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No. 11-551

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Respondents do not dispute that, each year for more than 15 years, Congress has imposed an express statutory ceiling on the total appropriations available to the Secretary of the Interior to pay contract support costs under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.* Under the ISDA—which unequivocally reserves Congress's authority to control the expenditure of public funds, see 25 U.S.C. 450j-1(b)—the Secretary cannot commit the Treasury to pay more than Congress appropriates. And, as the ISDA requires, the contracts at issue in this class action expressly recognize that the appropriations made available by Congress may be insufficient to cover respondents' requests for funding. Respondents, who entered into contracts containing those terms, have no contractual right to demand payment of amounts Congress did not appropriate.

Respondents nonetheless dismiss the statutory caps as a "distraction" (Br. 52) and insist that they are entitled to recover all of their requested contract support costs as a matter of contract law (Br. 14), overriding Congress's appropriations judgment. That contention is fundamentally misconceived. Absent some competing assertion of constitutional prerogative—and there is none here—this Court has never declined to give effect to an explicit invocation of Congress's authority to determine the amount of funds that may be "drawn from the Treasury" for a particular purpose. U.S. Const. Art. I, § 9, Cl. 7. Respondents remain free to petition Congress to appropriate additional sums. But the United States may not be held liable under the ISDA for the Secretary's compliance with statutory restrictions on the use of public funds.

A. Respondents Received All Of The Funding That The Secretary Promised

Respondents (Br. 14) and their amici contend that this is a "basic contract case" and that each member of the respondent class is entitled to recover, as a remedy for the Secretary's alleged "breach" (Br. 17), all of its requested contract support costs—even if the aggregate sum exceeds the "not to exceed" caps imposed by Congress. *Id.* at 17-35.

That theory fails in several fundamental respects, starting with its premise: neither the ISDA itself nor any contract at issue in this case promises that the Secretary will pay sums in excess of the appropriations provided by Congress. Indeed, although respondents spend pages discussing "basic principles of contract law" (Br. 17), they cannot point to *any example* of a contractual promise by the Secretary in this case that is not expressly made contingent on the availability of appropriations. Their inability to identify such a promise is hardly surprising, given that "[i]t is a fed-

eral crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." *OPM* v. *Richmond*, 496 U.S. 414, 430 (1990). Because the Secretary did not promise to pay more than Congress appropriated, there is no "breach" that could in turn give rise to a cause of action for damages to be paid out of the Judgment Fund.

1. The Secretary promised to pay only what Congress appropriated

Congress could hardly have been clearer that all funding under the ISDA is subject to Congress's appropriations decisions. Gov't Br. 36-43. The ISDA authorizes self-determination contracts, but it expressly provides that "[t]he amounts of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c)(1). Every self-determination contract must include an explicit proviso that the Secretary's obligation to "make available" the agreed sums is "[s]ubject to the availability of appropriations." 25 U.S.C. 450*l*(a)(1) and (c) (model agreement § 1(b)(4)). As a corollary, the Act requires every contract to provide that the tribal contractor's own obligation to "administer the programs, services, functions and activities" at issue is likewise "[s]ubject to the availability of appropriated funds." *Id.* (model agreement § 1(c)(3)). The Act itself broadly declares that, "*[n]otwithstanding any other provision in this [Act]*, the provision of funds under this [Act] is subject to the availability of appropriations." 25 U.S.C. 450j-1(b) (emphasis added). And for good measure, Congress has specified in every relevant appropriations act since fiscal year 1999 that the statutory limits on contract support costs shall apply "notwithstanding any other provision of law, including but not limited to the Indian Self-Determination

Act of 1975, as amended." See, *e.g.*, Pub. L. No. 105-277, 112 Stat. 2681-245 to -246.

