No. 02-1472

IN THE

Supreme Court of the United States

CHEROKEE NATION and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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1a. The government constructs the bulk of its opposition on the erroneous proposition that appropriations to pay these contractors never were available in the first place. Accordingly, the government contends, there are no conflicts between the decision below and either the *Winstar* family of cases forbidding the government from unilaterally altering its contract obligations, or the *Blackhawk* family of cases holding the government liable when it fails to pay a contractor at a time when agency appropriations are legally available to so. *See United States v. Winstar*, 518 U.S. 839 (1996); *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980). But the very issue of "availability" is what produces one of the conflicts giving rise to the petition, for under the Federal Circuit's *Blackhawk* approach appropriations were available, while under the decision below they were not. The government cannot wish away the conflict by simply positing that the Tenth Circuit's approach is correct.

The government's argument rests on the following syllogism: Petitioners' contracts were subject to the "availability of appropriations," Congress here limited the "availability" of the appropriations, and so the government was excused from paying fully on the contracts. The only problem with this argument is that Congress at the legally relevant times never limited the appropriations in any way. The government concedes as much, stating only that contract payments were supposedly limited by "committee reports," Resp. Br. 3, which merely "recommended" how the agency might spend its lump sum appropriation. *Id*. 4. *See also id*. 4-5 ("The committee report earmarked [a stated sum]" (emph. added)). The government recognizes that in a subsequent contract year "Congress enacted a statutory cap on contract support costs" by providing that an amount "not to exceed" a stated sum was legally available to pay contract support costs that year, *id*. 5 (emph. added), but glosses over the fact that in the two years relevant here Congress enacted no statutory cap on such costs. To be clear, at the time each payment came due – not

years later thanks to a retroactive rider—no provision of any act of Congress limited the availability of the Indian Health Service's appropriation to pay these contractors to a designated "not to exceed" amount. This was the case both for contract support costs associated with "ongoing" contracts and those associated with "new" contracts.[1]

b. Mindful that the appropriations acts on their face reveal that the ISDA's routine "availability of appropriations" clause was *never* triggered here, the government advances the audacious proposition that when Congress used the time-worn term of art "availability of appropriations," it actually meant not their "*legal* availability" but their "practical availability." *Id.* 16 (emph. in original). But the government offers no support whatsoever for such a sweeping redefinition, one that would leave it not to Congress, but to the whim of often hostile and self-interested federal bureaucrats to decide when appropriations are actually available to pay a government contractor. The term of art "availability of

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[1] As to the latter costs (which were at issue for the Shoshone-Paiute FY1996 contract only, and a small portion of the Cherokee FY1997 contract), the government does not defend the court of appeals' erroneous conclusion that when Congress "set aside $7.5 million in the Indian Self-Determination ["ISD"] Fund" for potential future year expenditures, Resp. Br. 4, Congress also fixed the maximum amount that could be spent on such costs in the current year. *See* Pet. 19a-20a n.10. The government's reluctance here is consistent with its concession elsewhere that "the appropriation of $7.5 million for the ISD Fund [in the FY1996 and FY1997 appropriations acts] was not a statutory 'cap,'" Aplts' Br. 16, filed in *Shoshone-Bannock Tribes v. Secretary, DHHS*, 279 F.3d 660 (9th Cir. 2002), and that "[i]n order to be a statutory cap, the language would have to read that 'not to exceed' $7.5 million was available for new CSC, rather than that $7.5 million 'shall remain available.'" *Id.* 30 n.20. *See also Matter of Forest Service*, B-231711, 1989 WL 240615, at *2 (Comp. Gen. Mar. 28, 1989) (statutory term of art "shall remain available" only designates a special period during which the stated sum may be spent, *not* a maximum earmark on what is legally available in the current year); U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW approvingly, at 6-8 (citing *Forest Service* as "B-231711").

appropriations" has a long and well-understood pedigree in federal appropriations law. Pet. 12-13, 15-16. Not only is Congress presumed to be "knowledgeable about existing law pertinent to the legislation it enacts," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988), but it is especially presumed to know the meaning of commonly used "terms of art." *INS v. St. Cyr*, 533 U.S. 289, 312, n.35 (2001) (internal quotation omitted); *see also Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 615-16 (2001) (Scalia, Thomas, JJ. concurring) ("[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning").

