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No. 11-551

IN THE

Supreme Court of the United States

KENNETH L. SALAZAR, ET AL.,
Petitioners,
v.
RAMAH NAVAJO CHAPTER, ET AL.,
Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICI* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are the Chamber of Commerce of the United States of America ("the Chamber") and the National Defense Industrial Association ("NDIA").[1]

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in – or itself initiates – cases that raise issues of vital concern to the Nation's business community.

NDIA is a non-partisan, non-profit organization with a membership of 1,765 companies and 96,296 individuals, including some of the nation's largest defense contractors. NDIA members contract to provide a wide variety of goods and services to the government. NDIA thus has a specific interest in government policies and practices concerning the government's acquisition of goods and services and its fulfillment of its contractual obligations.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for all parties have consented to the filing of this brief.

The issues presented in this case could have profound implications for Chamber and NDIA members. The government's brief argues that the government may disregard its contractual promise to pay for services rendered simply because the government has exhausted the funding appropriation. The government is incorrect. As this Court recognized just a few years ago, more than a century of government contracts law holds that the government is not excused from payment of contract obligations simply because it has chosen to spend the appropriated funds on other projects. *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 637-38 (2005) (citing *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)).

Amici filed in support of the tribal contractors in *Cherokee*. *See* Brief of *Amici Curiae* the Chamber of Commerce of the United States of America, *et al.*, in Support of the Cherokee Nation and Shoshone-Paiute Tribes, *Cherokee Nation of Okla. v. Thompson*, 543 U.S. 631 (2005) (No. 02-1472), 2004 WL 1386408. And they have a critical interest in ensuring that this Court reaffirms the government's reliability as a contracting partner. As Justice Jackson piquantly observed, "[i]t is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one way street." *Federal Crop Ins. v. Merrill*, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting). The government is seeking to avoid turning those square corners here. It has seized upon contractual language that is ubiquitous and claims that it has the extraordinary

effect of excusing the government from fulfilling its contractual promises. Were this Court to accept the government's position, it would upend decades of settled expectations of the government contracting industry, and ultimately frustrate the government's ability to contract with private companies. *Amici* thus urge the Court to affirm the decision below allowing the contractors to recover, and thereby reaffirm that when the government promises in its contracts to pay for services rendered, it must do so.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's brief is permeated by a fundamental misunderstanding about the question this case presents. The government argues repeatedly, in many different forms, that it is not obligated to pay the contractors for their work because agencies generally lack authority to spend in excess of the appropriations they are given. *E.g.*, Br. of the United States at 30 ("[F]ederal officials have no authority to obligate the United States to pay money in excess of authorized appropriations.").

The government is correct on one level: an agency typically is not permitted to make payments under a contract in excess of its available appropriations. Indeed, the government generally is required to obligate sufficient funds to the contract before entering into it. But that does not answer the questions that are central here: whether the government is in *breach* of contract if, having contracted, it fails to perform because the government has nonetheless spent the funds

elsewhere, and what *remedy* the contractor is entitled to for that breach. For a century, the answers to those questions have been clear. Under the venerable *Ferris* doctrine, affirmed by this Court just seven years ago in *Cherokee*, the government is not excused from paying a performing contractor on the ground that it has spent the appropriated funds elsewhere. Rather *Cherokee* agreed with the contractors (and the Chamber and NDIA as *amici*) that "[i]f the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to another purpose* or assumes obligations that exhaust the funds." *Cherokee*, 543 U.S. at 641 (emphasis added; quotation marks omitted). The *Ferris-Cherokee* doctrine recognizes that where an appropriation may be spent to support multiple contracts, it is singularly the government's responsibility to ensure – and singularly beyond the power of the contractor to confirm – that sufficient funds remain available for a contract. *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892). And a contractor who does not know – and cannot be expected to know – that the government has spent the funds elsewhere should not be penalized for having performed.

The government has no effective answer. It argues that a contracting officer may not unilaterally pay money in excess of an appropriation. But again, while that is generally true, it does not change the fact that the government is in breach when it fails to fulfill its contractual obligations, and the contractor is entitled to damages for breach payable from the

Judgment Fund. The government also argues that Congress supposedly used distinctive terms in the appropriation language at issue here to show that it did not intend to compensate contractors if the appropriated funds were spent elsewhere. But these arguments are red herrings. The language the government points to is not distinctive at all, but found in many, if not all, appropriations – *including the very appropriations at issue in Cherokee*.

For example, the government makes much of the fact that the appropriation in this case contained a provision stating that the contract was "subject to the availability of appropriations." Yet the government fails to mention that this language was also present in *Cherokee* where the Court – correctly – explained that it was not a license for the government to spend appropriated funds elsewhere or to breach contracts, but rather a term of art used to allow a contract to be drawn up while making its actual award contingent on sufficient funds being appropriated and made available for obligation. *Cherokee*, 543 U.S. at 643. The expectation is that Congress will appropriate sufficient funds. *See, e.g.*, *Matter of Army Corps of Engineers' Continuing Contracts,* B-187278, Mar. 28, 1977, 56 Comp. Gen. 437, 77-1 CPD ¶ 265. And once the funds were appropriated – as they were in *Cherokee* and here – the government had no leeway to spend them elsewhere.

The government's other purported distinguishing factors are even more anodyne. The government stresses that the appropriation in this case was "not

to exceed" a certain amount. But virtually every appropriation is "not to exceed" the stated amount whether it uses that language or not, including the appropriation in *Ferris* itself. The very point of the rule in *Ferris* and *Cherokee* is that the government is not excused from payment even though the appropriation was limited.