The ISDA consequently does not guarantee any particular level of funding for contract support costs irrespective of the appropriations Congress actually makes.[1] Indeed, Congress enacted the ISDA's broadest availability-of-appropriations contingency, 25 U.S.C. 450j-1(b), as part of the same 1988 amendments that first created the ISDA's requirement to provide funding for contract support costs. See Gov't Br. 39-40. Congress thus reserved its authority to decide how much public money to make available for contract support costs each year, just as it does for other federally funded programs for the benefit of Indians.

Consistent with the ISDA, *every* contract in the record of this litigation provides that federal funding under the contract is contingent on the availability of appropriations. See, *e.g.*, J.A. 98, 123, 206. Furthermore, as respondents acknowledge (Br. 7), every contract under the ISDA incorporates the provisions of the Act itself—including the broad availability-of-appropriations condition in Section 450j-1(b). See 25 U.S.C. 450*l*(a)(1) and (c) (model agreement § 1(a)(1)). Respondents, both individually and collectively, therefore had notice of the prospect that Congress might decline to fund their contract support costs at 100% of their needs. Each member of the respondent class entered into a contract that explicitly acknowledged the possibility of insufficient appropriations and stipulated that *both* sides would be excused from full performance if appropriations were inadequate. 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) & (5), and (c)(3)).

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[1] Contrary to respondents' assertion (Br. 14, 21-22), the government has consistently argued throughout this litigation that the ISDA does not guarantee "full" funding of tribal contract support costs irrespective of appropriations. See, *e.g.*, Gov't C.A. Br. 17-20; J.A. 82 (answer).

Under "basic principles of contract law" (Br. 17), therefore, respondents have received the benefit of their bargain. As the district court found (and respondents do not dispute), in every fiscal year at issue, the Secretary "distributed to tribal contractors the full amount of funding appropriated for" contract support costs. Pet. App. 98a. Moreover, unlike in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), in which the governing "appropriations Acts contained no relevant statutory restriction," *id.* at 637, the "not to exceed" caps at issue here bar the Secretary from reprogramming other agency funds. See Resp. Br. 36 n.12 (acknowledging that, unlike here, the government "was free in *Cherokee* to reprogram funds to pay the contract support costs fully"). By distributing to respondents every dollar Congress appropriated for contract support costs each fiscal year, the Secretary fully discharged the government's statutory and contractual obligations.[2]

2. Respondents ignore the plain terms of the contracts and the ISDA

Respondents' argument to the contrary depends on their contention (Br. 25, 43) that the statutory and contractual phrase "subject to the availability of appropriations" does not actually make the Secretary's promise to pay funds from the Treasury contingent upon the availability of appropriations. In respondents' view, the multiple availability-of-appropriations clauses merely operate as

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[2] There is no substance to respondents' contention (Br. 24 & n.8) that the government "conceded" liability in a single sentence in a district-court filing in another litigation. The sentence at issue, which respondents do not reproduce, merely recognized the possibility that the Tenth Circuit might refuse to give effect to the availability-of-appropriations provisos in the ISDA. See Gov't C.A. Br. 49-55.

"*timing* provision[s] that affect[] *when* the contract becomes binding, not how much a party is owed" (Br. 25).

That argument ignores both the statutory text and common sense. Congress meant what it said: the Secretary's obligation to provide funding for contract support costs under the ISDA is "subject to"—that is, "under the contingency of" or "dependent upon," *Webster's New International Dictionary of the English Language* 2509 (2d ed. 1958)—Congress's appropriation of sufficient funds. The very point of such provisions is to reserve Congress's constitutionally rooted authority to control the expenditure of funds from the Treasury. Cf. *OPM* v. *Richmond*, 496 U.S. at 425 (authority of all federal officials is "limited by a valid reservation of congressional control over funds in the Treasury").

