant to the Indian Self-Determination Act. *See* 25 C.F.R. § 256.12.

On September 19, 2017, the Pit River Tribal Council and the Department of the Interior's Bureau of Indian Affairs entered into a HIP self-determination contract with the Pit River Tribe for the administration of the HIP program for the period of September 19, 2017, to September 19, 2018, and that contract was subsequently amended to remain effective through December 31, 2020. *See* 2-ER-5–7 (OIG Report); *see also* 3-ER-66–74 (HIP contract). The contract was issued pursuant to the Indian Self-Determination Act. *See* 3-ER-73 (HIP contract) (citing Pub. L. No. 93-638, 88 Stat. 2203 (1975), later codified at 25 U.S.C. § 5301 *et seq.*).

b. The Tribal Transportation Program (TTP) is a funding program that was established for the benefit of federally recognized tribes to "to provide safe and adequate transportation and public roads" within or providing access to tribal lands. 23 U.S.C. §§ 201-202; 81 Fed. Reg. 78,546, 78,546-57 (Nov. 7, 2016). The TTP is governed by Department of the Interior regulations. *See* 23 U.S.C. §§ 202 (a)(6), (b)(2); 25 C.F.R. pt. 170. As directed by Congress, "[n]otwithstanding any other provision of law or any interagency agreement, program guideline, manual, or policy

directive, all [TTP] funds made available through the Secretary of the Interior" shall be made available "in accordance with the [Indian Self-Determination Act]." 23 U.S.C. § 202(b)(6)(A) (footnote omitted); *id.* § 202(b)(7).

In 2016, the Pit River Tribe entered into a TTP program agreement with the Bureau of Indian Affairs. *See* 2-ER-8 (OIG Report); *see also* 3-ER44-65 (TTP Agreement). Program agreements are a type of contracting instrument that permit Tribes to carry out the programmatic functions of the TTP "in accordance with the [Indian Self-Determination Act]." 81 Fed. Reg. 78,457 (Nov. 6, 2016). As required by the TTP authorizing statute and TTP regulations, the Tribe's TTP Agreement was made pursuant to 23 U.S.C. § 202 (a)(2)(B), the TTP regulations themselves, and as authorized by the Indian Self-Determination Act, for purposes of Federal Tort Claims Act coverage and application of the Prompt Payment Act. *See* 3-ER-44 (TTP Agreement); *see also* 3-ER-26.

2. Petitioner Samuel Kent was employed by the Pit River Tribe from September 2018 through mid-2019 as a contracts and grants specialist. 2-ER-6 (OIG Report). While working for the Tribe, petitioner raised concerns with tribal officials about the Tribe's management of HIP grant funds the Tribe received from the Bureau of Indian Affairs and also about the Tribe's handling of TTP grant funds. 2-ER-6–10 (OIG Report). Shortly after these complaints, the Tribe terminated petitioner's employment on July 11, 2019, for violations of tribal policy relating to his removal of

confidential and proprietary tribal documents from the Tribe's offices. 2-ER-12 (OIG Report).

On October 28, 2019, petitioner submitted a complaint pursuant to Section 4712 to the Department of the Interior's Office of the Inspector General alleging, *inter alia*, that his employment was terminated as a reprisal for protected disclosures, namely his reports of concerns about the Tribe's handling of the HIP funds and TTP funds. 2-ER-5 (OIG Report). OIG referred petitioner's allegations of fraud and mismanagement to the Bureau of Indian Affairs, for investigation and response. *Id.*

OIG subsequently conducted an investigation into petitioner's claim that he was fired in retaliation for disclosures protected by Section 4712. The OIG investigation proceeded on the assumption that "41 U.S.C. § 4712 applied to any and all Federal grants received by the Tribe, regardless of whether those grants were made pursuant to or under the authority of [Indian Self-Determination Act]." 2-ER-5 (OIG Report).

