No.

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

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 for the development, operation, and maintenance of concessions, such as restaurants, lodges, and gift shops, in the national parks.

RULE 14.1(b) 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 and 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).

RULE 29.6 STATEMENT

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the National Park Hospitality Association ("NPHA"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 282 F.3d 818. The Memorandum Opinion of the district court addressing the issue before this Court (App., *infra*, 35a-92a) is reported at 142 F. Supp. 2d 54. Other opinions issued by the district court 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 (App., *infra*, 93a-94a). The jurisdiction of this Court is invoked 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) 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 this part or the [National Park 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 Contact 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 disagreed with the Federal Circuit's interpretation of the CDA and ignored the views of the Department of the Interior's own Board of Contract Appeals. Furthermore, the Comptroller General has specifically questioned the D.C. Circuit's reasoning.

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, 1978 U.S.C.C.A.N. 5235, 5238. Given the importance of the CDA to government contracting – and the court of appeals' cramped interpretation of the scope of this important federal statute – review by this Court is plainly warranted.

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 services" or "the procurement of construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a)(2)-(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 presently 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). Those processes provide contractors with neutral arbiters to review decisions reached by the agency's contracting officer. In particular, the contractor has the choice either to appeal any decision to the agency's "Board of Contract Appeals" (see 41 U.S.C. §§ 606, 607)) or to remove the mat-

ter to the Court of Federal Claims (see 41 U.S.C. § 609(a)(1)), which is statutorily required to review the agency's decision "de novo" (41 U.S.C. § 609(a)(3)). Substantively, a major advantage of the CDA over the hodgepodge 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. The NPS was created in 1916 "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.'" App., *infra*, 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." App., *infra*, 2a (quoting An Act to Establish a National Park Service, ch. 408, 39 Stat. 595 (1916)).

"[P]rovid[ing] for the enjoyment" of the national parks (16 U.S.C. § 1) generally requires that visitors both be offered various services throughout the parks and be provided access to facilities, such as lodges, restaurants, and retail outlets, where those services are delivered. Because the government has been unable or unwilling to undertake on its own behalf the huge financial burdens and other responsibilities associated with the provision of these visitor services and facilities, 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 App., *infra*, 49a (NPS has always "relied on private concessioners for the provision of 'lodging, food, merchandising, transportation, outfitting and guiding, and similar activities.'") (quoting 64

Fed. Reg. 20,630 (Apr. 17, 2000)). The national parks concessions program, therefore, historically has been a partnership between the NPS and concessions contractors to develop and provide access to the national parks for the enjoyment of the public.

Between 1916 and 1965, there was no specific statutory scheme governing the relationship between the NPS and the concessioners that contracted to provide visitor services in the national parks. In light of growing industry and governmental concern about the NPS's concessions-contracting policies (see App., *infra*, 3a-4a), Congress enacted the National Park Service Concessions Policy Act ("1965 Act"), Pub. L. No. 89-249, 79 Stat. 969 (1965), to govern concessions contracts. The 1965 Act basically codified preexisting NPS concession policy. See S. REP. NO. 89-765, 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 App., *infra*, 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. 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 "ac-

commodations, 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.

The NPS has since 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)). The regulations declare that:

> Concession contracts are not contracts within the meaning of 41 U.S.C. 601 *et seq*. (the Contact 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. 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 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 App., *infra*, 68a-72a. The district 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." App., *infra*, 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 App., *infra*, 70a.

The court of appeals affirmed. 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 interpretative authority over its provisions." App., *infra*, 27a.[1] Accordingly, the court of appeals agreed with the NPHA that the agency was not entitled to *Chevron* deference in its interpretation of the CDA. Nevertheless, the court upheld the 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.

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

> § 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. *Id*. at 27a.

REASONS FOR GRANTING THE PETITION

The Contract Disputes Act was enacted both to standardize the federal government's contracting policies and to ensure that those who contract with the government receive fair treatment. The decision below that the CDA is inapplicable to government contracts that procure goods or services for the benefit of third parties, rather than for the government itself, cannot be squared with the plain language of the CDA and creates a gaping hole in the coverage of this important federal statute. In addition, the decision is in direct conflict with the decisions of the Federal Circuit and its predecessor, the Court of Claims, and has been rejected or questioned by the Department of Interior's own Board of Contract Appeals and by the Comptroller General. Further review is plainly warranted.