2a. Because neither appropriations act limited the "availability of appropriations" to pay these contracts, the decision below is in direct conflict with the Federal Circuit's *Blackhawk* rule. In *Blackhawk*, a plumbing company entered into a settlement agreement with the Veteran's Administration under which the agency agreed to make two payments, the first on December 10, 1973, and the second on January 30, 1974. 622 F.2d at 544, 553. The parties understood that the agency had not internally budgeted for either payment and therefore it would have to reprogram its funds accordingly. *Id*. at 547-48 & n.6. They also agreed that "[the] Government's obligation [under the Agreement] is contingent on the availability of appropriated funds from which payment in full can be made." *Id*. at 542. On January 3, 1974, Congress intervened with "Section 301," *id*. at 545, an appropriations rider that (not unlike Section 314 here) purported to prohibit the agency, both prospectively and retroactively, from making any settlement payments absent specific statutory approval. *Id*. at 552.

Although the government prefers to focus on the second, post-rider payment, what is relevant here is that, as to the first payment—due before the rider's enactment—the court found Section 301 ineffective: "As to the first principal payment, however, appropriated funds were available at the time that

payment fell due [*i.e.*, three weeks before Section 301's enactment]," *Blackhawk*, 622 F.2d at 553 (emph. added), holding squarely that "[t]he right to the first payment was a vested right." *Id*. (emph. added). With respect to the government's same 'internal budgeting-reprogramming' defense advanced here, the court noted that the agency had "lump-sum appropriations," *id*. at 547, and thus held that agency "reprogramming" issues were "purely of an in-house accounting nature and, as such are irrelevant to any determination regarding the availability of appropriated funds," *id.* at 552 n.9 (emph. added). This is hardly the "*dictum*" the government would now have the Court ignore. Resp. Br. 17. *Blackhawk* thus is doubly irreconcilable with the Tenth Circuit's contrary decisions that (1) an internal agency budget can cut off the availability of an appropriation to pay a contract, and (2) a retroactive rider can eliminate vested contract rights. These conflicts alone warrant certiorari.

These are not mere technicalities, for they cut to the heart of the government's contracting relations, most of which occur in the context of similar lump-sum appropriations. If either an agency can internally budget (or rebudget) its appropriations with impunity, or Congress can step in long after the fact and do the same, there is absolutely no reliability left in government contract law. Contracts will thus be illusory. The danger of such a principle, and the insidious uncertainty the decision below will spawn, are additional compelling reasons to grant the petition.

b. The government's remaining attempts to make *Blackhawk* go away are make-weight. For instance, the government argues that these contractors should lose because "ISDA contracts are not procurement contracts." Resp. Br. 18. But the government never explains why this distinction makes a difference. Indeed, it fails to note that the agreement enforced in *Blackhawk* under similar circumstances was not a procurement contract either. Moreover, despite Congress' having relieved tribal contractors of the heavy burden of the

Federal Procurement Policy Act and its implementing regulations, § 450j(a)(1), Congress without qualification still made ISDA contracts fully enforceable under the Contract Disputes Act, 41 U.S.C. § 601 *et seq*. ("CDA"), just like any other routine government contract (whether called "procurement" or not). 25 U.S.C. § 450m-1(a), (d).[2]

The government also advances the creative notion that since these particular contracts are between two governments, they are actually less worthy of full enforcement than other government contracts. Resp. Br. 18. Piling on, the government argues that since Congress might limit the agency's available appropriations, the contractor could not have a vested interest in those agreements. But this thesis simply begs the question of whether appropriations were "available" in the first place, an issue on which the government cannot prevail without resort to its extreme reinterpretation of that term of art to mean whatever sum an agency decides to pay in light of "competing claims and priorities." *Id*. 16.

As an alternative, the government argues that these contractors were not entitled to be paid at the beginning of the year anyway. Resp. Br. 10-11. But the contracts conclusively demonstrate otherwise, Pet. 8-9 nn.5-6, and Congress confirmed the timing of these contracts. *E.g.*, Pub. L. 104-134, 110 Stat. 1321-189 (1996) (contract payment "shall be deemed to be obligated at the time of the . . . contract award"). It is not a matter of paying these government contractors ahead of others, but simply of paying them on time.

3. Throughout its opposition the government argues that, although petitioners might otherwise prevail under hornbook appropriations and contract law, the ISDA trumps that law because the last few words of 25 U.S.C. § 450j-1(b), dealing with reductions in funding, protect "programs, projects or

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[2] *See also* S. Rep. 100-274 (1987), at 34-36 (§ 450m-1 overrules *Busby School of the Northern Cheyenne Tribe v. United States*, 8 Cl.Ct. 596, 600 (1985), which held that as non-procurement contracts, ISDA agreements were not enforceable under the CDA).

activities serving a tribe." Resp. Br. 17-18 (clause distinguishes case from *Blackhawk*), 23 (clause means "agency would not be required to reprogram"). But whatever the meaning of that narrow provision,[3] it only offers limited protection to programs truly "serving a tribe," three key words the government's Opposition repeatedly, and tellingly, omits. Resp. Br. 16 (three times mentioning instead other "priorities"), 17 ("other programs" or "other priorities"), 23 ("other programs").