OIG issued its Report of Investigation to the Secretary of the Interior, petitioner, and the Tribe on December 6, 2021. 2-ER-4 (OIG Report). The OIG Report concluded that (1) petitioner had made protected disclosures as defined by Section 4712, 2-ER-16 (OIG Report); (2) that "management officials responsible for the termination of Kent's employment knew about the protected disclosures;" *id.*; (3) that he was terminated after he made those disclosures, *id.*; and (4) that the temporal proximity of his protected activity and his termination satisfied his burden to show

that his disclosures were a "contributing factor" to his termination, 2-ER-17 (OIG Report). The OIG Report also concluded that the Tribe had "provided some evidence in support of [the] decision to terminate Kent's employment," namely, his removing confidential tribal documents and personnel records in violation of tribal policy, but the Report ultimately found that "the Tribe did not meet its burden of showing by clear and convincing evidence that it would have taken the same adverse action against Kent absent his protected disclosures." 2-ER18–23 (OIG Report) (formatting and capitalization altered).

C. Agency Determination

Darryl LaCounte, the Director of the Bureau of Indian Affairs, issued the agency's final determination on January 5, 2022. 1-ER-2 (Final Agency Decision).

The agency's decision noted that the OIG Report "had assumed without deciding that 41 U.S.C. § 4712 applied to any and all Federal grants received by the Tribe, regardless of whether those grants were made pursuant to or under the authority of [the Indian Self-Determination Act]." 1-ER-2 (Final Agency Decision) (quotation marks omitted). The decision reasoned that "it is clear that 41 U.S.C. § 4712 does not apply to Indian Self-Determination and Education Assistance Act agreements made under [the Indian Self-Determination Act], including the HIP and TTP administered by [the Tribe] in this case." *Id.* Because the whistleblower-retaliation provision is not applicable to his complaint, the agency denied petitioner's request for relief under Section 4712. *Id.*

SUMMARY OF ARGUMENT

Petitioner seeks review of the Department of the Interior's decision on his whistleblower-retaliation complaint pursuant to 41 U.S.C. § 4712. The agency correctly determined that Section 4712 did not apply by operation of the provision of the Indian Self-Determination Act that exempts contracts administered under the Act from federal laws and regulations relating to contracting, procurement, and acquisition, unless they expressly apply to tribes. *See* 25 U.S.C. § 5324(a)(1).

In order to maximize tribal autonomy and reduce the burdens of federal procurement and acquisition law on tribes administering federal programs and services through self-determination agreements, the Indian Self-Determination Act exempts those agreements from federal contracting and procurement law unless those laws expressly apply to tribes. Section 4712 is contracting or procurement law within the scope of the Act's exemption provision. *See* 25 U.S.C. § 5324(a)(1). Section 4712's text, statutory context, and purpose demonstrate that it is a contracting or procurement law. And the Indian Self-Determination Act's other provisions underscore this conclusion. Because Section 4712 does not expressly apply to Indian tribes, the Indian Self-Determination Act bars the application of Section 4712 to the agreements that gave rise to petitioner's whistleblower complaint.

Petitioner's principal argument is that Section 4712 does not expressly exclude self-determination agreements. That argument, however, reverses the inquiry: the dispositive question is whether the Indian Self-Determination Act exempts the Tribe

from Section 4712. The agency correctly determined that it does. Petitioner's remaining challenges to the agency decision are without merit.

STANDARD OF REVIEW

Agency orders issued pursuant to Section 4712 are reviewed under the familiar standards of the Administrative Procedure Act. *See* 41 U.S.C. § 4712(c)(5) ("Review shall conform to chapter 7 of title 5."). Under those standards, a court may not set aside agency action unless it is based on factual findings "unsupported by substantial evidence," 5 U.S.C. § 706(2)(E), or unless the "agency action, findings, and conclusions [are] found to be[] . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). This Court's standard of review for agency actions is highly deferential. *See Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1236 (9th Cir. 2001) ("To determine whether an agency violated the arbitrary and capricious standard, this court must determine whether the agency articulated a rational connection between the facts found and the choice made. The court is not empowered to substitute its judgment for that of the agency." (citations omitted)). Legal questions raised in a petition for review are subject to de novo review. *Cf. Tomczyk v. Garland*, 25 F.4th 638, 643 (9th Cir. 2022).

ARGUMENT

The Agency Properly Determined that Section 4712 Does Not Apply to Petitioner's Complaint.

