No. 02-196

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Respondents.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, applies to contracts between the National Park Service and private parties that provide concession services, including the development, operation, and maintenance of facilities such as restaurants, lodges, and gift shops, in the national parks.

RULES 24.1(b) AND 29.6 STATEMENT

In addition to the National Park Hospitality Association, plaintiffs/appellants in the court of appeals (in four consolidated cases) were Amfac Resorts L.L.C. (since renamed Xanterra Parks & Resorts L.L.C.), ARAMARK Sports and Entertainment Services, Inc., and Hamilton Stores, Inc. In addition to the United States Department of the Interior, respondents are Gale Norton, Secretary of the Interior, Fran P. Mainella, Director of the National Park Service, and Delaware North Park Services, Inc. (which intervened as a defendant in this and one of the consolidated cases).

The National Park Hospitality Association ("NPHA") is a non-profit trade association that has no parent corporations or stock. The NPHA represents concessioners who operate concessions, such as restaurants, lodges, recreational services, and gift shops, in the national parks.

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MISCELLANEOUS

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 282 F.3d 818. The Memorandum Opinion of the district court addressing the issue before this Court (Pet. App. 35a-92a) is reported at 142 F. Supp. 2d 54. Other opinions of the district court on unrelated issues are reported at 143 F. Supp. 2d 7 and 150 F. Supp. 2d 96.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2002, and a timely petition for rehearing was denied on May 8, 2002 (Pet. App. 93a-94a). The petition for a writ of certiorari was filed on August 6, 2002, and was granted on November 12, 2002 (J.A. 28). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(a) of the Contract Disputes Act of 1978, 41 U.S.C. § 602(a), provides:

> (a) Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28, United States Code) entered into by an executive agency for –
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property.

36 C.F.R. § 51.3 provides in relevant part:

> *A concession contract (or contract)* means a binding written agreement between the Director [of the National Park Service] and a concessioner entered under the authority of [36 C.F.R. pt. 51] or the [National Park Service Concessions Policies Act of 1965, Pub. L. No. 89-249] that authorizes the concessioner to provide certain visitor services within a park area under specified terms and conditions. *Concession contracts are not contracts within the meaning of 41 U.S.C. 601 et seq. (the Contract Disputes Act)* and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions.

(second emphasis added).

STATEMENT

This case concerns the applicability of the Contract Disputes Act of 1978 ("CDA") to concessions contracts, and in particular to contracts between the National Park Service ("NPS") and the private concessioners who contract to provide visitor services and to operate and maintain facilities in the national parks. The language of the CDA broadly covers all contracts entered into by a federal agency for the procurement of personal property, services, or the repair and maintenance of real property. Despite the CDA's breadth, the NPS has asserted by regulation that the statute does not apply to its concessions contracts. In upholding that regulation, the District of Columbia Circuit ignored the text of the CDA and disagreed with the views of the Department of the Interior's own Board of Contract Appeals.

As Congress recognized when it passed the CDA, "[h]ow [government] procurement functions has a far-reaching impact on the economy of our society and on the success of

many major Government programs." S. REP. NO. 95-1118, at 4, reprinted in 1978 U.S.C.C.A.N. 5235, 5238. The D.C. Circuit's decision is based on a cramped interpretation of the CDA that undermines this important federal statute.

1. The Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383, 41 U.S.C. §§ 601-613, on its face applies to *all* government contracts for "the procurement of property, other than real property in being," "the procurement of services" or "the procurement of construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a)(1)-(3). The statute was designed to replace a system of dispute resolution procedures based on "[t]he predilections of different agencies" (S. REP. NO. 95-1118, at 3) that was "often too expensive and time consuming for the efficient and cost-effective resolution of small claims and, on the other hand, often fail[ed] to provide the procedural safeguards and other elements of due process that should be the rights of litigants" (*id.* at 4). Thus, the CDA has "broad application in order to unify the diverse and often inconsistent procedures [previously] existing among the many procuring agencies." *Id.* at 17.

The CDA "provides a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." *Id.* at 1; see also H.R. REP. NO. 95-1556, at 5. Under the CDA, parties contracting with the government have a number of important procedural and substantive rights. The CDA establishes that all claims "relating to" a contract covered by the CDA are subject to the Act's administrative dispute processes. See 41 U.S.C. § 605(a). Most importantly, those processes provide due process protection to contractors by mandating that neutral arbiters review final decisions reached by the agency's contracting officer. In particular, the contractor has the choice to appeal the contracting officer's decision either to the agency's "Board of Contract Appeals" (see 41 U.S.C. §§ 606, 607)) or to the Court of Federal Claims (see 41

U.S.C. § 609(a)(1)), both of which are statutorily required to review the decision "de novo" (41 U.S.C. § 609(a)(3)). Substantively, a major advantage of the CDA over the hodge-podge of dispute-resolution schemes it replaced is that contractors are entitled to interest on any amount found due to them on their claims. See 41 U.S.C. § 611; *Oroville-Tonasket Irrigation Dist.* v. *United States*, 33 Fed. Cl. 14, 23 n.3 (1995).

2. When the NPS was created in 1916 it was charged with two basic mandates: "to oversee our national parks and to 'conserve the scenery and the natural and historic objects and the wild life therein and * * * provide for the enjoyment of the same.'" Pet. App. 49a (quoting 16 U.S.C. § 1 (omission in original)). In the Act creating the NPS, "Congress authorized the Interior Secretary to 'grant privileges, leases, and permits for the use of land for the accommodation of visitors' to each of the 'various parks, monuments, or other reservations' under the Secretary's authority." Pet. App. 2a (quoting An Act to Establish a National Park Service, ch. 408, 39 Stat. 595 (1916) ("NPS Organic Act")).

"[P]rovid[ing] for the enjoyment" of the national parks (16 U.S.C. § 1) generally requires that visitors be offered various services throughout the parks. Usually, these services are delivered in park commercial facilities, such as lodges, restaurants, and retail outlets, that are owned by the federal government. Because the government has been unable or unwilling to develop the expertise or assume the huge financial burdens and other responsibilities associated with the provision of these visitor services, throughout its history the NPS has relied on private concessions contractors to build, maintain, and operate its visitor-service facilities and to provide many of the other services that the public typically associates with a national park, such as outfitter and guide services. See Pet. App. 49a (NPS has always "relied on private concessioners for the provision of 'lodging, food, merchandising, transportation, outfitting and guiding, and similar

activities.'") (quoting Concession Contracts, 65 Fed. Reg. 20,630 (Apr. 17, 2000)). The national parks concessions program, therefore, has always been a partnership between the NPS and concessions contractors to develop and provide access to the national parks for the enjoyment of the public. In this way, the NPS can concentrate on its other mandate under the NPS Organic Act – the conservation of park natural and historic assets.