As Congress recognized, the Secretary does far more than just administer "programs . . . serving a tribe." In this regard, Congress included in the ISDA extensive provisions underscoring those considerable aspects of the agency's appropriation that were not to be protected from the Act's command, and behind which the agency could *not* hide to avoid its payment obligations. Thus, Congress in the ISDA specified that "[t]he amount of funds required by [§ 450j-1(a)] . . . shall not be reduced to make funding available for contract monitoring or administration by the Secretary," § 450j-1(b)(1); "shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract," § 450j-1(b)(4); and "shall not be

[3] The government's breathtakingly broad reading of this clause would permit the Secretary never to pay an ISDA contractor anything at all, so long as the agency spends all its appropriations on something else—other "priorities." Such a reading is not credible in a statute that virtually reeks of an intent to rein in a malfeasant agency and guarantee to tribal contractors enforceable contract rights. *See generally* S. Rep. 100-274, at 7-10, 20-21, 30-31, 37-38 (detailing agency misconduct from 1975 to 1987); *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1344-45 & n.9 (D.C. Cir. 1996) (discussing agency failures and adding "[p]recisely because the Secretary had consistently failed to behave in a reasonable manner . . . Congress elected specifically to cabin the Secretary's discretion under the Act"). Lest the whole statutory scheme be jettisoned on the basis of these few words, the "reduction" clause more plausibly only limits the Secretary's power, reserved in the immediately preceding subsection (5), to "increase[ ]" the amount of a contract.

reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring," § 450j-1(b)(3). (Emph. added.) These detailed statutory provisions confirm that such amounts, running in the hundreds of millions of dollars, are legally available to be reprogrammed to fully pay ISDA contractors.[4]

In the end, all the government does is press the proposition, accepted below in the form of improper "find[ing]s," Pet. 24a (made without benefit of trial and in the context of a pre-discovery summary judgment motion), that paying fully these contractors would have caused adjustments in tribal programs someplace else. Of course adjustments would have to be made if these payments had not already been internally budgeted, but in agency administration, not tribal programs.

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[4] As the record reflects, the Secretary held aside millions of dollars to pay for multiple layers of federal administration and other objectives targeted by Congress in §§ 450j-1(b)(1), (3) and (4). *E.g.*, Pet. C.A. App., Fitzpatrick Declaration, at 530-33 (describing over $400 million retained each year in IHS Headquarters for, *inter alia*, "inherently federal functions;" "Self-Governance [contract] negotiation[s];" and "Headquarters administrative support functions") & 541 (describing $47.7 million spent on "Direct Operations" for Area and Headquarters administration). IHS did so even in the face of repeated appropriations committee warnings imploring IHS to reprogram and restructure its operations in order to pay its contractors in full. *E.g.*, H.R. Conf. Rep. 103-740, at 51 (1994); S. Rep. 103-294, at 110 (1994); H.R. Rep. 103-158, at 100 (1993) (all demanding IHS reduce administrative activities and restructure in order to fund ISDA self-governance compacts). Not only is it perfectly "logic[al]," Resp. Br. 16, for Congress to offer a measure of protection only to programs "serving a tribe," while offering none to the government's own internal bureaucracy, but to read the ISDA otherwise would improperly "exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit," *Holloway v. United States*, 526 U.S. 1, 9 (1999), rendering Congress's express prohibitions in §§ 450j-1(b)(1), (3) & (4) nothing but "an exercise in futility," *Pierce County v. Guillen*, 123 S.Ct. 720, 730 (2003).

If the mere fact of an adjustment anywhere were sufficient to cut off contractors' rights, there would be nothing "contractual" at all to government contracts. This is not the law under *Blackhawk* and *Winstar*, and the Tenth Circuit's suggestion otherwise is a compelling reason to grant the petition.