Federal contracting and procurement laws do not apply to contracts, grants, and cooperative agreements made in accordance with the Indian Self-Determination Act except when those laws expressly apply to Indian tribes. Petitioner's whistleblower complaint arises out of tribal agreements administered in accordance with the Indian Self-Determination Act. Section 4712's whistleblower protection provision is a federal procurement provision that applies to all grantees and contractors and does not expressly apply to tribes. The Indian Self-Determination Act therefore bars the application of Section 4712's whistleblower-protection provision to the Tribe's administration of those agreements.

A. The Indian Self-Determination Act bars the application of Section 4712 to these self-determination contracts.

Petitioner's whistleblower-retaliation complaint arises from the Tribe's HIP and TTP agreements with the Department of the Interior, which are authorized and administered pursuant to the Indian Self-Determination Act. The Act provides that, with exceptions not applicable to these agreements, self-determination contracts between an Indian tribe and the federal government are not subject to federal laws and regulations relating to contracting, procurement, or acquisition, unless those laws and regulations expressly apply to tribes. *See* 25 U.S.C. § 5324(a)(1). Because the whistleblower-retaliation provision is a federal contracting or procurement law and it

does not expressly apply to tribes, that provision is not applicable to petitioner's complaint.

1. Section 4712 is a contracting or procurement law within the meaning of the Indian Self-Determination Act's provision exempting self-determination contracts from those laws, 25 U.S.C. § 5324(a)(1).

Section 4712 is on its face a federal contracting or procurement law. By its terms, Section 4712 applies to any federal "contractor, subcontractor, grantee, subgrantee, or personal services contractor." 41 U.S.C. § 4712(a)(1). *See San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236, 1240 (9th Cir. 2022) ("The starting point for our interpretation of a statute is always its language." (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989))). The provision is aimed at preventing waste, fraud, and abuse in government contracts and grants. *See* S. Rep. No. 114-270, at 1 (2016) (noting that purpose of the provision "is to improve the whistleblower rights of Federal contractors working on Federal contracts, grants and other programs"). Section 4712 operates a contracting law and is included, by operation of the Federal Acquisition Regulation, as a contract provision in government contracts above a certain threshold. *See* Federal Acquisition Regulation 3.908-9.

In addition to the text of the provision, Section 4712's context and "place in the overall statutory scheme" confirm that it is a contracting or procurement law. *San Carlos Apache Tribe*, 53 F.4th at 1240 (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015)). Congress codified Section 4712 in title 41, the title of the U.S. Code on

public contracts, and within subtitle I, "Federal Procurement Policy," and Division C, "Procurement." The Supreme Court has held that "the heading of a section" is a "tool[] available for the resolution of a doubt about the meaning of a statute," *Yates v. United States*, 574 U.S. 528, 540 (2015) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)), and has also looked to a provision's placement within the Code to gauge its meaning and scope, *id.* at 540-41. Here, the whistleblower provision's heading and placement confirm that Section 4712 is a contracting and or procurement law.

The context of the Indian Self-Determination Act reinforces the conclusion that Section 4712 is a contracting or procurement law within the meaning of the Act. The Indian Self-Determination Act's treatment of construction contracts within the same subsection as the exemption from federal contracting law illustrates the point. The Act makes certain acquisition laws applicable to construction contracts. *See* 25 U.S.C. § 5324(a)(3)(A) ("With respect to a construction contract . . . , the provisions of division B (except sections 1123, 2303, 2304, and 2313) of subtitle I of title 41 and the regulations relating to acquisitions promulgated under division B (except sections 1123, 2303, 2304, and 2313) of subtitle I of title 41 shall apply" under certain conditions.) That provision of the Act also specifies that "no Federal law [in a list enumerated in clause (ii)] or any other provision of Federal law (including an Executive order) relating to acquisition by the Federal Government shall apply to a construction contract that a tribe or tribal organization enters into under this chapter,

unless expressly provided in such law." *Id.* § 5324(a)(3)(C)(i). The enumerated list includes Division C of title 41, where Section 4712 is codified, making clear that Section 4712 is an acquisition law that would otherwise apply to construction contracts under the Indian Self-Determination Act. *id.* § 5324(a)(3)(C)(ii). Accordingly, the treatment of Section 4712 in the Act confirms that it is a procurement or acquisition law within the scope of the Indian Self-Determination Act.