A. The Decision Below Is Clearly Incorrect And Is Contrary To The Views Of The Comptroller General And The Department Of Interior's Own Board Of Contract Appeals.

The D.C. Circuit's construction of the Contract Disputes Act is demonstrably incorrect. The CDA on its face applies to *any* "express or implied contract" entered into by "an executive agency" for "the procurement of" either "services" or the "construction, alteration, repair or maintenance of real property" (41 U.S.C. § 602(a)(2)-(3)), unless the CDA "specifically provide[s]" otherwise. *Id.* § 602(a). 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. Thus, the NPS is left to assert that concessions contracts entail neither the procurement of services nor the procurement of construction, repair, or maintenance of real property. However, concessions contracts are manifestly of both these sorts.

1. The NPS plainly "procur[es] services" when it contracts with a concessioner. The NPS has a statutory duty to 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); see also 16 U.S.C. § 1. Rather than undertaking these tasks itself, the NPS discharges its statutory duty by procuring the services of contractors who, subject to pervasive regulation and supervision by the agency, provide visitor services, staff park facilities, construct, maintain, and repair federally-owned structures, and perform related functions that promote the public's use and enjoyment of the national parks. For example, under section 3(a)(1) of the Standard Concession Contract, 65 Fed. Reg. at 26,064, the NPS lists for each contract the "visitor services" that the concessioner "is required to provide * * * during the term of" the contract. 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 these services from concessioners.

That visitors to the national parks enjoy a benefit from concessioners' actions in no way negates the obvious fact that the government has "procur[ed] services" – among others, the discharge of its statutory duty to accommodate the public (see 16 U.S.C. §§ 1, 5952) and the upkeep of its facilities within the parks. Thus, as the district court itself acknowledged, "the government is receiving services; it is

contracting for the provision of amenities to the visitors of its national parks" (App., *infra*, 68a).

2. The NPS is also typically "procur[ing] construction, alteration, repair, or maintenance of real property" by contracting with concessioners. By statute, all the real property that concessioners construct or use in the national parks belongs to the government, not to the concessioner. See App, *infra*, 20a; 16 U.S.C. § 5954(d). Concessioners are nonetheless responsible for constructing, maintaining and repairing that property. For example, under section 9(a) of the Standard Concession Contract, 65 Fed. Reg. at 26,068, concessioners "construct or install upon lands assigned to the Concessioner * * * those real property improvements that are determined by the [NPS] to be necessary and appropriate for the conduct by the Concessioner of the visitor services required and/or authorized under [the contract]." Such real property "will immediately become the property of the United States." *Ibid.* Similarly, section 9(d) of the Standard Concession Contract requires concessioners to "undertake and complete" a "Concession Facilities Improvement Program," the specifics to be detailed in each contract. *Ibid.* Section 6(g) makes concessioners responsible for weed and pest management at concession facilities. *Id.* at 26,067. Finally, as discussed above, section 10(a) 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. It is thus beyond question that the government is procuring construction, repair, and maintenance services – as the district court again recognized (App., *infra*, 69a).

3. The D.C. Circuit nonetheless held that concessions contracts are not subject to the CDA because "[t]heir function is * * * to procure services or goods for" "park area visitors" rather than "for the government." App., *infra*, 27a. This statement is both incorrect and irrelevant.

The court of appeals' statement is incorrect because, as noted above, concessions contracts provide a "service" *to the government* by helping the NPS discharge its statutory obligation to accommodate visitors in their enjoyment of the national parks. In addition, whoever might be said to "benefit" from the provision of goods and services in the national parks, it is beyond question that *the government itself* is the principal beneficiary of the concessioners' contractual obligation to maintain and repair park facilities *owned by the government*. A contract to maintain and repair the El Tovar Hotel at Grand Canyon National Park is no different in this respect than a contract 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)) or 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)).

