No. 03-853

In the Supreme Court of the United States

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent agrees with the government that the Court should grant the petitions for a writ of certiorari in both this case and *Cherokee Nation* v. *United States*, No. 02-1472 (filed Apr. 3, 2003) (*Cherokee I*), and should consolidate the two cases for purposes of briefing and oral argument. See Mem. in Response (Resp. Mem.) 3. While agreeing with the government's position on the proper disposition of the petitions in the two cases, respondent devotes the bulk of its submission to arguing (i) that the government made a "misrepresentation" in *Cherokee I* on an issue as to which the government has made a "dispositive factual admission[]" in this case (Resp. Mem. 4-5), and (ii) that the government's arguments on the merits are incorrect (*id.* at 5-9). Respondent is wrong on both counts. In particular, respondent is fundamentally wrong in contending that the Indian Health Service (IHS) was required to divert to the payment of contract support

costs for Indian Tribes the funds that were needed to support the inherent federal functions of IHS itself—funds necessary for there even to *be* an IHS that could enter into contracts with respondent and other Tribes. Nothing in the Indian Self-Determination Act (ISDA) or in the United States' agreements with respondent and other Tribes compelled that startling and self-defeating result.

A. The Government Made No Admission In This Case Or Any Misrepresentation In *Cherokee I* Concerning The Ability To Pay Contract Support Costs Without Affecting Tribal Services

The petition urges that, in order to ensure a full consideration of all pertinent issues, the Court should grant review in both this case and *Cherokee I*. Pet. 30. The petition suggests in the alternative (*ibid.*) that, if the Court wishes to grant certiorari only in one of the cases, the government on balance would favor review in *Cherokee I*. As the petition explains (at 28-29), the trial court in *Cherokee I* compiled a full factual record and made findings of fact that were affirmed by the court of appeals. In this case, by contrast, the court of appeals (over the government's objection) sought to develop a factual record on appeal through post-argument briefing, and the court relied on questionable conclusions that it reached in the first instance on appeal without any remand for factfinding, as would be consistent with the ordinary course of review. See Pet. App. 31a-33a.

Respondent nonetheless submits that the record in this case is actually superior to the one in *Cherokee I*. According to respondent (Resp. Mem. 4-5), the record in *Cherokee I* is marred by a "misrepresentation" by the government concerning the Secretary's ability to pay additional contract support costs without reducing funding for tribal services, whereas the record in this

case contains a contrary "admission" by the government that the Secretary could have paid additional contract support costs without affecting funding for tribal services. That contention is incorrect. The government's submissions in the two cases do not differ in any material respect, and the government has made no factual admission of the sort respondent suggests.

In the district court proceedings in *Cherokee I*, the government submitted a declaration showing that appropriations in the relevant fiscal years were insufficient to pay respondent's full contract support costs, and that additional payments to respondent thus would have required reprogramming funds used for tribal services. See Pet. App. 14a-15a, *Cherokee I* (No. 02-1472); C.A. App. 527-539, *Cherokee Nation* v. *Thompson*, 311 F.3d 1054 (10th Cir. 2002) (C.A. No. 01-7106). Respondent did not challenge that declaration, see Pet. App. 15a, *Cherokee I* (No. 02-1472), and the district court and court of appeals found that the government had "demonstrated that providing to [respondent its] entire CSCs for ongoing contracts would have necessitated a reduction in funding for other tribal programs," *ibid.*; see *id.* at 28a, 46a.

There was no contrary admission in this case. The government submitted essentially the same declaration to the Board of Contract Appeals in this case as it filed in *Cherokee I*, see C.A. App. 473-484, and it filed a similar (but expanded) declaration in the court of appeals in response to the court's request for supplemental briefing, see 5/12/03 Decl. of Lovell Hopper (Hopper Decl.) (Exh. 1 to Revised Supp. Br. of Appellant Tommy G. Thompson (filed May 12, 2003)). Respondent grounds its claim of an "admission" in the Secretary's explanation in the declarations in this case that, in the pertinent fiscal years (as in every year), a portion of IHS's appropriations funded the agency's "residual" or

"inherent federal functions," *i.e.*, those functions that by nature cannot be contracted to Tribes and are needed for IHS to function as a federal agency even if all IHS health programs were contracted to Tribes. See C.A. App. 478 ¶ 13; see also Hopper Decl. ¶¶ 8, 10, 17, 20, 28, 31, 39, 42. The Secretary's explanation that a portion of IHS's appropriations paid for such inherent federal functions in no way constituted a theretofore undisclosed admission: the declaration in *Cherokee I* likewise explained that a portion of IHS's appropriations is allocated to a "residual amount" that is "not subject to contracting" but instead pays for "inherently federal functions needed for the IHS to function as a federal agency." C.A. App. 532-533 ¶ 14, *Cherokee I* (C.A. No. 01-7106). And the Secretary has consistently maintained that funding for those functions is not "available for reprogramming (i.e. to make up for the contract support cost shortfall)." C.A. App. 478 ¶ 13.