This reading of the Indian Self-Determination Act is consistent with its purposes to maximize tribal administration and autonomy in the provision of services through self-determination agreements. As the regulations explain, "Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction, planning, conduct and administration of educational as well as other Federal programs and services to Indian communities." 25 C.F.R. § 900.3(a)(1); *id.* § 900.3(b)(1) ("The Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs."). To that end, the Act "relieve[s] tribes and the Government of the technical burdens that often accompany procurement." *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 640 (2005); S. Rep. No. 100-274, at 7 (1987) (noting that application of procurement rules to contracts with tribes "resulted in excessive paperwork and unduly burdensome

reporting requirements"). Exempting these agreements from Section 4712 is consistent with preserving tribal autonomy to execute programs subject to self-determination agreements.

Finally, to the extent that the provision is ambiguous on whether the Indian Self-Determination Act exempts Section 4712, the Act provides that the ambiguity should be interpreted in favor of the Tribe. *See* 25 U.S.C. § 5321(g) ("[E]ach provision of this chapter and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe."); *see also Tavares v. Whitehouse*, 851 F.3d 863, 877 (9th Cir. 2017) (any reasonable ambiguity should be construed in favor of the tribes).

2. The Indian Self-Determination Act precludes the application of contracting and procurement laws except when those laws expressly apply to Indian tribes. *See* 25 U.S.C. § 5324(a)(1) (contracting laws do not apply "except to the extent that such laws expressly apply to Indian tribes"). Section 4712 does not expressly apply to tribes by its terms. Section 4712 does not mention tribes in its text or provide any other express indication that the provision would apply notwithstanding the Indian Self-Determination Act's exemption of federal procurement law. *Cf. Chippewa Cree Tribe of Rocky Boy's Reservation v. U.S. Dep't of the Interior*, 900 F.3d 1152, 1158 (9th Cir. 2018) (concluding that a whistleblower-retaliation provision in a different statute "clear[ly]"

applied to tribes where the statute required self-determination agreements to include the whistleblower-retaliation provision).

Because Section 4712 is a federal contracting or procurement law that does not expressly apply to Indian tribes, the Indian Self-Determination Act, 25 U.S.C. § 5324(a)(1), exempts the Tribe's HIP and TTP agreements from Section 4712.[1]

B. Petitioner's arguments that the Indian Self-Determination Act does not apply to his whistleblower-retaliation complaint lack merit.

1. Petitioner's principal argument is that Section 4712 does not itself contain an exception for the self-determination grants. Opening Br. 23-25 ("Contrary to the [Bureau of Indian Affairs] Director's construction of the Act, ISDEAA contracts are not included in the provisions of [Section 4712] containing the sole exception to the broad scope of individuals Congress intended to provide whistleblower protections."); Opening Br. 27 ("Respondent's interpretation of the [Section 4712] would require this Court to accept the proposition that Congress chose *not* to include any textual indication of their intent to exclude ISDEAA agreements from [Section 4712's] coverage in the two separate subsections dedicated to defining the [Section 4712's] limitations."). Petitioner's argument has the inquiry backwards. The Indian Self-Determination Act exempts the application of Section 4712 to the Tribe: the Act provides that self-determination contracts are not "subject to Federal contracting or

[1] Accordingly, the Court need not address whether tribal sovereignty would bar the application of Section 4712.

cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes." 25 U.S.C. § 5324(a)(1). The exemption from federal contracting law applies "[n]otwithstanding any other provision of law." *Id.* § 5324(a); *cf. United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) ("[A]s a general proposition[,] statutory 'notwithstanding' clauses broadly sweep aside potentially conflicting laws."). Petitioner's contention that Section 4712 does not itself exempt self-determination agreements from the coverage of that provision does not address the question whether the Indian Self-Determination Act exempts Section 4712's application. Opening Br. 37-38. Nor can Section 4712's expansive terms and legislative history, Opening Br. 37-40, override the Indian Self-Determination Act's command that contracting laws, including Section 4712, do not apply to self-determination contracts.