Moreover, the court of appeals' statement is irrelevant because nothing in the CDA suggests that that statute applies only to agency contracts that procure goods, services or maintenance of real estate "for the government." App., *infra*, 27a. To the contrary, the CDA unambiguously covers *all* procurement contracts entered into by government agencies, even those that may be said to benefit third parties. As the Court of Claims has observed, "[i]t is hoped that *every* Government purchase 'benefits the public' in some way." *Yosemite Park & Curry Co.* v. *United States*, 582 F.2d 552, 559 n.8 (Ct. Cl. 1978) (emphasis in original). Indeed, given the purposes of the CDA – to standardize government contracting and to bring fairness to the government contracting process – it is hard to see why it would matter whether the goods, services, or property repair contracted for by the government principally benefit "park area visitors" rather than the government itself. The court of appeals was not at liberty to add

limiting language to a statute that Congress 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); *United States* v. *Rodgers*, 466 U.S. 475, 480 (1984); *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 222 (1945).[2]

4. As the court of appeals acknowledged (App., *infra*, 28a-29a), the Department of the Interior's own Board of Contract Appeals has long held that NPS concessions contracts are subject to the CDA and has specifically found that the portion of 36 C.F.R. § 51.3 exempting such contracts from the CDA is invalid. See *Watch Hill Concessions Inc.*, IBCA No. 4284-2000, 01-1 BCA ¶ 31,298, 2001 WL 170911, at *6 (Feb. 16, 2001); *Nat'l Park Concessions, Inc.*, IBCA No. 2995, 94-3 BCA ¶ 27,104, 1994 WL 462401 (Aug. 18, 1994); *R & R Enters.*, IBCA No. 2417, 89-2 BCA ¶ 21,708, 1989 WL 27790, at *32 (Mar. 24, 1989), aff'd on reconsideration, 89-3 BCA ¶ 22,043, 1989 WL 75890 (July 6, 1989). As the Board stated in *Watch Hill*,

> Congress could not have expressed itself more clearly to the effect that *all* contract claims based on a valid contractual theory fall within the procuring

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[2] Nor was the court of appeals correct that coverage under the CDA requires the government to "commit[] to pay out government funds." App., *infra*, 28a (internal citation and quotation marks omitted). CDA coverage explicitly does not depend on the expenditure of appropriated funds. See 41 U.S.C. § 602(a). Thus, the CDA is different from most other procurement-related statutes, which *are* limited to appropriated-fund activities and therefore do not apply to NPS concessions contracts. (For example, the Davis-Bacon Act (40 U.S.C. § 276a *et seq.*) applies only to certain "contract[s] in excess of $2,000" (*id.* § 276a(a)), and the Service Contract Act (41 U.S.C. § 351 *et seq.*) applies to contracts "in excess of $2,500" (*id.* § 351(a)); neither statute applies to NPS concessions contracts.)

> 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, beginning with the decision of the contracting officer.

2001 WL 170911, at *6 (emphasis added).

Rather than follow these decisions by the expert IBCA (see 41 U.S.C. §§ 607(d), 609(a)(1)), the court of appeals relied on *YRT Services Corp.* v. *United States*, 28 Fed. Cl. 366 (1993). See App., *infra*, 28a. But *YRT* held only that another set of rules, the Federal Acquisition Regulations ("FAR"), do not apply to concessions contracts. In addressing the question of whether the FAR applied to concessions contracts, *YRT* analogized to the applicability of yet another federal contracting statute – the Competition in Contracting Act ("CICA"), Pub. L. 98-369, 98 Stat. 1175 (codified at 31 U.S.C. §§ 3551-3556, 41 U.S.C. § 253) – which the *YRT* court opined did not apply to concessions contracts. *See YRT*, 28 Fed. Cl. at 392. In making this CICA-applicability analogy, however, the *YRT* decision offered no opinion about the applicability of the CDA.