B. Funding For Inherent Federal Functions Is Not Available To Pay Contract Support Costs

Respondent errs in its contention (Resp. Mem. 5) that the Secretary was required to make up the shortfall in appropriations for contract support costs by reprogramming funds required to pay for inherent federal functions. Respondent relies on 25 U.S.C. 450j-1(b)(3), which states that the amount of funds for self-determination contracts "shall not be 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." Respondent, like the court of appeals below, conflates the general category of funds for "Federal functions" (referred to in Section 450j-1(b)(3)) with the more particular category of funds for "*inherent* federal func-

tions." The statute makes clear that inherent federal functions are not coextensive with the "Federal functions" encompassed by Section 450j-1(b)(3), but instead represent a specific type or subset of federal functions, *i.e.*, functions that cannot be contracted to Tribes. See 25 U.S.C. 458aaa(a)(4) (defining "inherent Federal functions" to mean "those Federal functions which cannot legally be delegated to Indian tribes").

The very nature of IHS's inherent ("residual") federal functions dictates that funding for those functions was never "available" in the first place to support the delivery of health care (whether by IHS or by Tribes under contract), and therefore is not subject to reprogramming to pay for the Tribes' contract support costs. Because inherent federal functions by definition may not be performed by Tribes under contract, it would make little sense to require that funds needed to perform those functions be redirected to pay the Tribes' contract support costs. Indeed, any such conclusion would be nonsensical. For instance, as explained in the petition (at 24-25), if the Secretary in 1996 had reprogrammed funds originally designated for IHS's residual functions to pay instead for the program-wide shortfall in contract support costs, that would have virtually wiped out any funding for IHS's inherent federal functions, essentially requiring the agency to close its doors and cease its operations. Respondent's interpretation of the funding provisions for self-determination contracts thus would contemplate the elimination of IHS's very ability to enter into such contracts.

Given that consequence of respondent's position, it is not surprising that the understanding has always been that funds for inherent federal functions are segregated from those that are available to pay for contracts and programs for the delivery of health care. Indeed, the statutory provisions added to the ISDA in 2000 to

establish a tribal self-governance program in IHS specifically distinguish between "inherent Federal functions," as defined in 25 U.S.C. 458aaa(a)(4), and a Tribe's "tribal share," defined to mean "an Indian tribe's portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) *that are not required by the Secretary for performance of inherent Federal functions*," 25 U.S.C. 458aaa(a)(8) (emphasis added). See also 25 U.S.C. 458aaa-4(b)(1) (funding agreement shall authorize Tribe to receive "full tribal share funding"); 42 C.F.R. 137.42 (same); S. Rep. No. 221, 106th Cong., 1st Sess. 6 (1999) (noting that definition of "tribal share" is consistent with a proposed regulation under the already-established BIA self-governance program defining "residual" funds needed to carry out inherent federal functions, and that "[a]ll funds appropriated under the [ISDA] are either tribal shares or Agency residuals"); 25 U.S.C. 458cc(k); 25 C.F.R. 1000.82, 1000.94, 1000.95 (BIA self-governance program). Funds needed to support inherent federal functions therefore are not subject to reprogramming to pay for contract support costs or other costs incurred by Tribes under self-determination agreements. Respondent's annual agreements with IHS reflect that basic understanding. See C.A. App. 279 (FY 1995 Annual Funding Agreement (AFA)) ("funds identified herein were calculated by IHS using the same *residual and categorical line-item assumptions* which IHS utilized in FY 1994") (emphasis added); *id.* at 348 (FY 1996 AFA) ("should the residual amount be decreased, this [agreement] shall be modified to include [respondent's] share of additional funding made available by the decrease in residual").