4. The government's effort to distance this case from *Winstar* suggests that the Act and the contracts "placed the risk of insufficiency *on petitioners*." Resp. Br. 19. But even assuming that is true, the converse is surely true too: when contract payments come due and the risk of unavailable appropriations does not materialize (as was the case here), under § 450m-1(a) the government is liable for the resulting "money damages" if it nonetheless fails to pay. It is ludicrous to suppose that in the commonplace setting of contracts with "availability" clauses, contractors never have repose and certainty in their rights, and that the mere possibility of future retroactive legislation means such contractors have no real rights in the first place. It is precisely because contractors should be able to count on government agencies to honor their responsibilities out of available appropriations that plenary review here is necessary.

Contrary to the government's view, in considering a statutory "cap" on available appropriations the Federal Circuit in *Babbitt v. Oglala Sioux Tribal Public Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), never suggested that government contractors operating under "availability" clauses have no rights. The court held only that the government's contractual obligations in such circumstances are limited to the appropriations Congress at the time chooses to make available for the agency to pay them. *Id*. at 1378. Nothing in that decision remotely suggests that once Congress acts, a contractor also bears the risk either that the agency will simply spend down its appropriations on other discretionary activities and leave the contractor with nothing, or that the government years later might declare retroactively that no appropriations were ever

available in the first place. Indeed, the Federal Circuit in *Oglala* noted that the government *is* bound "contractually" once there are legally available funds. *Id*. at 1379-80.

The decision below has even less to do with the D.C. Circuit decision in *Ramah Navajo*. Unlike here, *Ramah Navajo* involved a congressional decision reflected in an appropriations act to limit the agency's contracting funds. 87 F.3d at 1342. There was no suit for damages for unpaid amounts, but only a suit challenging the agency's mishandling of a genuine appropriations shortfall. *Id.* at 1343. Never did the D.C. Circuit even hint that if Interior had, instead, received a lump-sum appropriation, it could still have avoided its obligations to pay the contractors in full. And no other court has ever so held, either under the ISDA or any other contracting regime.

5. The government tries to avoid the conflicts between the decision below and both *Winstar* and the *Red Lion* line of cases by insisting, not that Congress can change contract rights after the fact, but that Congress in Section 314 merely "made its intent" in the earlier appropriations acts "clear," Resp. Br. 20. *See* Pet. 20-21, discussing *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969). In making this bald assertion the government simply ignores that Congress in Section 314 never stated this to be its intent, the provision contains a telling "notwithstanding" clause reflecting a clear intent to alter pre-existing law, there were no lower court conflicts on the meaning of those enactments, and no legislative history exists supporting a mere intent to clarify a perceived ambiguity. All of these are the key missing guideposts for distinguishing a genuine clarification from an outright amendment. Pet. 21-22.

Indeed, as the government points out (Resp. Br. 22), the only relevant history shows that Congress was well aware of the uniform court decisions finding the ISDA and earlier appropriations Acts unambiguous, and finding the government's liability for underpaying contractors equally clear.

See S. Rep. 105-227 (1998), at 51-52 (discussing the importance of "[t]he availability of full CSC funding" to carry out ISDA contracts, the recent "deficiencies in CSC funding," and that "[a]gainst this backdrop, in several cases the Federal courts have held the United States liable for insufficient CSC funding"). Contrary to the government's view, the situation thus could not be more unlike *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999). *See id*. at 1287 (pre-existing "body of law that frequently [was] inconsistent and that provide[d] a vague and nebulous definition"), 1288 (history reflected "effort to retain the same standard of conduct"), 1290 ("drafting history" of original enactment "ambiguous"). Congress knew it was altering the pre-existing law under which the courts had consistently found the government liable for contract underpayments. Just as clearly under *Winstar* and *Red Lion*, that is something Congress cannot do with impunity.[5]

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

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[5] The government makes a half-hearted and belated suggestion that this case became moot seven years ago, when the relevant appropriations lapsed. Resp. Br. 23. But unlike cases for equitable relief brought under the Administrative Procedure Act, 5 U.S.C. § 702, this is a breach of contract action for "money damages" under the CDA. Resp. Br. 8 (acknowledging same); 25 U.S.C. § 450m-1(a) (authorizing "money damages"), (d) (referencing CDA). *See also* 41 U.S.C. § 605(a) (permitting six years, not the lapse of a contemporaneous appropriation, to submit a CDA claim). By statutory mandate, CDA money judgments are paid out of the Judgment Fund Appropriation created by 31 U.S.C. § 1304(a), an appropriation that under Art. I, § 9, cl. 7 certainly is an "Appropriation[ ] made by Law." *See Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994). For similar reasons, Section 314 is irrelevant too, for it does not even mention the Judgment Fund Appropriation, much less make that appropriation unavailable. Pet. 77a (addressing only appropriations "for the Bureau of Indian Affairs and the Indian Health Service").

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