Respondents are correct (Br. 25) that one function of a "subject to the availability of appropriations" clause is to enable agencies to enter into contracts for fiscal years for which Congress has not yet made appropriations. See *Cherokee*, 543 U.S. at 643. But the reason it has that effect is that, if Congress fails (or refuses) to appropriate sufficient funds, the contract is not binding on the government: there is no contractual promise to pay more than Congress appropriates, and thus no violation of the Anti-Deficiency Act. See 31 U.S.C. 1341(a)(1)(A)-(B). For the same reason, the plain meaning and effect of Section 450j-1(b) and the corresponding contractual provisions is that the Secretary has no obligation to provide funds beyond what Congress appropriates. See *Bradley* v. *United States*, 98 U.S. 104, 114 (1878) (giving effect to a contractual availability-of-appropriations clause); see also *Sutton* v. *United States*, 256 U.S. 575, 579 (1921) (similar). Indeed, the Secretary could not lawfully do so.

3. Absent a special grant of "contract authority," all federal contracts are subject to the availability of appropriations

Contrary to the arguments of respondents (Br. 22) and their amici, the fact that the Secretary's promise to pay funds from the Treasury is contingent on the availability of appropriations does not make the government's promise "illusory." Because of the Secretary's promises, the Secretary is contractually bound to distribute to respondents all of the appropriated funds Congress makes legally available for the payment of ISDA contract support costs, even if the Secretary would prefer to use that money elsewhere. That was the Court's holding in *Cherokee*, see 543 U.S. at 641-643, and it is uncontested that the Secretary has discharged that responsibility here, see Pet. App. 98a.

Accordingly, the appropriations contingencies do not make the Secretary's promises to pay contract support costs "illusory," any more than the principal commitment made by the government in any ISDA self-determination contract—to provide the amount of public funds that the Secretary "would have otherwise provided for the operation of the programs" at issue, 25 U.S.C. 450j-1(a)(1)—is an "illusory" promise. Indeed, except where Congress provides the "special statutory authority needed to bind the Government without regard to the availability of appropriations," *Cherokee*, 543 U.S. at 643, *all* government contracts are contingent upon the appropriations provided by Congress.

As our opening brief explained (at 31-32), Congress has enacted a handful of statutes that create the special statutory authority—known as "contract authority"—to which this Court referred in *Cherokee*. See 2 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 6-88 (3d ed. 2006) (*Red Book*) (discussing contract authority). Although respondents avoid using the term "contract au-

thority," their arguments boil down to the assertion that the ISDA creates such authority: they argue that the Act requires the Secretary to provide "full" funding for all tribal contract support costs and that, if Congress does not appropriate sufficient funds to cover those costs, tribal contractors can simply recover the unappropriated sums as "damages" from the Judgment Fund. Br. 19-34.

Federal law has long provided, however, that a statute "may be construed * * * to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states * * * that such a contract may be made." 31 U.S.C. 1301(d). This Court relied on that interpretative rule nearly a century ago in *Sutton*, holding that the Secretary of War was "without power" to promise more than the amounts Congress appropriated because Congress had not clearly permitted the making of a deficiency contract. See 256 U.S. at 579 (relying on the predecessor to Section 1301(d)). Some statutes do meet that standard: a provision of the Price-Anderson Act, for example, authorizes the Nuclear Regulatory Commission to "incur obligations without regard to" the Anti-Deficiency Act. 42 U.S.C. 2210(j). In the ISDA, by contrast, Congress not only failed to include any such provision, but repeatedly declared that all funding under the Act is "subject to the availability of appropriations." See 25 U.S.C. 450j(c)(1), 450j-1(b) and 450*l*(c) (model agreement § 1(b)(4)). And as this Court explained in *Cherokee*, one effect of such a provision is precisely to confirm that agency officials do *not* possess the "special statutory authority needed to bind the Government without regard to the availability of appropriations." 543 U.S. at 643.