Congress's 1994 amendment to the provision exempting self-determination contracts from federal contracting law confirm this reading. Prior to the amendment, the Indian Self-Determination Act provided that self-determination contracts "shall be in accordance with all federal contracting laws and regulations" except that the agency retained discretion to waive any such laws that it "determine[d] are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act." Pub. L. 93-638, § 106(a), 88 Stat. at 2210. In amending the Act, Congress reversed the presumption that federal contracting laws would apply to

self-determination agreements, mandating that those laws apply only when they expressly provide for application to tribes. 25 U.S.C. § 5324(a)(1),

For similar reasons, petitioner cannot show that the agency's interpretation of the Indian Self-Determination Act and Section 4712 was arbitrary and capricious; a new substantive rule; or "an unlawful agency action that exceeded the authority delegated to either the Secretary of the U.S. Department of the Interior (Secretary) or the [Bureau of Indian Affairs] Director." Opening Br. 4-5.

2. Petitioner's comparison of Section 4712 with a similar provision found in the American Reinvestment and Recovery Act (Recovery Act) only underscores that Congress did not intend for Section 4712 to apply to tribes in these circumstances. Opening Br. 37-38. Unlike Section 4712, the Recovery Act's whistleblower-protection provision expressly applies to tribes. *See* Pub. L. No. 111-5, § 1553, 123 Stat. 115, 297-302 (2009); *see also id.* § 1610(b), 123 Stat. at 304-05. As this Court explained in reviewing a dispute under the Recovery Act, that statute "makes clear that it applies to tribes." *Chippewa Cree Tribe*, 900 F.3d at 1158. Indeed, that statute required that "[a]ll projects to be conducted under the authority of the Indian Self-Determination and Education Assistance Act and the Recovery Act" be identified by the agency and required that the agreements incorporate the provisions of the Recovery Act, including the whistleblower retaliation provision. *See* Pub. L. No. 111-5, § 1610(b), 123 Stat. at 304-05. Section 4712 contains no similar express application to tribes.

3. Petitioner also erroneously contends that the TTP agreement is not a self-determination contract and, therefore, the Indian Self-Determination Act's exemption for federal procurement and contracting law does not apply. *See* Opening Br. 47-48 (arguing that the TTP agreement was authorized under Public Law 112-141 instead of the Indian Self-Determination Act); Opening Br. 49 & n. 88 (arguing that TTP agreements are subject to different regulations than self-determination agreements); Opening Br. 49 (explaining that TTP agreement is not the same as Indian Self-Determination Act model agreement). Petitioner's argument fails at each turn.

First, as petitioner acknowledges, the TTP agreement was entered into under authority granted pursuant to Public Law No. 112-141, the authorizing statute for the Tribal Transportation Program. *See* Pub. L. No. 112-141, sec. 1101, 126 Stat. 405, 414 (2012); *see also id.* sec. 1119, §§ 201-202, 126 Stat. at 473-86 (authorization and codification of Tribal Transportation Program). That law, codified at 23 U.S.C. §§ 201-202, requires that all funds are made available to tribes "in accordance with the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 *et seq.*)." 23 U.S.C. § 202(b)(6)(A). Second, that TTP agreements may be subject to additional regulatory requirements beyond those required for other self-determination agreements does not alter the conclusion that the Indian Self-Determination Act applies to TTP agreements. Finally, nothing in the Indian Self-Determination Act requires the agency to use a model contract for all programs. Thus even if petitioner were correct that the Pit River Tribe's TTP agreement was not identical to a model

agreement, that would not deprive the TTP agreement of its status as a self-determination agreement or render inapplicable the Indian Self-Determination Act's exemption from federal procurement and contracting laws.

4. Petitioner also faults the agency's decision for failing to provide a lengthy explanation, *see* Opening Br. 44-45, and for purportedly deviating from advice given in an internal memorandum to the Office of Inspector General, *see* Opening Br. 49-51. Neither argument has merit.

The agency's final decision adequately set forth its legal conclusion that the Indian Self-Determination Act prevented the application of Section 4712 to petitioner's complaint. The agency's decision to deny the complaint on threshold, legal grounds did not require extensive explanation or a review of the facts or legal merits of petitioner's complaint.