Even if *YRT* were relevant to this case, that decision was expressly based on the views of the Comptroller General, who administers the CICA. See 28 Fed. Cl. at 392 (citing *Stephen Sloan Marine Corp.*, B-234219, 89-1 C.P.D. ¶ 435 (May 9, 1989)). But the Comptroller General since has clarified that *YRT* was based on a misunderstanding of his CICA jurisdiction. Thus, in adopting *YRT's* "permits" analogy, the D.C. Circuit ignored the Comptroller General's repeatedly-expressed position that concessions contracts are *not* like "permits," but instead involve services for the agency and hence are subject to CICA.[3]

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[3] See *Total Procurement Services, Inc.*, B-255934.3, 1994 WL 450445 (Aug. 16, 1994) ("Where a license agreement or conces-

Underscoring the D.C. Circuit's error, the Comptroller General just last month explained the distinction between NPS "permits" and NPS "contracts," holding that NPS concessions contracts are "procurements" within its CICA jurisdiction:

> [W]here the award of a concession contract included the provision of numerous services to the government, which the agency might otherwise have had to purchase or perform itself, we found that the solicitation involved a procurement of services. * * * On the other hand, * * * where the agency's issuance of concession permits merely allowed entry by visitors into a national park, and did not also include the provision of services to the government, we did not exercise jurisdiction.

Starfleet Marine Transp., Inc., B-290181, 2002 U.S. Comp. Gen. LEXIS 90, at *14-15 (July 5, 2002).

Indeed, the decision in *Starfleet Marine* considered and rejected the D.C. Circuit's reasoning in this very case:

> In reaching its conclusion and holding, the [D.C. Circuit] seems to have assumed that all concession contracts result in no more than "incidental benefits" to the government. In its brief discussion of this

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sion contract confers a benefit upon the government and furthers the function of an agency, we view the agreement or contract as one involving the procurement of property or services and therefore subject to our bid protest jurisdiction."); *West Coast Copy, Inc.*; B-254044.2, 1993 WL 476970, at *4 (Nov. 16, 1993) ("Where the government invites private vendors to compete for a business opportunity, the performance of which will produce a benefit to the government (such as a reduction in the government agency's own workload or some other support of the agency's mission), all elements necessary to invoke our [CICA] jurisdiction are present.").

> issue, the court also appears to have assumed that the primary purpose of a contractual transaction makes it exclusively a sale or a procurement. In our opinion, the court's view that a concession contract cannot also involve the procurement of property or services within the meaning of CICA does not take into account the specific facts of each situation.

Id. at *16-17.[4]

5. Finally, we note that when it was to the government's advantage to do so, the Department of Justice itself argued that the CDA applies to concessions contracts. See *Pound* v. *United States*, No. 94-496C (Fed. Cl. Aug. 30, 1996); App. *infra*, 95a-100a. The concessions contract at issue in *Pound* was to operate a marina on land owned by the Army Corps of Engineers. See *id*. at 98a. The government argued that the CDA applied to that concessions contract under, among other subsections, 41 U.S.C. § 602(a)(3), which covers government contracts for the repair or maintenance of real property. See Defendant's Motion To Dismiss Or, In The Alternative, For Summary Judgment Upon Count I Of The Complaint And Motion For Summary Judgment Upon Counts II And III And Defendant's Counterclaim, at 10-11 (Apr. 28, 1995), re-

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[4] Although the Comptroller General's reasoning is persuasive evidence that the CDA applies to NPS concessions contracts, we agree with the NPS that the CICA in fact does not apply to such contracts. The CICA applies to "contract[s] for the procurement of property or services" (31 U.S.C. § 3551(1)(A)), which, as the Comptroller General notes, are also contracts within the scope of the CDA. See *Starfleet Marine*, 2002 U.S. Comp. Gen. LEXIS, at *16 n.10. Like the CDA, the jurisdiction of the CICA "does not turn on whether appropriated funds are involved." *Id.* at *12. But the CICA, unlike the CDA, on its face "does not encompass procurement procedures which are otherwise expressly authorized by other statutes" (*YRT*, 28 Fed. Cl. at 392-393 (citing 41 U.S.C. § 253(a)(1))), such as the 1998 Act.

printed at App., *infra*, 100a. The government contended that the CDA was applicable because the concessioner constructed structures on and maintained the marina, in much the same way that NPS concessioners construct structures on and maintain NPS concessions.[5]

In sum, both the D.C. Circuit's decision limiting coverage of the CDA to contracts that "procure services or goods *for the government*" (App., *infra*, 27a (emphasis added)) and its determination that NPS concessions contracts fail to meet that test are contrary to the plain language and purpose of the statute and are inconsistent with the views of expert agencies. The NPS plainly procures both "services" and the "construction, alteration, repair or maintenance of real property" (41 U.S.C. § 602(a)(2)-(3)) in its concessions contracts.