Between 1916 and 1965, although Congress had authorized concessions contracting by the NPS, there was no specific statutory scheme governing the relationship between the agency and concessioners. In light of growing industry and governmental concern about the NPS's concessions-contracting policies (see Pet. App. 3a-4a), Congress enacted the National Park Service Concessions Policy Act of 1965 ("1965 Act"), Pub. L. No. 89-249, 79 Stat. 969 (1965), to govern concessions contracts. The 1965 Act's primary purpose was to codify preexisting NPS concession policy in order to assure concessioners that their investments and contract rights enjoyed legal protection. See S. REP. NO. 89-765, reprinted in 1965 U.S.C.C.A.N. 3489, 3489 (principal purpose of the 1965 Act was "to put into statutory form policies which * * * have heretofore been followed by the [NPS] in administering concessions"). Among other things, the 1965 Act afforded concessioners a preferential right of renewal for their concessions contracts (16 U.S.C. § 20d) and authorized the NPS to grant other specified contractual inducements for making investments in the national parks. See Pet. App. 4a, 50a-51a. In exchange, "[c]oncessioners paid the government a franchise fee * * * for the privilege of operating on federal land." *Id.* at 4a.

In 1998, Congress repealed the 1965 Act and passed a replacement statute, the National Parks Omnibus Management Act of 1998 ("1998 Act"), Pub. L. No. 105-391, 112 Stat. 3497 (codified with certain exceptions at 16 U.S.C. §§ 5951-5966). The 1998 Act altered various technical aspects of the

system under which the NPS enters into private concessions contracts to provide visitor services in the national parks. Like the 1965 Act before it, the 1998 Act sought to further the mission of the national park system by protecting the parks for the future while ensuring that the agency continued to provide the appropriate "accommodations, facilities, and services" that are "necessary and appropriate for public use and enjoyment." See 16 U.S.C. § 5951(b)(1). In particular, the 1998 Act specified that the NPS "shall utilize concessions contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to units of the National Park System." 16 U.S.C. § 5952. Although the 1998 Act expressly addressed the applicability of certain other statutes (see, *e.g.*, 16 U.S.C. § 5962 (40 U.S.C. § 303b does not apply to contracts under the 1998 Act)), it did not purport to exempt NPS concessions contracts from the scope of the CDA.

The NPS thereafter issued regulations implementing the 1998 Act (see Concession Contracts, 65 Fed. Reg. 20,630 (Apr. 17, 2000) (codified at 36 C.F.R. pt. 51)), as well as a model "Standard Concession Contract" (65 Fed. Reg. 26,052 (May 4, 2000)). These regulations declare that:

> Concession contracts are not contracts within the meaning of 41 U.S.C. 601 *et seq*. (the Contract Disputes Act) * * *.

36 C.F.R. § 51.3.

3. In November and December 2000, the National Park Hospitality Association ("NPHA"), a non-profit trade association that represents many concessioners who do business in the national parks, and three individual concessioners filed separate actions challenging aspects of the NPS regulations and Standard Concession Contract. Among other claims, the NPHA and the individual plaintiffs (collectively, "NPHA") challenged 36 C.F.R. § 51.3 as being contrary to the CDA. See 5 U.S.C. § 706(2); 28 U.S.C. § 1491(b)(4). The NPHA

alleged that the regulation improperly excluded NPS concessions contracts from the CDA, despite (1) the CDA's plain language, legislative purpose, and legislative history; (2) contrary decisions of the Federal Circuit and its predecessor (the Court of Claims); (3) contrary decisions of the Court of Federal Claims and the Department of Interior's Board of Contract Appeals ("IBCA"); (4) the position taken by the NPS in at least one prior reported decision on a concessions contract dispute; and (5) the obvious consequent ability, if the regulation were upheld, of virtually any agency to employ similar means to circumvent the CDA.

The cases were consolidated in the district court. On May 23, 2001, the court granted summary judgment in the NPS's favor in most respects, and in particular held that the CDA does not apply to concessions contracts. See Pet. App. 68a-72a. The court acknowledged that in an NPS concessions contract "the government is receiving services" and "is contracting for the provision of amenities to the visitors of its national parks" (*id.* at 68a), thus fulfilling its statutory obligation to accommodate visitors (see generally 16 U.S.C. §§ 1, 5951). The court also acknowledged that "because the concession contracts contain various terms relating to the stewardship of concession areas, * * * it can be said that the government is also bargaining for the maintenance of real property." Pet. App. 68a. Despite these conclusions, the court determined that the CDA is ambiguous as to whether it applies to concessions contracts. See *id.* at 68a-69a. The court then afforded *Chevron* deference to the NPS and concluded that 36 C.F.R. § 51.3 was a permissible interpretation of the CDA. See Pet. App. 70a.

The District of Columbia Circuit affirmed in relevant part. At the outset, the court of appeals held that the district court's rationale was erroneous: the NPS "does not administer the Contract Disputes Act, and thus may not have inter-

pretative authority over its provisions." Pet. App. 27a.[1] Accordingly, the court of appeals agreed with the NPHA that the NPS was not entitled to *Chevron* deference in its interpretation of the CDA. Nevertheless, the court upheld the agency's determination that the CDA does not apply to concessions contracts:

> The primary purpose of concessions contracts is to permit visitors to enjoy national parks in a manner consistent with preservation of the parks. 16 U.S.C. § 5951. That the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep these contracts into the ambit of the Contract Disputes Act.

Id. at 29a. In the D.C. Circuit's view, concessions contracts do not fall within the CDA because their purpose is to benefit "park area visitors," rather than the government itself. *Id*. at 27a.

SUMMARY OF THE ARGUMENT

This case presents a straightforward question of statutory interpretation. The Contract Disputes Act by its terms applies to any contract for "the procurement of services" or "the procurement of construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a)(2), (3). NPS concessions contracts fall comfortably within these provisions; they uniformly involve the procurement of services, and usually also involve the procurement of work related to government-owned facilities within the national parks. Thus, NPS concessions contracts are subject to the CDA, and the concessioners who agree to provide services within the national

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[1] To the extent Congress granted limited authority to implement and interpret the CDA, it was to the Administrator of the Office of Federal Procurement Policy, not to the Secretary of the Interior. See 41 U.S.C. §§ 607(h), 608(f).

parks are entitled to the statute's substantive and procedural protections.

Rather than abide by the plain language of the CDA, the NPS has created a series of putative exceptions to the statute that, in the agency's view, exempt its concessions contracts from the Act. In particular, the agency claims that only contracts involving the expenditure of government funds are subject to the CDA. But there is no statutory basis for this exception. Furthermore, such an exception is inconsistent with the goals of the statute, which include unifying dispute-resolution mechanisms across diverse forms of government contracts and different government agencies and expanding government contractors' access to impartial fora for the resolution of disputes with the government. If this putative exception were to exist, agencies could easily manipulate their contracts to avoid the CDA.

The NPS's other major justification for exempting its concessions contracts from the CDA is equally fallacious. According to the agency, the CDA applies only to those contracts that directly benefit the government and does not extend to contracts for the procurement of goods or services that primarily "benefit * * * the public" (Br. in Opp. 11). But again, there is no statutory basis for this exception, which would wreak havoc with government procurement law. Coverage under the CDA would depend upon subjective determinations of who may be said to "benefit" from a government procurement. In any event, NPS concessions contracts *do* involve the procurement of services, and the construction, alteration, repair and maintenance of real property, that directly benefit the government. Thus, even if the agency's cramped reading of the CDA were correct, NPS concessions contracts would still fall within the statute's scope.

The CDA was designed to have "broad application in order to unify the diverse and often inconsistent procedures ex-

isting among the many procuring agencies" (S. REP. NO. 95-1118, at 17). Accordingly, the CDA applies to *all* government contracts for the procurement of goods or services "[u]nless otherwise specifically provided herein" (41 U.S.C. § 602(a)). The NPS was not at liberty to add limiting language to a statute that Congress plainly intended to be broad and comprehensive. See *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593, 598 (2001).