Nor does petitioner's reference to internal advice to OIG advance his claim. The agency final decisionmaker is charged under Section 4712 with making the ultimate decision concerning a whistleblower's complaint. Under the statute, the Office of Inspector General is responsible for conducting an investigation and "submit[ting] a report of the findings of the investigation." 41 U.S.C. § 4712(b)(1). The agency decisionmaker is charged with making a determination "whether there is sufficient basis to conclude" that an unlawful reprisal has occurred. *Id.* § 4712(c)(1). The agency is free, therefore, to come to a different conclusion than OIG, and,

similarly, the decisionmaker is not bound by any preliminary or internal advice to OIG.

5. Finally, petitioner contests the delegation of authority to decide his complaint to head of the Bureau of Indian Affairs. Opening Br. 52-55. Section 4712 authorizes "the head of the executive agency concerned" to determine whether an unlawful reprisal occurred and order appropriate relief. *See* 41 U.S.C. § 4712(c)(1). Agency heads routinely delegate the authority to resolve Section 4712 disputes to administrative law judges or other officials within the agency. *See, e.g.*, *Texas Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350 (5th Cir. 2021) (reviewing an administrative law judge's determination under Section 4712); *DuPage Reg'l Office of Educ. v. U.S. Dep't of Educ.*, 58 F.4th 326, 329 (7th Cir. 2023) (same); *see also Chippewa Cree Tribe*, 900 F.3d 1152 (reviewing determination under Recovery Act whistleblower provision delegated to Department of the Interior's Solicitor). Nothing in Section 4712 requires a personal determination by the head of the agency or prevents the agency head from delegating that decision-making authority to another agency official.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, respondents state that they know of no related case pending in this Court.

s/ Jaynie Lilley
Jaynie Lilley

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,182 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

s/ Jaynie Lilley
JAYNIE LILLEY

ADDENDUM

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25 U.S.C. § 5324. Contract or grant provisions and administration

(a) Applicability of Federal contracting laws and regulations; waiver of requirements

(1) Notwithstanding any other provision of law, subject to paragraph (3), the contracts and cooperative agreements entered into with tribal organizations pursuant to section 5321 of this title shall not be subject to Federal contracting or cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes.

(2) Program standards applicable to a nonconstruction self-determination contract shall be set forth in the contract proposal and the final contract of the tribe or tribal organization.

(3)(A) With respect to a construction contract (or a subcontract of such a construction contract), the provisions of division B (except sections 1123, 2303, 2304, and 2313) of subtitle I of Title 41 and the regulations relating to acquisitions promulgated under division B (except sections 1123, 2303, 2304, and 2313) of subtitle I of Title 41 shall apply only to the extent that the application of such provision1 to the construction contract (or subcontract) is--

(i) necessary to ensure that the contract may be carried out in a satisfactory manner;

(ii) directly related to the construction activity; and

(iii) not inconsistent with this chapter.

(B) A list of the Federal requirements that meet the requirements of clauses (i) through (iii) of subparagraph (A) shall be included in an attachment to the contract pursuant to negotiations between the Secretary and the tribal organization.

(C)(i) Except as provided in subparagraph (B), no Federal law listed in clause (ii) or any other provision of Federal law (including an Executive order) relating to acquisition by the Federal Government shall apply to a construction contract that a tribe or tribal organization enters into under this chapter, unless expressly provided in such law.

(ii) The laws listed in this paragraph are as follows:

(I) Chapters 1 to 11 of Title 40 and division C (except sections 3302, 3307(e), 3501(b), 3509, 3906, 4710, and 4711) of subtitle I of Title 41.

(II) Section 6101 of Title 41.

(III) Section 9(c) of the Act of Aug. 2, 1946 (60 Stat. 809, chapter 744).

(IV) Division C (except sections 3302, 3307(e), 3501(b), 3509, 3906, 4710, and 4711) of subtitle I of Title 41.

(V) Section 13 of the Act of Oct. 3, 1944 (58 Stat. 770; chapter 479).

(VI) Chapters 21, 25, 27, 29, and 31 of Title 44.

(VII) Section 3145 of Title 40.
(VIII) Chapter 65 of Title 41.
(IX) Chapter 67 of Title 41.
(X) The Small Business Act (15 U.S.C. 631 et seq.).
(XI) Executive Order Nos. 12138, 11246, 11701 and 11758.