4. Respondents' "over-commitment" theory underscores the error of their interpretation of the ISDA

Respondents contend that the government is liable for unappropriated funds because the Secretary "over-committed himself" (Br. 1) by accepting too many contractual obligations. But as respondents eventually acknowledge (Br. 52), the ISDA *requires* the Secretary to accept all proposals for self-determination contracts from tribes except in specific circumstances. See 25 U.S.C. 450f(a)(1) ("The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts[.]"); 25 U.S.C. 450f(a)(2)(A)-(E) (permitted grounds for declination). Nor is a tribe limited to a single contract: at any time, a tribe can request an additional contract—for example, to administer a different federal program—or propose to expand an existing contract. The Secretary is generally not free to refuse. If the Secretary does decline a contract request, furthermore, the tribe can sue to reverse that decision. See 25 U.S.C. 450m-1(a) (authorizing "injunctive relief to reverse a declination finding").[3] Even as respondents chastise the Secretary for "over-committing himself" (Br. 1), therefore, they are careful not to suggest that the Secretary had any other choice.

Respondents appear to recognize (Br. 52-53) the difficulty of reconciling: (a) Congress's requirement that the Secretary accept every qualifying ISDA contract, which respondents construe to include a promise of "full" funding for all contract support costs irrespective of appropriations,

[3] Indeed, the Tenth Circuit has gone so far as to hold that the Indian Health Service was required to accept a tribe's proposal for an ISDA contract notwithstanding that the agency had already promised to other tribes all of the funds in a capped appropriation. *Southern Ute Indian Tribe* v. *Sebelius*, 657 F.3d 1071, 1079-1080 (2011), petition for cert. pending, No. 11-762 (filed Dec. 19, 2011).

with (b) the statutory appropriations caps that Congress has enacted each year for more than 15 years. Respondents' solution to this dilemma is to declare the statutory scheme "schizophrenic" (Br. 53) and insist that they must be paid 100% of their contract support costs notwithstanding the statutory caps. If respondents were correct, the result would be schizophrenic indeed: in their view, Congress effectively required officials at the Bureau of Indian Affairs to violate the Anti-Deficiency Act by promising to pay sums in excess of statutory appropriations limits. That conclusion is itself sufficient reason to reject respondents' interpretation. Cf. *Hercules, Inc.* v. *United States*, 516 U.S. 417, 427-428 (1996) ("We view the Anti-Deficiency Act, and the contracting officer's presumed knowledge of its prohibition, as strong evidence that the officer would not have provided, in fact," the contractual promise claimed).

In any event, the dilemma respondents posit disappears if the plain text of the ISDA is given its intended effect: "Notwithstanding any other provision in this [Act], the provision of funds under this [Act] is subject to the availability of appropriations." 25 U.S.C. 450j-1(b); see also 25 U.S.C. 450j(c)(1), 450*l*(c) (model agreement § 1(b)(4)). In the ISDA, Congress committed the United States to a policy of supporting the self-determination of Indian tribes, and it required the Secretary to accept every qualifying request from an Indian tribe for a contract to administer a federally funded program for the benefit of Indians. But Congress also reserved, in unmistakable terms, its discretion to decide each year how much of the public's money should be spent for that purpose. Accordingly, the Secretary here accepted all of respondents' requests for ISDA contracts and, consistent with those contracts, distributed all of the funds that Congress appropriated for contract support

costs. The Secretary promised—and Congress authorized—nothing more.

5. The Secretary's methodology for distributing the appropriated sums is not at issue

Respondents also criticize the Secretary's methodology for distributing the sums appropriated by Congress for contract support costs. Br. 9-10, 23, 49. But this class action involves no challenge to the Secretary's distribution decisions, nor could it: because the total appropriated sum is fixed, any change in the distribution method would benefit some class members at the expense of others. This case arises solely from respondents' claim that the Secretary's refusal "to pay more than the 'not to exceed' level" of funding specified in the appropriations caps constitutes a breach of contract as to *every* member of the class. J.A. 73 (amended class complaint).