B. The Decision Below Creates A Conflict In The Circuits On Whether The Contract Disputes Act Applies To Concessions Contracts.

The court of appeals' construction of the Contract Disputes Act cannot be squared with the decision of the Federal Circuit in *Total Medical Management, Inc.* v. *United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997), and of the Federal Circuit's precursor – the Court of Claims – in *Yosemite Park & Curry Co.*, 582 F.2d 552.

Total Medical Management involved agreements between the military and a private health care company to provide medical services to military dependants at an army hospital. As here, the government argued that the agreements 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 re-

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[5] The Court of Federal Claims in *Pound* did not address substantively the applicability of the CDA, noting instead that the parties *agreed* that the Act applied. See *Pound* v. *United States*, No. 94-496C, slip op. at 1 n.1, 10 n.2 (Fed. Cl. Aug. 30, 1996).

ceive the medical care." See *Total Med. Mgmt.*, 104 F.3d at 1320. The Federal Circuit rejected that argument, explaining that, "since it is clear that the government has legal obligations to military dependents and benefits by obtaining said dependents' care at a reduced cost," the agreements were procurement contracts subject to the CDA. *Ibid*.

In precisely the same way, the NPS has statutorily defined legal obligations to provide the visiting public with food, lodging, and other services in the national parks, and it has elected to discharge those duties by procuring them from concessioners rather than by furnishing them directly. See 16 U.S.C. §§ 1, 5951, 5952. See generally pages 4-6, *supra*. The decision below – that the CDA does not apply to NPS concessions contracts because their function is to "authorize third parties to provide services" rather than "to procure services or goods for the government" (App., *infra*, 27a) – is totally at odds with the Federal Circuit's view of the CDA in *Total Medical Management*.

Indeed, the NPS itself convinced the Court of Claims that concessions contracts fall within the reach of certain government procurement statutes such as the CDA. In *Yosemite Park & Curry Co.*, the concessioner argued that NPS concessions contracts were exempt from such statutes. The NPS disputed that assertion, and the court agreed with the agency. As the court explained, NPS concessions contracts will be covered by procurement statutes – assuming other statutory requirements are met – because the NPS cannot "avoid normal, legally mandated, procurement procedures" by "characteriz[ing] the procurement of * * * services for the public as the granting of a 'concession' to a specific contractor." *Yosemite Park & Curry Co.*, 582 F.2d at 558. As the court explained,

> [P]laintiff's attempted argument that a "concession" purchase is somehow different from a normal purchase because a concession contract "benefits the

> public" should * * * be accorded little weight. It is hoped that *every* Government purchase "benefits the public" in some way.

Id. at 559 n.8 (emphasis in original).[6]

Despite the fact that the NPHA expressly relied on *Total Medical Management*, *Yosemite Park & Curry Co.*, and *Oroville-Tonasket* in its briefs (see Br. Pls.-Appellants at 52, 54; Reply Br. Pls.-Appellants at 28), the court below never mentioned, much less attempted to reconcile, these conflicting decisions. Certiorari is plainly warranted to resolve this significant split of authority.

C. The Issue Presented Here Is Of Substantial Practical Importance.

This Court's review is essential because of the practical importance of the issue presented. The government contracts to purchase more than $220 billion in goods and services each year. See *Encourage Contracting Out of Federal Services: A Legislative Hearing on H.R. 3832, The Services Acquisition Reform Act of 2002 (SARA)*, *Before the Subcomm. on Technology and Procurement Policy, House Comm. on Gov't Reform*, 107th Cong. (Mar. 7, 2002) (statement of Angela B. Styles, Administrator for Federal Procurement Policy, at 1). This case has implications not only for NPS

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[6] The Court of Federal Claims – the court to which Congress has conferred jurisdiction over CDA claims (see page 4, *supra*) – has also held that the CDA applies to concessions contracts indistinguishable from NPS concession contracts. See, *e.g.*, *Oroville-Tonasket*, 33 Fed. Cl. at 22 (concluding that contract to manage a dam providing irrigation involved both "procurement of services" and procurement of "construction, alteration, repair or maintenance of real property" for purposes of CDA because contractor operated and maintained federally-owned facility, thus fulfilling responsibilities assigned by Congress to Secretary of Interior).

concessions contracts, but also for a significant portion of *all* government procurement contracts.