(b) Payments; transfer of funds by Treasury for disbursement by tribal organization; accountability for interest accrued prior to disbursement

Payments of any grants or under any contracts pursuant to sections 5321 and 5322 of this title may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this subchapter. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

. . .

(p) Interpretation by Secretary

Except as otherwise provided by law, the Secretary shall interpret all Federal laws (including regulations) and Executive orders in a manner that facilitates, to the maximum extent practicable--

(1) the inclusion in self-determination contracts and funding agreements of--

(A) applicable programs, services, functions, and activities (or portions thereof); and

(B) funds associated with those programs, services, functions, and activities;

(2) the implementation of self-determination contracts and funding agreements; and

(3) the achievement of Tribal health objectives.

41 U.S.C. § 4712. Enhancement of contractor protection from reprisal for disclosure of certain information

(a) Prohibition of reprisals.--

(1) In general.--An employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

(2) Persons and bodies covered.--The persons and bodies described in this paragraph are the persons and bodies as follows:

(A) A Member of Congress or a representative of a committee of Congress.

(B) An Inspector General.

(C) The Government Accountability Office.

(D) A Federal employee responsible for contract or grant oversight or management at the relevant agency.

(E) An authorized official of the Department of Justice or other law enforcement agency.

(F) A court or grand jury.

(G) A management official or other employee of the contractor, subcontractor, grantee, subgrantee, or personal services contractor who has the responsibility to investigate, discover, or address misconduct.

(3) Rules of construction.--For the purposes of paragraph (1)--

(A) an employee who initiates or provides evidence of contractor, subcontractor, grantee, subgrantee, or personal services contractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) Investigation of complaints.--

(1) Submission of complaint.--A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the executive agency involved. Unless

the Inspector General determines that the complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor, subcontractor, grantee, subgrantee, or personal services contractor concerned, and the head of the agency.

(2) Inspector General action.--

(A) Determination or submission of report on findings.--Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) Extension of time.--If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

(3) Prohibition on disclosure.--The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is--

(A) made with the consent of the person alleging the reprisal;

(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

(C) necessary to conduct an investigation of the alleged reprisal.

(4) Time limitation.--A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.

(c) Remedy and enforcement authority.--

(1) In general.--Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the executive agency concerned shall determine whether there is sufficient basis to conclude that the contractor, subcontractor, grantee, subgrantee, or personal services contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

(A) Order the contractor, subcontractor, grantee, subgrantee, or personal services contractor to take affirmative action to abate the reprisal.

(B) Order the contractor, subcontractor, grantee, subgrantee, or personal services contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor, subcontractor, grantee, subgrantee, or personal services contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

(D) Consider disciplinary or corrective action against any official of the executive agency, if appropriate.

(2) Exhaustion of remedies.--If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor, subcontractor, grantee, subgrantee, or personal services contractor to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(3) Admissibility of evidence.--An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

(4) Enforcement of orders.--Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency concerned shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the executive agency.

(5) Judicial review.--Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the executive agency. Review shall conform to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforcement of the order of the head of an executive agency, unless a stay is specifically entered by the court.

(6) Burdens of proof.--The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an executive agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

(7) Rights and remedies not waivable.--The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

(d) Notification of employees.--The head of each executive agency shall ensure that contractors, subcontractors, grantees, subgrantees, and personal services contractors of the agency inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

(e) Construction.--Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

(f) Exceptions.--(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor of an element of the intelligence community if such disclosure--

(A) relates to an activity of an element of the intelligence community; or

(B) was discovered during contract, subcontract, grantee, subgrantee, or personal services contractor services provided to an element of the intelligence community.

(g) Definitions.--In this section:

(1) The term "abuse of authority" means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract or grant of such agency.

(2) The term "Inspector General" means an Inspector General appointed under chapter 4 of title 5 and any Inspector General that receives funding from, or has oversight over contracts or grants awarded for or on behalf of, the executive agency concerned.

(h) Construction.--Nothing in this section, or the amendments made by this section,1 shall be construed to provide any rights to disclose classified information not otherwise provided by law.