In any event, respondents' objections lack merit. Contrary to respondents' caricatures, the Secretary does not claim unfettered discretion to "pay[] whomever [he] wants and shortchang[e] the rest" (Br. 2). But the Secretary obviously had to adopt *some* methodology for distributing the appropriated funds without exceeding the statutory caps, and the D.C. Circuit ruled more than a decade ago that the Secretary was required to do so in an equitable manner consistent with the ISDA. *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1347-1349 (1996). Accordingly, the Secretary has distributed the funds appropriated by Congress each year in a transparent and proportional manner—originally on a "uniform, pro rata basis" (Pet. App. 9a) as provided in annual notices in the *Federal Register*, and now according to an algorithm developed in 2006 after extensive consultation with affected tribes. See Gov't Br. 11

& n.5. Some of respondents' contracts expressly refer to those policies. See, *e.g.*, J.A. 123.

Nor is there any merit to respondents' suggestion (Br. 9-10) that the Secretary's methodology over-compensates or under-compensates certain tribes. The data on which respondents rely, which appear on the website of one of their amici, are not in the record below. But as far as we can tell, the variations they describe are the results of ordinary, after-the-fact adjustments to indirect cost rates based on audits of the affected tribes' expenses. Cf. Resp. Br. 21 n.5 (noting that such adjustments are "commonplace in government contracts"). And even if the Secretary's methodology were flawed, that would mean, at most, that the capped sums must be distributed differently—not that respondents could recover amounts in excess of the statutory caps.

B. Because Of The Statutory Caps, Respondents' Reliance On *Cherokee* And *Ferris* Is Misplaced

Respondents' argument, at bottom, is that the statutory appropriations caps that Congress has imposed each year are irrelevant. But respondents articulate no plausible theory for ignoring express limits Congress placed on the use of public funds. Nor can their argument derive any support from *Cherokee* or *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892), neither of which involved any contention that Congress had, by statute, explicitly circumscribed the authority of agency officials to bind the United States to pay the amounts at issue.

1. Respondents ignore the plain meaning and effect of the statutory appropriations caps

Respondents dismiss the "not to exceed" statutory caps as a "distraction" (Br. 52) and contend that awarding respondents all of their requested contract support costs—in

aggregate amounts far in excess of those caps—would "not undermine Congress's control over appropriations" (Br. 52). But statutory restrictions on the use of public funds are not so easily set aside. "It is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation." *Hooe* v. *United States*, 218 U.S. 322, 333 (1910). As this Court has explained, the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM* v. *Richmond*, 496 U.S. at 427-428. The appropriations caps in this case reflect Congress's judgment that the important federal policies served by underwriting Indian tribes' contract support costs under the ISDA do not justify jeopardizing the funding available for other programs for Indians and Indian tribes, including essential services for tribes that have elected *not* to enter into ISDA contracts. Gov't Br. 28-29; see, *e.g.*, H.R. Rep. No. 609, 105th Cong., 2d Sess. 125-126 (1998) ("[T]he Committee cannot afford to pay 100% of contract support costs at the expense of basic program funding for tribes."). Judgments of that kind are quintessentially for Congress to make. Respondents do not cite, and we have not found, any case in which this Court has declined to give effect to such an explicit invocation of Congress's appropriations authority, at least absent some competing claim of constitutional prerogative, which respondents do not advance here.

In respondents' view, however, the "not to exceed" statutory caps impose no upper limit at all on the amounts to be paid from the Treasury. Respondents construe the caps as merely procedural in effect: the only consequence of the

Secretary's exhaustion of the appropriated sum, they argue (Br. 38, 51), is that tribal contractors may recover the remainder of their contract support costs from the Judgment Fund, rather than from the Secretary directly. Respondents insist (Br. 28-34) that, by appropriating enough funds to satisfy the claim of any single contractor taken alone, Congress permitted the Secretary to bind the United States to *any number* of contracts as long as no single contract exceeds the appropriated amount, irrespective of the aggregate sum.