This case therefore is controlled not by Section 450j-1(b)(3), but instead by the prescription that,

"[n]othwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." 25 U.S.C. 450j-1(b); see 25 U.S.C. 458aaa-18 (repeating same language). As the court of appeals in *Cherokee I* correctly concluded, there were insufficient appropriations available in the relevant fiscal years to pay for respondent's contract support costs. Payment of those costs therefore would have required reduced funding to support tribal services and programs, including funding for the inherent federal functions that are necessary to have such tribal services and programs in the first place.[1]

C. Respondent's Remaining Arguments Are Erroneous And Do Not Counsel Against Review

1. Respondent's additional arguments on the merits (Resp. Mem. 5-9) are incorrect. Contrary to respondent's contention (Resp. Mem. 5), the government has not argued that self-determination agreements do "not really involve a 'contract' at all." Instead, the government explained in the petition (at 17) that self-determination agreements constitute government-to-government funding arrangements rather than typical government procurement contracts. See 25 U.S.C. 450b(j). Whereas a procurement contractor performs services for the government, Tribes that elect to enter into self-determination agreements essentially step into the shoes of the government by receiving federal funding

[1] Respondent observes (Resp. Mem. 5, 9) that the balance sheet for the relevant fiscal years now reflects a nominal balance ranging from $1.25 million to $6.8 million. Those sums are far from sufficient to pay for the overall shortfall in contract support costs for those years, which ranges from $21.9 million to $34.6 million.

and performing federal services otherwise performed by IHS. That understanding reinforces the express prescription in the statute (25 U.S.C. 450j-1(b)) that funding for federal services performed by Tribes under self-determination agreements—like funding for services performed by federal agencies—is subject to Congress's furnishing of sufficient appropriations. It also reinforces the conclusion that, whether the health services are performed by IHS or by Tribes under contract, there is a core set of inherent governmental functions that must be carried out by IHS and that therefore require a portion of IHS's lump sum appropriation.

Moreover, Congress later exercised the appropriations authority expressly reserved in 25 U.S.C. 450j-1(b) by specifying in Section 314 (Pub. L. No. 105-277, 112 Stat. 2681-288) of the FY 1999 appropriation for IHS that, "[n]otwithstanding any other provision of law," the amounts "appropriated to or earmarked in committee reports * * * by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes * * * for contract support costs associated with self-determination or self-governance [agreements] * * * are the total amounts available for fiscal years 1994 through 1998 for such purposes." Pet. App. 106a. That provision unambiguously establishes that the Secretary is not required to pay additional contract support costs for those years. Respondent suggests (Resp. Mem. 9) that Section 314 was intended only to address the Secretary's five-year authority to make adjustments to a previous year's appropriation account and to liquidate past obligations. See 31 U.S.C. 1553(a). But the plain terms of Section 314 limit the Secretary's expenditure of funds for contract support costs for fiscal years 1994 through 1998 to the amounts earmarked in the committee reports for those years, and it is undisputed that those amounts were insufficient to pay the overall con-

tract support costs for those years. Moreover, the legislative history reflects that Congress was acting specifically in response to concerns that the government might be held "liable for insufficient CSC funding" in suits like this one. S. Rep. No. 227, 105th Cong., 2d Sess. 52 (1998). Section 314 thus plainly prohibits any additional payment for contract support costs for the years 1994 through 1998.

2. Although the court of appeals' decision creates a square conflict, the government explained in the petition (at 27) that the conflict may not have broad prospective significance. Respondent appears to agree with that point (Resp. Mem. 7), noting that Congress, since fiscal year 1998, has provided explicit statutory caps on appropriations for contract support costs, thereby eliminating any question concerning the extent of the Secretary's obligation to fund those costs. But respondent fails to address the further concern that would arise if the Federal Circuit's decision is read to require IHS (and BIA) to reprogram funds needed to perform inherent federal functions in order to fund other aspects of Tribes' self-determination or self-governance agreements that (unlike contract support costs) are not specifically capped within either agency's lump-sum appropriation—such as the funding of basic services. See Pet. 27-28. Respondent also observes (Resp. Mem. 7) that the statute of limitations now would likely foreclose any new claims to recover contract support costs for the fiscal years before Congress began using explicit statutory caps. Nonetheless, as respondent acknowledges (*id.* at 8), there is pending litigation concerning the Secretary's obligation to pay for contract support costs in such years, including two putative class

actions.[2] See Pet 27. It is for the foregoing reasons that the government did not oppose the Tribe's petition in *Cherokee I* and suggests here that the Court grant review in both *Cherokee I* and this case.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petitions for a writ of certiorari in this case and in *Cherokee Nation* v. *United States*, No. 02-1472, should be granted and the cases should be consolidated for briefing and argument. In the alternative, the petition in this case should be held pending the decision in No. 02-1472 and disposed of as is appropriate in light of the Court's decision in that case.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MARCH 2004

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[2] Respondent observes (Resp. Mem. 8) that the motion for class certification was denied in *Cherokee I*, but the question of class certification remains unresolved in the two putative class actions referred to in the petition, *Pueblo of Zuni* v. *United States*, No. 01-1046 (D.N.M. filed Sept. 10, 2001), and *Tunica-Biloxi Tribe* v. *United States*, No. 02-2413 (D.D.C. filed Dec. 9, 2002).