ARGUMENT

THE CONTRACT DISPUTES ACT APPLIES TO NATIONAL PARK SERVICE CONCESSIONS CONTRACTS

The text and history of the Contract Disputes Act make clear that Congress intended the statute to be comprehensive: the Act was designed to end the previous uncertainty about which dispute-resolution regime would govern any specific contract dispute by imposing uniform procedures on virtually every government contract. Thus, with only a few carefully delineated exceptions, the CDA covers all disputes between the government and those with whom it contracts for the procurement of goods, services, or the maintenance of real property. Only by ignoring the CDA's plain language, and inappropriately creating new exceptions to the statute, could the court of appeals find that NPS concessions contracts fall outside the statute's scope.

A. The CDA Applies By Its Plain Terms To Virtually All Government Contracts For The Procurement Of Goods Or Services.

In upholding the NPS's effort to exempt its concessions contracts from the CDA, neither the D.C. Circuit nor the district court seriously analyzed the language of the statute. Rather, like the agency (see Br. in Opp. 10-12), both courts instead stressed the several ways in which NPS concessions contracts differ from the majority of government procure-

ment contracts. But such differences are irrelevant to the plain meaning of the CDA. "[I]n [this and] all statutory construction cases, [courts must] begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citations and internal quotation marks omitted). That is manifestly the case here.[2]

The beginning and the end of this case should therefore be the plain language of 41 U.S.C. § 602(a), which defines those contracts to which the CDA applies in a way that irrefutably encompasses NPS concessions contracts. But if the plain language were not enough, the breadth of the CDA is evident in the statute's structure and background, both of which further underscore that it must apply to NPS concessions contracts.

1. The CDA's plain language.

The CDA applies to "*any* express or implied contract" entered into by "an executive agency" for "the procurement of" (1) "property, other than real property in being," (2) "ser-

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[2] Even if the CDA were ambiguous, the NPS's regulation exempting its concessions contracts from the statute would deserve no deference because the CDA is not "a statutory scheme [the NPS] is entrusted to administer." *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); Pet. App. 27a. See note 1, *supra*. If each agency could independently interpret the CDA, it would frustrate a central purpose of the statute, which was to make government procurement policy *consistent* across agencies. See S. REP. NO. 95-1118, at 2, 17; pages 18-19, *infra*; see also 41 U.S.C. § 404(a) (Office of Federal Procurement Policy exists to "provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies").

vices," or (3) the "construction, alteration, repair or maintenance of real property" (41 U.S.C. § 602(a)(1)-(3) (emphasis added)) – unless the CDA "specifically provide[s]" otherwise (*id.* § 602(a)).[3]

The NPS does not deny that concessions contracts are "contracts" and that it is an "executive agency," nor does it claim that the CDA itself specifically exempts these contracts from its coverage. Thus, the agency is left to assert (Br. in Opp. 9) that "[t]he CDA applies only to procurement contracts, and the NPS's concession contracts are not procurement contracts." But there are two significant problems with this textual argument.

To begin with, the CDA does not limit its scope to a category of contracts known as "procurement contracts." The word "procurement" appears in the CDA as a noun, rather than as an adjective describing and limiting the types of contracts entitled to the protections of the statute. Accordingly, the NPS ascribes far too much significance to the catch phrase "procurement contracts" in its construction of the statute. Moreover, "procurement" is a broad term; its common meaning is "[t]he act of getting or obtaining something." BRYAN A. GARNER, BLACK'S LAW DICTIONARY 1224 (7th ed. 1999).[4] In other words, Congress has dictated that the

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[3] The statute also applies to contracts for "the *disposal* of personal property," (41 U.S.C. § 602(a)(4) (emphasis added)), which are merely the converse of contracts for the procurement of personal property.

[4] See also, *e.g.*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1974 (2d ed. 1961) ("procurement" means "[a]ct of procuring or obtaining; attainment; acquisition"; principal definition of "procure" is "[t]o bring into possession; to acquire; gain; get; to obtain by any means, as by purchase or loan").

The statutory term "procurement" is matched in breadth by the term "services"; the relevant definition in *Black's* for a "service" is

CDA applies generally to almost the entire gamut of government contracts: unless expressly exempted by statute, the Act applies any time an agency contracts to "get or obtain" *any* item of personal property or *any* service (including specifically the "construction, alteration, repair or maintenance of real property").

2. The CDA's structure.

The entire statutory scheme of the CDA confirms the expansive nature of the term "procurement." In determining the meaning of a statutory term, "a court must look to the structure and language of the statute as a whole." *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) (citation omitted). See, *e.g.*, *Harris* v. *United States*, 122 S. Ct. 2406, 2411-2412 (2002). The overall structure of the CDA – and in particular the narrowness of the statutory exceptions to the CDA's coverage – demonstrates the Act's broad applicability to contracts such as those at issue here.

Congress expressly exempted a few specific categories of agency procurement contracts from the CDA's scope. See pages 14-15, *infra*. However, Congress also mandated that *only* those exceptions "specifically provided" *within the CDA itself* could operate to exclude a contract from the statute's dispute-resolution mechanisms. See 41 U.S.C. § 602(a) ("[u]nless otherwise *specifically provided herein*, this Act applies to *any* express or implied contract * * * entered into by an executive agency * * *") (emphasis added).[5]

"[a]n intangible commodity in the form of human effort, such as labor, skill, or advice." See BLACK'S LAW DICTIONARY, at 1372.

[5] Congress further provided in the CDA that "a contractor may bring an action directly on [a] claim in the United States Court of [Federal] Claims, *notwithstanding any contract provision, regulation, or rule of law to the contrary*." 41 U.S.C. § 609(a)(1) (emphasis added). See, *e.g.*, *OSHCO-PAE-SOMC* v. *United States*, 16

Given this statutory mandate, neither agencies nor courts have the authority to graft additional exceptions onto the CDA. "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference * * * is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States* v. *Johnson*, 529 U.S. 53, 58 (2000). See also, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 122 S. Ct. 441, 447 (2001) ("'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'") (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)). But the NPS and the lower courts in this case have done just that: it is undisputed that none of the statutory exceptions exempts NPS concessions contracts from the CDA.

The CDA "specifically provide[s]" only the following few exceptions:

- Only executive agency contracts (and the contracts of specified non-appropriated fund entities) are covered by the CDA; contracts by the legislative and judicial branches are not included. See 41 U.S.C. § 601(2); *Erwin* v. *United States*, 19 Cl. Ct. 47 (1989); S. REP. NO. 95-1118, at 16.

- Agencies may exempt certain contracts with foreign governments and international organizations from the CDA (41 U.S.C. § 602(c)), because such contracts "are often regarded by other governments as being international agreements rather than conventional commercial transactions * * * [and thus] these agreements frequently provide that disputes arising during performance of the agreement will be re-

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Cl. Ct. 614 (1989) (parties to a CDA-covered contract may not agree to limit the right of appeal to the Claims Court).

solved through consultation among the governments." 124 Cong. Reg. S18,641 (daily ed. Oct. 12, 1978) (statement of Senator Byrd).