This Court has never embraced such an extraordinary proposition, which would substitute the individual decisions of administrative officials for Congress's own determination of the total sums that may be paid from the Treasury. *OPM* v. *Richmond*, 496 U.S. at 427-428; see *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937) (Appropriations Clause "was intended as a restriction upon the disbursing authority of the Executive department"); *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1850) ("Any other course would give to the fiscal officers a most dangerous discretion."). Respondents' approach would also undermine another basic purpose of the Appropriations Clause, which is to ensure political accountability for the use of the public's money. See Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1349 (1988). Congress decided how much money the Treasury would pay for ISDA contract support costs, and neither the Secretary nor respondents were free to ignore its judgment.

2. This Court has consistently held that agency officials cannot obligate public funds in excess of the appropriations provided by Congress

In light of Congress's plenary authority over the use of public funds, this Court has consistently held that the

United States is not bound by an *ultra vires* promise by an executive official to pay sums that Congress has not appropriated. See, *e.g.*, *Leiter* v. *United States*, 271 U.S. 204, 206-207 (1926); *Sutton*, 256 U.S. at 579; *Hooe*, 218 U.S. at 333; *Bradley*, 98 U.S. at 113-114, 117; *Reeside*, 52 U.S. (11 How.) at 291. See generally Gov't Br. 32-35. As this Court explained in *Bradley*, absent a statutory grant of contract authority, "it is clear that the head of the department cannot involve the government in an obligation to pay any thing in excess of the appropriation." 98 U.S. at 114.

Respondents would distinguish (Br. 44-46) these precedents on various factual grounds, including that the appropriations acts at issue in the *Sutton*, *Bradley*, and *Hooe* cases involved smaller sums for particular government projects. In none of those decisions, however, did this Court's reasoning depend on the size of the appropriation, the number of contractors actually or potentially involved, or any of the other grounds on which respondents now seek to distinguish them. The Court simply reasoned that, as a consequence of Congress's plenary authority over the use of public money, the responsible executive officials lacked the authority to bind the United States to pay sums that Congress had not authorized to be paid. In *Sutton*, for example, the Court did not weigh whether it was "reasonable to require the contractor to bear the risk" (Br. 44) of insufficient funds in light of the size of the appropriation or other factors. Instead, relying on the predecessor to 31 U.S.C. 1301(d), the Court rejected the contractor's claim on the straightforward ground that Congress had not unambiguously authorized the making of a deficiency contract. "The Secretary of War was, therefore, without power to make a contract binding the Government to pay more than the amount appropriated." 256 U.S. at 579.

Respondents offer no principled reason—let alone any textual basis in the Appropriations Clause—to conclude that the force of Congress's exercise of its constitutional authority to control the use of the public's money depends on whether a particular appropriation is a "line-item" or, as here, a larger but nonetheless expressly limited sum. Respondents (Br. 48) and their amici argue that contractors proceeding under a larger appropriation may lack notice if a contracting officer has reached the limit of available appropriations. But even if some form of constructive notice to contractors were required, explicit "not to exceed" appropriations caps of the kind at issue in this case provide a clear and public warning that Congress has restricted the discretion of executive officials to bind the government by contract. Respondents, notably, do not deny (Br. 47-48) that they have had *actual knowledge* of the statutory restrictions on the Secretary's authority to pay contract support costs. See Gov't Br. 50-51.

In any event, this Court has never suggested that a contractor may be entitled to recover money from the Treasury that Congress has refused to appropriate merely because the contractor lacked notice of the restriction. To the contrary, the Court has consistently held that such equitable considerations cannot permit a litigant to circumvent statutory restrictions on access to funds in the Treasury. In *OPM* v. *Richmond*, for example, the Court held that unauthorized advice by Executive Branch officials could not estop the government from enforcing limitations on the payment of public money, even though it produced individual hardship. 496 U.S. at 424-434. Likewise, in *Sutton*, the Court rejected the proposition that agency officials could, through their conduct, create an implied contract for the payment of sums Congress had not appropriated. 256 U.S. at 580-581. Respondents' theory here—that agency offi-

cials can bind the United States to pay sums far in excess of an expressly capped appropriation, merely because Congress appropriated a sum large enough to pay the costs of any one contractor considered in isolation—is even more plainly at odds with Congress's constitutional authority to regulate the terms on which public funds may be drawn from the Treasury.