As Congress explained in enacting the CDA,

> How procurement functions has a far-reaching impact on the economy of our society and on the success of many major Government programs. Both can be affected by the existence of competition and quality contractors – or by the lack thereof. The way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business.

S. REP. NO. 95-1118, at 4. "Prior to the CDA, the 'system' for resolving federal contract disputes can best be described as a mess." C. Kipps, T. Kindness, & C. Hamrick, *The Contract Disputes Act: Solid Foundations, Magnificent System* ("*Solid Foundations*"), 28 PUB. CONT. L.J. 585, 585 (1999). Thus, the CDA was passed with the express purposes of standardizing government contracting systems and providing contractors with an independent method to adjudicate disputes, thus freeing them from "[t]he predilections of different agencies." S. REP. NO. 95-1118, at 3.

The CDA has been a great success, hailed as "a remarkable milestone in the field of government contracts for several reasons, including the fact that it lifted the disputes process out of the discretionary realm of agency clauses and placed the process squarely within a fixed statutory framework." *Solid Foundations*, *supra*, at 591. The CDA has "worked exceedingly well" for the past two decades. *Id*. at 585. In the sole previous instance when the courts significantly limited the scope of the CDA – by proclaiming restrictive rules for "certifying" a claim – Congress eventually stepped in to overrule that cramped interpretation. See *id.* at 592-595. Rather than rely on Congress, in this instance the Court should grant certiorari to resolve the confusion in the circuits over the coverage of the CDA and to correct the

lower court's unduly narrow reading of the statute. Cf. *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 400 (1966) (Court granted certiorari "because of the importance of [questions about the coverage of government contract disputes clause] in the administration of government contracts").

The decision below – exempting government contracts that benefit third parties from the scope of the CDA – undermines the CDA's goals of consistency and external accountability and threatens a return to the messy system of yesteryear, when "contractors were caught in an irrational patchwork system that limited their access to court, failed to provide adequate due process protections, and often resulted in substantial delays." *Solid Foundations*, *supra*, at 587. As *Total Medical Management*, *Oroville-Tonasket*, and *Pound* demonstrate, the NPS is far from unique in relying on concessions contracts to fulfill significant portions of its statutory mission.[7] The decision below could affect all such concessions contracts. Even *uncertainty* about whether concessions contracts include the protections of the CDA is, from the perspective of a contractor, almost as bad as not having such protections at all. Yet the D.C. Circuit's amorphous "benefits-third-parties" exception makes it difficult or impossible for agencies and contractors alike to determine whether a specific contract is covered by the CDA, or if instead its benefits inure to third parties to such an extent that the CDA does not apply.

The decision below also creates an incentive for agencies that would rather not expose their contracting decisions to a

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[7] See also, *e.g.*, *Harry Pohl KG*, ASBCA No. 51523, 01-1 BCA ¶ 31,329, 2001 ASBCA LEXIS 40 (Feb. 28, 2001); *Home Entm't, Inc*., ASBCA No. 50791, 99-2 BCA ¶ 30,550, 1999 ASBCA LEXIS 126 (Aug. 23, 1999); *Senor Tenedor, S.A. de C.V.*, ASBCA Nos. 48502 *et al.*, 97-2 BCA ¶ 29,192, 1997 ASBCA LEXIS 150 (Aug. 15, 1997).

neutral arbiter to design their contracting programs in such a way that the CDA would not apply. Because it could be argued that any government service contract benefits the persons served – even if fulfilling a statutory mandate – the unifying protections and procedures afforded to a large percentage of government contracts could unravel quickly.

Finally, the decision below has significant implications for the well-being of the Nation's national parks. Under the regulation at issue, NPS concessioners are denied neutral arbiters in any dispute they may have with the NPS, which "influences how, whether, and at what prices they compete for Government contract business." S. REP. NO. 95-1118, at 4. The lack of protection afforded by the CDA will damage the public-private partnership that long has served visitors to the national parks and fulfilled the statutory mandate of 16 U.S.C. § 1 (see pages 4-5, *supra*), in ways that may significantly undermine the public's ability to enjoy these national treasures.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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