- Maritime contracts are afforded special treatment under the CDA in order to preserve the district courts' traditional admiralty jurisdiction. See 41 U.S.C. § 603; S. REP. NO. 95-1118, at 18; *Whitey's Welding & Fabrication, Inc.* v. *United States*, 5 Cl. Ct. 284, 287 (1984) (Kozinski, C.J.).

- Contracts for the procurement of real property, while not "specifically" excluded from the CDA, are outside the scope of the CDA's applicability clause (41 U.S.C. § 602(a)) because such contracts fall within the eminent domain power. See 124 Cong. Rec. H10,729 (daily ed. Sept. 26, 1978) (statement of Rep. Kindness).[6]

- Finally, the CDA specifies that only *some* Tennessee Valley Authority ("TVA") contracts are subject to the CDA. 41 U.S.C. § 602(b). But for this provision, no TVA contracts would have been covered because the TVA is not an executive agency. This legislative compromise was designed to take account of the TVA's complicated status as a quasi-governmental entity. See 124 Cong. Reg. S18,640-S18,641 (daily ed. Oct. 12, 1978) (statement of Senator Byrd)).

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[6] This limitation is a narrow one; although contracts for the *purchase* of real property are not governed by the CDA, *leases* of real property fall within the scope of the statute. See ROBERT T. PEACOCK & PETER D. TING, CONTRACT DISPUTES ACT ANNOTATED 1-6 (1998) (collecting cases). Similarly, contracts for the procurement of work *related to* real property, including the construction of new facilities and the maintenance of existing ones, are also explicitly covered by the CDA. See 41 U.S.C. § 602(a)(3).

Obviously, none of these exceptions excludes NPS concessions contracts from the CDA. But equally important is the fact that each of these exemptions is narrow and carefully cabined to address a specific legislative concern. None can plausibly be read to demonstrate any desire on the part of Congress to limit the CDA generally, to exempt concessions contracts, or to authorize agencies to choose to exclude other categories of contracts from the statute.

3. The CDA's background.

Were the plain language and statutory structure not sufficient, the background against which the CDA was enacted and the legislative purpose it was designed to serve would also warrant a broad and comprehensive reading of the Act's coverage.

Before the CDA was passed, the manner of resolving government contracts disputes had become exceedingly complex and unworkable. Each executive agency was left to its own devices to fashion a system (or systems) of dispute resolution. Many of these failed to meet the needs of either contractors or the government and frequently gave agencies far too much authority to determine the correctness of their own contract actions. Thus, the Senate Report explained that, prior to the CDA,

> the methods and forums for handling * * * disputes [under government contracts] exist[ed] by executive branch fiat. * * * The agency boards of contract appeals [were] appointed by, report[ed] to, and [were] paid by the agency involved in the dispute. Their subpena power [was] limited. Often they [had to] decide cases concerning action by high-level agency officials. * * * The predilections of different agencies * * * [brought] forth new provisions and procedures that [were] restrictive and uncoordinated.

S. REP. NO. 95-1118, at 2-3.[7]

In response, in November 1969 Congress established the "Commission on Government Procurement" "to promote the economy, efficiency, and effectiveness of procurement by the executive branch of the Federal Government." Pub. L. No. 91-129 § 1, 83 Stat. 269 (Nov. 26, 1969). As it was statutorily required to do (*id.* § 4), the Commission studied all aspects of government procurement and eventually released a four-volume Report. See REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT (1972).

The Commission's Report called for sweeping changes. The Commission found that "patchwork solutions to procurement problems [would] no longer suffice" and that "there is urgent need for *a more unified approach* to procurement." 1 *id.* at 1-2 (emphasis added). The specific changes proposed by the Commission included those that eventually became the CDA. See 4 *id.* pt. G; S. REP. NO. 95-1118, at 4. The Commission "concluded that the system for resolving contract disputes need[ed] significant institutional and substantive change if it is to provide effective justice to the contractors and the Government." 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, at 3. In particular, the

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[7] See also, *e.g.*, L. Spector, *The Contract Disputes Act of 1978 – Some Observations and Predictions*, 39 FED. B.J. 1, 4-6 (1980) (describing the "turmoil" that existed before the CDA); S. Jacoby, *The Contract Disputes Act of 1978: An Important Development*, 39 FED. B.J 10, 13-15 (1980) (discussing confusion and controversy that existed before the CDA about the effect of the "finality" provisions in standard disputes clauses and of the Wunderlich Act, which precluded judicial review unless the contractor could establish breach); C. Kipps, T. Kindness & C. Hamrick, *The Contract Disputes Act: Solid Foundations, Magnificent System*, 28 PUB. CONT. L.J. 585, 585 (1999) ("Prior to the CDA, the 'system' for resolving federal contract disputes can best be described as a mess.").

Commission found that contractors should be afforded "direct access to court," the "fully judicialized, totally independent forum that historically has been the forum within which contract rights and duties have been adjudicated." *Id.* at 23-24.

Congress took the Commission's advice to heart. In the CDA, Congress sought to protect government contractors' right to independent review in court, even – or perhaps especially – where an agency might prefer a dispute-resolution system that it could better control. Under the CDA, "a contractor may bring an action directly on [a] claim in the United States Court of [Federal] Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary." 41 U.S.C. § 609(a)(1); see note 5, *supra*. The Senate Report explained that direct access to court was critical to the fair resolution of disputes between the government and its contracting partners. "[T]he government subjects itself to judicial scrutiny when it enters the marketplace, and should not be the judge of its own mistakes nor adjust with finality any disputes to which it is a party." S. REP. NO. 95-1118, at 12.

Further implementing the Commission's suggestions, Congress designed the CDA to have "broad application in order to unify the diverse and often inconsistent procedures existing among the many procuring agencies" (S. REP. NO. 95-1118, at 17), thereby avoiding "[t]he predilections of different agencies" (*id.* at 3). See *Watch Hill Concessions Inc.*, IBCA No. 4284-2000, 01-1 BCA ¶ 31,298, 2001 WL 170911, at *6 (Feb. 16, 2001) ("Congress could not have expressed itself more clearly to the effect that all contractor claims based on a valid contractual theory fall within the procuring agencies' jurisdiction under the Contract Disputes Act. This was essential to Congress' design that all contract disputes be resolved according to the same set of procedures * * *.") (citing *Paragon Energy Corp.* v. *United States*, 645 F.2d 966, 975 (Ct. Cl. 1981)).

Because two of the critical goals of the CDA were to protect the right of government contractors to seek de novo review in court even where an agency might prefer otherwise and to "unify" dispute-resolution mechanisms across subject matter and across agencies (S. REP. NO. 95-1118, at 11-12, 17), it follows that courts should not countenance agency attempts to defeat congressional intent by excepting their contracts from the CDA. See *Watch Hill*, *supra.* If agencies had the ability to craft their contracts so as to avoid the Act, the world of government contracting might rapidly return to that which existed prior to the CDA's enactment, with similar contract disputes resolved in different fora using different procedures and providing the contractor with different rights. That would plainly deny contractors the due process protections that the CDA sought to provide and subvert the "more unified approach to procurement" that the Commission on Government Procurement first recommended over 30 years ago (1 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, at 1-2) and that Congress codified in the CDA.