3. Cherokee *and* Ferris *do not authorize courts to disregard statutory restrictions on public funds*

Because of the statutory appropriations caps, respondents and their amici are mistaken in their belief that *Cherokee* and *Ferris* support their position. See Gov't Br. 48-52. This Court in *Cherokee* did not discuss any of the precedents above, let alone overrule more than a century of decisions holding that, absent a statutory grant of "contract authority," executive officers cannot bind the United States to pay amounts in excess of appropriations. And *Ferris*, which predated nearly all of those precedents, is not inconsistent with them.

Cherokee involved the government's liability for ISDA contract support costs that were promised in contracts funded by an ordinary, unrestricted, lump-sum appropriation. In holding that the government was liable for contract support costs that the agency did "not deny that it promised to pay," this Court repeatedly stressed that Congress had "appropriated sufficient *legally unrestricted* funds to pay the contracts at issue." 543 U.S. at 637 (emphasis added). Indeed, in rejecting the arguments advanced by the government, the Court referred *eight times* to the fact that Congress had imposed no statutory restriction on the agency's ability to reprogram other appropriated funds in

order to satisfy the tribes' claims.[4] Although respondents now suggest (Br. 35-36) that *Cherokee* too involved the application of a statutory cap, that contention is flatly at odds with the Court's opinion. See, *e.g.*, 543 U.S. at 637 (stressing that "Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue").

Ferris is even farther afield. Like *Cherokee*, *Ferris* involved a claim that the government was liable for breach of contract because agency officials had diverted, for other purposes, appropriated sums that the agency had lawfully obligated for the contractor. See 27 Ct. Cl. at 542-547. Cf. *Cherokee*, 543 U.S. at 641-642 (rejecting the contention that appropriations were unavailable merely because agency officials preferred to "allocate[] the funds to another purpose"). The court in *Ferris* had no need to consider whether the appropriation at issue included a statutory ceiling, as respondents now argue (Br. 35), because the breach was entirely attributable to the discretionary choices of agency officers who redirected funds that, at the

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[4] See *Cherokee*, 543 U.S. at 637 ("These appropriation Acts contained no relevant statutory restriction."); *ibid.* (discussing the applicable rule when "Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue"); *id.* at 640 (discussing who "should bear the risk that an unrestricted lump-sum appropriation would prove insufficient" to pay all claimants); *id.* at 641 (noting that "the relevant congressional appropriations contained *other* unrestricted funds, small in amount but sufficient to pay the claims at issue"); *ibid.* (rejecting the argument that certain "funds, though legally unrestricted (as far as the appropriations statutes' language is concerned), were nonetheless unavailable" to the tribes); *id.* at 642 (recognizing that Congress may "protect funds needed for more essential purposes with *statutory* earmarks"); *id.* at 643 (concluding that the ISDA's availability of funds provision was irrelevant because "Congress appropriated adequate unrestricted funds here"); *id.* at 647 (emphasizing that Congress "unambiguously provided unrestricted lump-sum appropriations").

time the contract was signed, were sufficient to cover the contract and had not been obligated for any other purpose. See *Cherokee*, 543 U.S. at 641 (citing *Ferris* for this proposition). The Court of Claims therefore did not confront any contention that, because of a statutory restriction, the agency lacked the authority to bind the United States to pay the amounts at issue in the first place.

As discussed in our opening brief (at 50), moreover, *Ferris* did not involve a contract expressly made contingent on the availability of appropriations. And to the extent *Ferris* turned on whether the contractor had actual knowledge of the insufficiency of appropriations, see 27 Ct. Cl. at 547, there is no question that respondents had such knowledge here. See p. 16, *supra*; Gov't Br. 50-51.

Respondents (Br. 14-15) and their amici thus significantly overread *Ferris* in declaring that it has been the law for 120 years that "an agency is bound to its contractual promises regardless of whether Congress appropriated enough money to cover all of the agency's contracts." If that sweeping proposition were the law, this Court's subsequent decisions in *Sutton, Bradley,* and other cases would have come out the other way, and this Court in *Cherokee* would have had no reason to emphasize that the appropriations at issue "contained no relevant statutory restriction." 543 U.S. at 637. Indeed, respondents are forced to acknowledge an "exception" to the supposed "firm rule" of *Ferris* (Br. 33-34) for every case in which this Court has addressed the same subject in the last century. This Court has never endorsed respondents' view that even an explicit statutory appropriations cap is ineffective to limit the ability of agency officials to bind the Treasury, and all of the Court's decisions point to the opposite conclusion.

In predicating their argument on *Ferris*, moreover, respondents ignore central features of the ISDA statutory

scheme. Under that scheme, respondents occupy a position wholly unlike the private contractor in *Ferris*, whose contract proposal the government was not required to accept and who had no relationship, legally or practically, to any other contractor who might seek payment from the same appropriation. By contrast, as evidenced by their joining together in this nationwide class action, respondents participate in a detailed statutory scheme in which, for present purposes, they are equally situated, and in which they equally participate in seeking an allocation of federal funds. The Secretary generally is required to accept each tribe's contract proposals, without regard to how many other contracts the Secretary has accepted, see p. 9, *supra*; Congress makes a single annual appropriations decision governing all of respondents' contracts at once, in contemplation of all tribes' right to participate in the statutory scheme simultaneously; and Congress specifically instructed the Secretary to consider the welfare of all other tribes in making funding decisions for each tribe, see 25 U.S.C. 450j-1(b). Under these circumstances, respondents cannot circumvent the explicit statutory caps imposed by Congress on the total funds available to pay contract support costs for all ISDA contractors by focusing on the dealings of each individual contractor with the Secretary in isolation, without regard to the equivalent rights and needs of other tribal contractors under the same statutory scheme.

C. Respondents Cannot Predicate Contract Liability On The President's Budget Proposals To Congress

Finally, respondents briefly attempt (Br. 54-55) to defend the judgment below on the ground that, over the years, Presidents have not submitted legislative proposals to Congress requesting sufficient appropriations to cover 100% of ISDA contract support costs. That contention,

which was not addressed by the majority below or by the district court, is without merit. See Pet. App. 84a-86a (Hartz, J., dissenting) (rejecting this contention); see also *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296, 1305-1306 (Fed. Cir. 2010) (rejecting the same argument), petition for cert. pending, No. 11-83 (filed July 18, 2011).

This Court has never suggested that the President's failure to make a particular legislative proposal to Congress may provide a basis for imposing civil liability on the government. That proposition would, at a minimum, raise serious constitutional questions under the Recommendations Clause, which protects the President's authority to recommend to Congress "such Measures as he shall judge necessary and expedient." U.S. Const. Art. II, § 3. Nor is Congress's authority under the Appropriations Clause contingent upon any request for funding from the Executive Branch. Moreover, respondents' notion (Br. 54) that the government cannot assert an appropriations defense to a lawsuit if the President failed to make a particular budget request is, in substance, merely an estoppel claim, albeit one even more fundamentally flawed than the claim this Court rejected in *OPM* v. *Richmond*. See 496 U.S. at 434 ("In this context there can be no estoppel, for courts cannot estop the Constitution.").

In any event, nothing in the ISDA or any contract at issue in this case purports to impose on the President an obligation to request any particular level of appropriations. As the dissent below recognized, the Court of Claims case on which respondents rely, *S.A. Healy Co.* v. *United States*, 216 Ct. Cl. 172 (1978), was "fact-specific" and the "rule stated in the opinion would not apply here." Pet. App. 84a. The statutory appropriations caps are themselves proof that Congress has been aware for years of respondents'

mounting claims for contract support costs and has declined to fund them in full.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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