B. NPS Concessions Contracts Fall Squarely Within The Scope Of The CDA.

As noted above, the NPS has never disputed that national park concessions contracts are "contracts," and it has never claimed that the CDA specifically exempts concessions contracts from its coverage. If these contracts are denied the protections of the CDA, it must be because they do not relate to the procurement of services or construction, repair, or maintenance of real property. However, NPS concessions contracts are manifestly contracts of these sorts. Both the breadth of the words "procurement" and "services" and the clear intent of Congress to establish a comprehensive contract dispute resolution mechanism counsel against giving the CDA a grudging interpretation.

1. When the NPS contracts with concessioners, it plainly "procur[es]" a wide range of "services" that have

been sought by the government. Thus, concessioners provide services directly or indirectly to visitors to the national parks, staff park facilities, construct, maintain, and repair federally-owned structures, and perform many related functions that promote the public's use and enjoyment of the national parks, all subject to pervasive regulation and supervision by the agency.

For example, under section 3(a)(1) of the Standard Concession Contract, the NPS is required to list within each concessions contract those "visitor services" that the concessioner "is required to provide * * * during the term of" the contract. See 65 Fed. Reg. at 26,064. Similarly, section 10(a) of the Standard Concession Contract provides that concessioners "shall be solely responsible for maintenance, repairs, housekeeping, and groundskeeping for all Concession Facilities to the satisfaction of the Director." *Id.* at 26,068-26,069. Plainly, the NPS is procuring services from concessioners pursuant to contract.

Rather than discuss the range of services contained within a concessions contract in the abstract, we refer the Court to a typical "prospectus" issued by the NPS for a concessions contract, in this case the prospectus issued on April 5, 2001 to procure services in operating "Accommodations, Facilities, and Services On the South Rim of Grand Canyon National Park." See J.A. 29-156 (excerpts of prospectus).[8]

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[8] Whenever the NPS seeks to enter into a new concessions contract, it issues a "prospectus" that "describes * * * the business opportunity" (J.A. 37), instructs prospective concessioners how to submit a responsive proposal, explains the criteria that the agency will use to decide among competing bids, and includes the contract that the successful bidder will be required to sign. Prospectuses for three concessions contracts were included in the record before the district court: the South Rim of the Grand Canyon, Yellowstone National Park, and Antelope Point. The prospectus for the South Rim of the Grand Canyon is in relevant respects typical of these

This prospectus is replete with evidence that the purpose of NPS concessions contracts is to procure diverse services. Thus, page one of the "Business Opportunity" section explains the reason for the prospectus: "The National Park Service has determined that certain visitor services and facilities are necessary and appropriate to enhance visitors' enjoyment of the park, while ensuring that resources are protected." J.A. 37.[9] Similarly, the "Offeror's Transmittal Letter" that the NPS requires a bidder to sign before the agency will even consider that bidder's proposal stresses that the bidder is "offer[ing] to provide visitor services and facilities at Grand Canyon National Park in accordance with the terms and conditions specified in the draft new Concession Contract" included in the prospectus. J.A. 122. Most importantly, the draft contract itself (J.A. 64-116) (hereinafter "Grand Canyon Contract") goes into great detail about the range and types of services that "the concessioner is required to provide * * * during the term of [the] Contract." Grand Canyon Contract § 3(a)(1), J.A. 73.

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three and of other prospectuses issued since enactment of the 1998 Act. (Although the Grand Canyon contract is one of the larger concessions contracts in the national park system, all of the over 600 concessions contracts administered by the NPS include visitor services of some description.)

The Joint Appendix includes significant sections of the Grand Canyon prospectus, including the entirety of the proposed concessions contract that was to be signed by a successful bidder. The full (478-page) prospectus is available at *http://www.nps.gov/grca/concessions*.

[9] By setting forth this purpose, the NPS is merely acknowledging that it is utilizing the concessions contract to satisfy its statutory mandate under the NPS Organic Act to provide for the public enjoyment of the national parks. See Part C.3, *infra*.

The proposed Grand Canyon concessions contract requires the concessioner to provide all of the following types of visitor services:

1. Overnight Accommodations
2. Food and Beverage Service
    a. Food Service
    b. Lounge Service
    c. Transportation/Visitor Information Desks
    d. Concierge Services
3. General Merchandise
4. Transportation Services
5. Automobile Services
6. Mule Operations
7. Kennels for cats and dogs
8. Camper Services
9. Trailer Village
10. Reservation System
11. Other

Ibid., J.A. 73-76.

These headings alone do not adequately convey the wide range of services that the new Grand Canyon concessioner must provide. For example, the concessioner will be required to run 12 hotels or lodges, owned by the government, that together contain 922 rooms; to staff and operate nine gift shops, owned by the government; to operate scheduled bus tours; to provide locksmithing services; to operate a Laundromat; and to run 10 food-service locations, owned by the government, ranging from a "Limited Snack Bar" to a "Gourmet/Fine Dining Restaurant." See *ibid*. These are paradigmatic examples of "services," and are typical of the kinds of services that the government solicits from concessioners, both large and small, that operate throughout the national park system. It thus seems beyond question that the NPS is "procur[ing] * * * services" under this and other concessions contracts that exist to support visitation to the national parks.

2. In many concessions contracts, the NPS also procures the "construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a)(3).[10] For example, under Section 9(d) of the Grand Canyon Contract, the concessioner is required "to undertake and complete an improvement program,"[11] including building apartments for employees, "[r]elocat[ing]" a maintenance facility, "renovat[ing]" a service station, a watchtower, an auto shop, a lodge, "Hermits Rest," and "NPS Building One"; "design[ing] and construct[ing]" the "new Desert View Trading Post," and "demolish[ing] several facilities – all at an estimated cost of almost $8.5 million. See J.A. 94-95. The Grand Canyon concessioner will also be "solely responsible for maintenance, housekeeping, and groundskeeping for all Concession Facilities to the satisfaction of the Director." Grand Canyon Contract § 10(a), J.A. 96. The concessioner is required to perform all of these construction and maintenance services despite the fact that "[t]he United States retains title and ownership to all Concession Facilities" (*id.* § 2(e), J.A. 70); see also Pet. App. 20a (citing 16 U.S.C. § 5954(d)).[12]

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[10] Because the NPS also uses concessions contracts for such things as outfitter and guide services that may not use fixed facilities within the park (see 1998 Act § 403(8), 16 U.S.C. § 5952(8)), not all concessions contracts are for the "construction, alteration, repair or maintenance of real property" (41 U.S.C. § 602(a)(3)). Those contracts not covered by this section are nevertheless subject to the CDA, because they are contracts for "the procurement of services" (41 U.S.C. § 602(a)(2)). See Part B.1, *supra*.

[11] Section 9(d) of the Standard Concession Contract requires the NPS to "provide [a] detailed description" of the improvement program to be undertaken in each concessions contract. See 65 Fed. Reg. at 26,068.

[12] Sections 2(e) and 10(a) of the Standard Concession Contract (65 Fed. Reg. at 26,063, 26,068-26,069) are identical to the same provisions of the Grand Canyon contract.

3. Given these examples of the types of services provided by concessioners under NPS concessions contracts, it is not surprising that the Department of the Interior's own Board of Contract Appeals has repeatedly held that NPS concessions contracts are subject to the CDA: the government contracts with concessioners to procure numerous specific services, as well as to procure the construction, alteration, repair, or maintenance of real property. Thus, in *National Park Concessions, Inc.*, IBCA No. 2995, 94-3 BCA ¶ 27,104, 1994 WL 462401 (Aug. 18, 1994), where the contract "'required and authorized' [the concessioner] to provide stated accommodations, facilities and services, including [a] specified improvement and building program," (*id.* at *6), the IBCA concluded that

> [i]t is apparent from [the concessioner's] contractual responsibilities and from the introductory language of its concession contracts, which acknowledges that [the concessioner] is performing services for the benefit of the Government and the public * * *, that NPS has procured from [the concessioner] services, and construction, alteration, repair and maintenance of real property, within the ambit of the CDA.

Id. at *14. Similarly, in *R & R Enterprises*, IBCA No. 2417, 89-2 BCA ¶ 21,708, 1989 WL 27790 (Mar. 24, 1989) the IBCA stressed that a concessions contracts "entered into by NPS is a procurement contract subject to the CDA, since it is for services that the Government itself would otherwise provide, and since no statutory exemption from the Act of exclusionary intent by Congress is evident." And just last year, the IBCA reiterated that, "at least in any concession contract where the concessioner is required to perform specific services or to make specific improvements to the land it occupies, * * * the contract is a procurement contract, subject to the Contract Disputes Act." *Watch Hill*, 2001 WL 170911, at *6.

In fact, the NPS *itself* once convinced the Court of Claims that "normal, legally mandated, procurement procedures" applied to a concessioner who contracted to provide "transportation services" to the general public at Yosemite National Park. See *Yosemite Park & Curry Co.* v. *United States*, 582 F.2d 552, 558-559 & n.8 (Ct. Cl. 1978) (emphasis in original).[13] The NPS's argument in *Yosemite Park* was correct, as later courts and the IBCA have agreed; the CDA applies to national park concessions contracts. There is no statutory basis for the agency's current attempt to exempt its concessions contracts from the scope of the CDA.

4. That NPS concessions contracts are subject to the CDA is confirmed by the fact that many other federal agencies routinely accept the applicability of the statute to similar concessions contracts used to procure a wide range of goods and services. Thus, the CDA has been applied without challenge to disputes involving concessions contracts with the Army and Air Force Exchange Service ("AAFES"),[14] the

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[13] We discuss below (at Part C.1) why the fact that the NPS paid for transportation services in *Yosemite Park* is irrelevant to CDA coverage.

[14] See, *e.g.*, *Int'l Hair*, ASBCA No. 50948, 01-1 BCA ¶ 31,393, 2001 WL 520821 (Apr. 25, 2001) (applying CDA to AAFES beauty shop concessions contract); *Harry Pohl KG*, ASBCA No. 51523, 01-1 BCA ¶ 31,329, 2001 WL 238730 (Feb. 28, 2001) (applying CDA to AAFES concessions contract to run specialty shops at base exchange); *Home Entm't, Inc*., ASBCA No. 50791, 99-2 BCA ¶ 30,550, 1999 WL 669405 (Aug. 23, 1999) (applying CDA to AAFES video rental concessions contract); *Outlaw Group, Inc.*, ASBCA No. 46,132, 96-1 BCA ¶ 27,949, 1995 WL 563830 (Sept. 13, 1996) (dismissing appeal because of failure to file claim but indicating that the CDA would apply to AAFES taxi concessions contract).

Army Corps of Engineers,[15] the Navy,[16] and the State Department.[17] That these other agencies comply unhesitatingly with the CDA is strong evidence that concessions contracts fall within the scope of the statute.[18]

C. The Reasons Offered By The NPS For Exempting Concessions Contracts From The CDA Are Insubstantial.

The NPS regulation (36 C.F.R. § 51.3) declaring that national park "[c]oncession contracts are not contracts within the meaning of the" CDA fails to provide any rationale to support that conclusion. However, throughout this litigation, and in support of the final regulation (see 65 Fed. Reg. at 20,635), the NPS has argued that its concessions contracts fall outside the scope of the CDA for three reasons.

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[15] See, *e.g.*, *Renaissance Investments, Inc.*, ENGBCA No. 5704, 98-1 BCA ¶ 29,712, 1998 WL 199079 (Apr. 17, 1998) (applying CDA to concessions contract with Corps of Engineers for excursion boat and attendant facilities); *Pound* v. *United States*, No. 94-496C, slip op. at 1 n.1, 10 n.2 (Fed. Cl. Aug. 30, 1996) (applying CDA to concessions contract to operate a marina on land owned by the Corps of Engineers).

[16] See, *e.g.*, *Rice King*, ASBCA No. 43,352, 92-2 BCA ¶ 24,805, 1992 WL 34026 (Feb. 20, 1992) (applying CDA to fast food concessions contract at naval station).

[17] See, *e.g.*, *Senor Tenedor, S.A. de C.V.*, ASBCA Nos. 48502, 49272, 97-2 BCA ¶ 29,192, 1997 WL 484580 (Aug. 15, 1997) (applying CDA to State Department concessions contract for cafeteria food services at the embassy in San Salvador).

[18] Although on one occasion the Defense Commissary Agency argued that a concessions contract with a "bagger" at a commissary was not subject to the CDA, the Armed Services Board of Contract Appeals rejected that contention out of hand. See *Hernandez*, ASBCA No. 53,011, 01-1 BCA ¶ 31,220, 2000 WL 1844742, at *8-9 (Dec. 12, 2000) (finding agreement to be "a contract for the procurement of services").

First, the NPS has claimed that the CDA does not apply to its concessions contracts because, under many of these contracts, the government makes no direct monetary payment to concessioners. Second, although NPS concessions contracts obviously procure "services" and the "construction, alteration, repair or maintenance of real property," the NPS has claimed, and the D.C. Circuit held, that these contracts are not subject to the CDA because the procurements benefit the public rather than the government. Third, the NPS has claimed that, if the CDA governs contracts that benefit the public rather than the government, it is applicable only to those contracts that provide benefits to the public that the agency is statutorily obligated to provide.

None of these asserted limitations on the scope of the CDA has any basis in the language of that statute. Nor are the NPS's attempts to evade the coverage of the CDA consistent with Congress's intent to provide a comprehensive dispute resolution scheme to replace the morass that preceded the CDA's enactment. In any event, even if these implied limitations exist, they are inapplicable here, because in its concessions contracts the NPS *does* procure services that benefit the government directly as well as services to the public that the agency is obligated to provide.

1. Monetary payments are irrelevant to CDA applicability.

The NPS's first explanation why the CDA does not apply to concessions contracts – that the government does not make payments to the contractor (see Br. in Opp. 10) – is statutorily irrelevant. Unlike various other procurement statutes and regulations, CDA coverage is not conditioned on the expenditure of any specified amount of money. See 48 C.F.R. §§ 1.104, 2.101 (Federal Acquisition Regulation applies only to contracts involving appropriated funds). So long as the government provides its contracting partner with something of value in exchange for the procurement of goods or ser-

vices – which is necessary not under the CDA *per se* but under the more general rule that a contract requires mutual consideration – the CDA applies.

In fact, *Bonneville Associates* v. *United States*, 43 F.3d 649 (Fed. Cir. 1994), upon which the government itself relies (at Br. in Opp. 10), demonstrates that it is unnecessary for the government to incur monetary liability for the CDA to apply. As the Federal Circuit noted in *Bonneville Associates*, the CDA is applicable to contracts for the "acquisition by purchase, lease, or *barter*[] of property or services." See *id.* at 653 (emphasis added). Definitionally, the government makes no monetary payment in a barter situation; thus – contrary to the government's key contention – the expenditure of government funds cannot be critical to CDA applicability. See also, *e.g.*, *Bartlett & Co. Grain*, AGBCA No. 86-187-1, 91-1 BCA ¶ 23,415, 1990 WL 166521 (Oct. 18, 1990) (CDA applies to a "payment-in-kind" contract between the Commodity Credit Corporation and a contractor, involving the trade of corn for soybeans); *Coffey* v. *United States*, 626 F. Supp. 1246, 1250 (D. Kan. 1986) (CDA applies to contract involving exchange of grain for the retirement of a farm loan). NPS concessions contracts are themselves a type of barter; concessioners agree to provide services in exchange for access to government-owned properties and the opportunity to earn a profit.

Indeed, a formalistic distinction based on whether the government's payment for goods or services is made in cash as opposed to some other quantum of value – such as the business opportunity to operate a concession – would simply create opportunities for agencies to exempt themselves from the CDA by clever drafting of their procurement contracts.[19] Under this theory, if the NPS were to collect visitor revenues

[19] The government uses concessions contracts to procure a wide range of services. See Part B.4, *supra.*

and then send back a percentage to the concessioner, the CDA would apply. But if, as here, a concessioner were to collect the revenues in the first instance and then send a percentage to the NPS, the CDA would not apply. Congress can hardly have intended for important statutory protections of government contractors to turn on such whimsical distinctions – distinctions that agencies themselves are entirely at liberty to manipulate. See *Franchise Tax Board* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 339 (1990).[20] That would run roughshod over the statutory scheme, which was designed to *standardize* dispute-resolution mechanisms across agencies and across contracts. See pages 18-19, *supra*.

2. A government procurement does not fall outside the scope of the CDA merely because it may be said to benefit the public as well as the government.

CDA coverage also does not depend on whether the "benefit" of contractual goods or services "is provided to the government," to the public, or both. See Br. in Opp. 11. Although the court of appeals held that only procurements for the direct benefit of the federal government fall within the purview of the CDA (see Pet. App. 27a), there is no textual basis for this judge-made exception to the statute. Rather, the CDA on its face applies to *any* contract for "the procurement of" goods and services, regardless of who directly benefits from that procurement. Likewise, nothing in the background or legislative history of the CDA supports the proposition that the Act's applicability turns on subjective determinations of who may be said to "benefit" from a government pro-

[20] Compare *Int'l Hair*, 2001 WL 520821, at *2 (applying CDA to AAFES beauty shop concessions contract where AAFES paid percentage concession fee to concessioner) with *Harry Pohl KG*, 2001 WL 238730, at *1 (applying CDA to AAFES specialty shops concessions contract where concessioner paid percentage concession fee to AAFES).

curement. See *Total Med. Mgmt., Inc.* v. *United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997) (rejecting argument that agreements with a private company to provide medical care to military dependents were not subject to the CDA "because they are not procurement contracts for the benefit of the government" but instead "are solely for the benefit of the military dependents who receive the medical care.").

A recent statute confirms that the CDA applies to contracts that are not for the direct benefit of the government. The Long-Term Care Security Act of 2000 ("Long-Term Care Act"), Pub. L. No. 106-265, 114 Stat. 762 (codified at 5 U.S.C. §§ 9001-9009), "establishes a program under which federal civilian employees, members of the uniformed services, as well as civilian and military retirees can purchase private group long-term care insurance for themselves and certain qualified relatives at a discount." H.R. REP. NO. 106-610(1), at 6. Under this statute, the Office of Personnel Management ("OPM") is required to enter into "master contracts" with private insurance carriers who will then offer optional long-term care insurance. See 5 U.S.C. § 9003(a). Although the direct beneficiaries of a "master contract" between OPM and an insurance carrier are the federal employees and retirees who will be entitled to purchase coverage from that carrier, Congress assumed that the CDA would nonetheless cover any dispute between OPM and the insurer. Thus, Congress added one minor twist to the otherwise-applicable CDA coverage; *"[f]or purposes of applying the Contract Disputes Act* of 1978 to disputes arising under this chapter between a carrier and [OPM]" (5 U.S.C. § 9003(c)(3) (emphasis added)), contractors may sue in district court as well as the Court of Federal Claims (*id.* § 9003(c)(3)(B)).[21]

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[21] The Long-Term Care Act also shows that there is no need for the government to incur a financial obligation to a contractor in order for the CDA to apply. See Part C.1, *supra*. OPM incurs no financial liability under the Long-Term Care Act. Rather, "[e]ach

Congress's decision not to limit the CDA to contracts that directly benefit the government rather than the public is not only plain on the face of the statute, but also perfectly sensible. What government contract for the procurement of goods or services does not also benefit the public? As the Court of Claims has observed, "[i]t is hoped that *every* Government purchase 'benefits the public' in some way." *Yosemite Park*, 582 F.2d at 559 n.8 (emphasis in original). Thus, contracts to install equipment for the air-traffic-control system (see *Oliver Eng'g Servs.*, DOTCAB Nos. 2549, 2550, 94-2 BCA ¶ 26,920, 1994 WL 179768 (May 09, 1994)), to repair a post office (see *D.L. Kaufman, Inc.*, PSBCA Nos. 4159 *et al.*, 00-1 BCA ¶ 30,846, 2000 WL 348319 (Mar. 10, 2000), or to purchase ammunition for the military (see *Propellex Corp.*, ASBCA No. 50,203, 02-1 BCA ¶ 31,721, 2001 WL 1678757 (Dec. 27, 2001), are each covered by the CDA, yet plainly benefit the public in a substantial way.

For these reasons, as we discussed above (at 25), the NPS itself once persuaded the Court of Claims to apply "normal, legally mandated, procurement procedures" to a contract under which a concessioner agreed to provide "transportation services" to visitors in Yosemite National Park. See *Yosemite Park*, 582 F.2d at 558. The agency successfully argued that it was not bound by the terms of a cost-plus-percentage-profit transportation services contract, because under the rules applicable to procurement contracts the profit percentage provided for in that agreement was too high. The court held that neither the NPS nor the concessioner could avoid normal procurement laws by "characteriz[ing] the procurement of

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eligible individual obtaining long-term care insurance coverage [is] responsible for 100 percent of the premiums for such coverage" (see 5 U.S.C. § 9004(a)), and OPM will be reimbursed by the private insurers for any administrative costs (see *id.* § 9004(f)). Nonetheless, Congress unquestionably expected the CDA to apply to disputes between OPM and insurers. See *id*. § 9003(c)(3).

[these] services for the public as the granting of a 'concession' to a specific contractor." *Ibid*.

Furthermore, even if a plausible line could be drawn between contracts that "directly" benefit the government and those that benefit the government only "indirectly" by benefiting the public (see Pet. App. 29a), conditioning CDA coverage on this gauzy distinction would undermine the legislative purpose of the Act. Were such a distinction to matter, it would lead to extensive satellite litigation as agencies assert that their contracts are not primarily for the benefit of the government. But the purpose of the CDA was to eliminate just such coverage dilemmas and to standardize the resolution of government contract disputes. See pages 18-19, *supra*; S. REP. NO. 96-1118, at 17. Similarly, the CDA would be undermined if agencies could exempt themselves from its coverage merely by including language in a contract that describes the benefits to the agency as in fact redounding to the public that the agency is supposed to serve.

By the same token, there is no statutory authority to limit the CDA to contracts that provide benefits to the public that the agency is *statutorily obligated* to provide. In addition, this limitation would again undermine the CDA's goals of simplifying and standardizing the dispute-resolution mechanisms applicable to government contracts. It would lead to satellite litigation not only over whether goods or services were primarily intended to benefit the public or the government but also over whether the government had an obligation to provide the goods or services in question. See *Ferens* v. *John Deere Co.*, 494 U.S. 516, 531 (1990). This Court should reject any effort to read this invented limitation into the CDA.

3. NPS concessions contracts would be subject to the CDA even if the statute applied only to contracts that procure benefits for the government.

Even if the CDA were limited to contracts that benefit the government directly, or that procure a benefit for the public that the agency is statutorily obligated to provide, NPS concessions contracts would still plainly be covered by the Act. The NPS's governing statutes explicitly state that the agency has an obligation to provide services to park visitors. Concessioners help the NPS to fulfill its statutory mandate to

> *promote and regulate the use* of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks * * *, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein *and to provide for the enjoyment of the same* in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1 (emphasis added). Thus, the NPS must provide "accommodations, facilities, and services that * * * are *necessary and appropriate* for public use and enjoyment" of the national parks. 16 U.S.C. § 5951(b)(1) (emphasis added). In fact, the NPS is *required* to "utilize concessions contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors * * * of the National Park System." *Id.* § 5952.

Although these statutes speak for themselves, it is instructive that outside this litigation the NPS has forcefully and repeatedly asserted that these statutory directives form an important part of its mission. For example, Appendix 1 to the Grand Canyon prospectus states: "Concessioners in the national parks *join with the National Park Service in carrying out a part of the Service's mission*." J.A. 140 (emphasis

added). Appendix 4 to the prospectus, which contains an excerpt from the "2001 NPS Management Policies," similarly explains that "[t]he National Park Service will provide, *through the use of concession contracts*, commercial visitor services within parks that are necessary and appropriate for visitor use and enjoyment." J.A. 153 (emphasis added). And in the portion of the prospectus entitled "The Park Area and Its Mission," the NPS states that

> [t]he need for commercial visitor services in Grand Canyon National Park is based on objectives for visitor use described in law, planning documents that exist for the park, and the judgment of management considering the way the park is currently used and the present objectives of the NPS.
>
> The NPS has determined that the facilities and services that are called for in this Prospectus are *necessary and appropriate* to the purposes of Grand Canyon National Park.

J.A. 63 (emphasis added).[22] Appendix 1 further stresses that

> The National Park Service has as its overall mission the preservation and public enjoyment of significant aspects of the nation's natural and cultural heritage. * * * The National Park service may provide "necessary and appropriate" facilities and services that

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[22] This same section of the prospectus further explains that

> [Various Grand Canyon specific] legislative statements, in addition to the NPS Organic Act, as amended, effectively provide the foundation upon which park management is based. Management seeks to protect the natural and cultural resources of the park, while providing for "the benefit and enjoyment of the people" through resource-based interpretive programs *and appropriate public and concessions facilities*.

J.A. 51 (emphasis added).

> are desirable for the visiting public through concession contracts.
>
> These services include a wide variety of commercial visitor services from backcountry guiding to first-class hotel operations. All are provided by [concessioners]. *All exist for the purpose of providing park visitors with the services and accommodations that are necessary and appropriate* for their full enjoyment of America's National Park Service-administered areas.

J.A. 137-138 (emphasis added).[23]

The extent to which the NPS supervises its concessioners is yet further evidence that NPS concessions contracts exist to benefit the NPS and to further the agency's mission. The agency retains the right to "determine and control the nature, type and quality of the visitor services described in [its] contract[s], including, but not limited to, the nature, type and quality of the merchandise, * * * to be sold or provided by the Concessioners within" a national park. Standard Concession Contract § 3(d)(1), 65 Fed. Reg. at 26,064. And all of a concessioner's "rates and charges to the public must be approved by the Director." *Id.* § 3(e), 65 Fed. Reg. at 26,064. The extensive control that the NPS maintains over *every* facet of a concessioner's operations confirms that these services are in fulfillment of the NPS's statutory mandate to accommodate visitors in their enjoyment of the national parks.

It is for these reasons that the Comptroller General, in an opinion that criticizes the D.C. Circuit's decision in this case, recently held that his bid-protest authority, which extends to "contract[s] for the procurement of property or services" (31 U.S.C. § 3551(1)(A)), applies to NPS concessions contracts.

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[23] See also, *e.g.*, "Gift Shop Mission Statement," J.A. 117 ("[t]he gift shops throughout the park play a primary role in assisting [the NPS] to meet [its] management objectives").

Where concessions contracts "include[] the provision of numerous services to the government, which the agency might otherwise have had to purchase or perform itself," they are for the "procurement of services." *Starfleet Marine Transp., Inc.*, B-290,181, 2002 CPD ¶ 113, 2002 WL 1461877, at *5 (July 5, 2002).

Finally, notwithstanding the NPS's implausible assertion that only the public stands to "benefit" from the provision of goods and services in the national parks, it is separately beyond question that the *government itself* is the direct and principal beneficiary of the concessioners' contractual obligation to maintain and repair park facilities, which are *owned by the government*. A contract to repair the "South Rim Village Historic Area" and the "Bright Angel Lodge," and to "maintain[]" "all Concession Facilities," at Grand Canyon National Park (J.A. 95-96) is no different in this respect than contracts to maintain and repair the John F. Kennedy Center for the Performing Arts (see *Grunley Constr. Co.*, ENGBCA No. 6327, 99-1 BCA ¶ 30,138, 1998 WL 835156 (Nov. 20, 1998)), the Smithsonian Museums (see *Niko Contracting Co.* v. *United States*, 39 Fed. Cl. 795 (1997), aff'd, 173 F.3d 437 (Fed. Cir. 1998) (table); *Libra Eng'g Inc.*, NASABCA Nos. 1182-17 *et al.*, 1984 WL 13526 (July 13, 1984)), or military installations in the Republic of Panama (see *J & J Maintenance, Inc.*, ASBCA No. 50,984, 00-1 BCA ¶ 30,784, 2000 WL 199758 (Feb. 15, 2000) – all of which are within the coverage of the CDA. Thus, it is clearly incontrovertible under section 3(a)(3) of the CDA (41 U.S.C. § 602(a)(3)), that every NPS concessions contract that involves the maintenance or improvement of real property is subject to the CDA.

* * * * *

We end where we began – with the language of 41 U.S.C. § 602(a). The CDA unambiguously applies to any contract entered into by an executive agency for either "the procurement of services" or "the procurement of construction, altera-

tion, repair or maintenance of real property." Because *every* NPS concessions contract satisfies at least one of these tests, the NPS regulation (36 C.F.R. § 51.3) must be held invalid. The NPS was not authorized to engraft exceptions found nowhere in the CDA, nor was it at liberty to ignore the protective purposes of this comprehensive government contracting statute by exempting its concessions contracts from the Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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