Similarly, the government emphasizes that the appropriation in *Cherokee* was an "unrestricted lump sum." This too is true, but irrelevant. Both the *Cherokee* appropriation and the *Ramah* appropriation could be spent on multiple contracts (in the same way that countless other appropriations are). What matters is that the funds were obligated to multiple contracts and no one contractor could know that its contract's funds were spent elsewhere. Far from distinguishing this case from *Cherokee*, the appropriation here fits precisely into that mold.

It would have enormous destabilizing effects on the government contracting community if the entirely unremarkable appropriation language present here were found to excuse the government from paying performing contractors. These terms are seen in government contracts of all stripes, and they have never been thought to leave a contractor without a remedy. In reality, the government is asking this Court to overturn its unanimous decision in *Cherokee* from just seven years ago.

This Court should reject that invitation. Congress has a panoply of tools to rein in agencies that contract beyond their appropriations. Among other things, it may levy both administrative and

criminal punishments against contracting officers who obligate funds in excess of their appropriations. And of course Congress has a wealth of more informal tools to bring to bear against agencies that do not carry out its wishes.

But there is no basis in law or policy for making the contractor responsible for the government's refusal to pay, or its failure to subdivide and apportion appropriated funds as the law requires. The government's position would have the effect of making contracts illusory by giving it a broad right to refuse payment at the stated price for services rendered. This proposed regime is grossly unfair to contractors, but it also does not serve well the government, which will find it difficult to find contracting partners willing to take on such risk. Only this Court can correct the government's erroneous and ultimately destabilizing view, and *amici* urge it to do so.

ARGUMENT

I. How Government Contracts Work.

Because the government's argument misapprehends the basic structure of government contracting and the manner in which contracts are funded, it is important at the outset to review how government contracts are supposed to work, and in particular what consequences arise when a contracting officer obligates more funds than have been appropriated for the undertaking in question.

Under the Constitution, Congress is vested with the sole authority to make appropriations for

government expenditures. The Appropriations Clause states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. 1, § 9, cl. 7; *see, e.g., Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (explaining that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress" (quotation marks omitted)). Thus, "under this system, Congress has the 'final word' as to how much money can be spent by a given agency on a given program."[2] 2 Government Accountability Office, Principles of Federal Appropriations Law 6-4 (3d ed. 2006) ("GAO Redbook").

In practice, Congress appropriates funds, which must then be subdivided as appropriate by the relevant agency before then being "obligated" to a contract. Under the Antideficiency Act, the contracting agency may face civil or criminal penalties if it obligates funds in excess of the amount available in the appropriation. 31 U.S.C. §§ 1341(a)(1)(A), 1511-1519.[3] As stated in the GAO

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[2] For a succinct summary of the law and regulations governing the funding of government contracts, *see* Jim Schweiter & Herb Fenster, *Government Contract Funding Under Continuing Resolutions*, 95 Fed. Cont. Rep. (BNA) 180, 180-82 (Feb. 15, 2011).

[3] This constitutionally mandated process may not be evaded by executive branch actions which would cause its contractors to perform their contracts with their own funds or would establish them as "volunteers". Both such evasions would violate the Antideficiency Act, which expressly forbids a federal officer or employee from "accept[ing] voluntary services for … government" except in highly limited circumstances not present

Redbook, which is the government's own authoritative summary of federal funding law, agencies "may not … commit the United States to make payments at some future time for goods and services unless there is enough money in the 'bank' to cover the cost in full. The 'bank' of course, is the available appropriation." GAO Redbook 6-37. Indeed, although the government fails to mention the point, the Antideficiency Act goes even further: absent an express statutory authorization, it prohibits, on pain of civil and criminal penalties, the very *making* of a contract that exceeds legally available funds. 31 U.S.C. § 1341(a)(1)(B); *Hercules v. United States*, 516 U.S. 417, 427 (1996); GAO Redbook 6-39.

The annals of government contracting law, however, are replete with evidence that government agencies do not always comply with their statutory fiscal obligations. One problem arises when, as is commonly the case, Congress appropriates a sum of money that is to be obligated to multiple contracts. In such a scenario, there is the potential for the contracting agency to "over-obligate," that is to obligate funds to several contracts which collectively total more than the appropriation, even though each contract individually is less than the appropriation.[4]

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here. 31 U.S.C. § 1342. And both would unlawfully "augment" the appropriations. *See* GAO Redbook 6-162 to 6-235.

[4] For a discussion of how the Antideficiency Act's subdivision requirements were a response to the problem of over-obligation and "coercive deficiencies," *see* Herbert L. Fenster & Christian

Black-letter law governs what happens when the government engages in over-obligation. The government, to be sure, has in general acted doubly unlawfully because a contracting officer may neither pay funds in excess of its appropriation, nor enter into a contract that is not fully funded The officer, for example, could face both criminal penalties or adverse personnel action under the Anti-Deficiency Act. 31 U.S.C. §§ 1341(a), 1350 (criminal fines up to $5,000 and imprisonment up to two years); *id.* § 1349(a) (punishment may include "administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office").

But the contractor is in a vastly different position. The contractor has contracted with the government and rendered performance. Although the government had over-obligated the appropriation, the contractor could not be expected know that was the case at the time the contract was awarded. From the contractor's perspective, the appropriation was sufficient to cover *its* contract.

In that situation, the law has been for 120 years that the contractor, having performed, is entitled to payment. It is true, as the government argues, that the agency cannot augment its appropriations, but neither can it foist upon contractors the burden of its shortfall. Instead, under the landmark holding of *Ferris*, which this Court expressly endorsed in

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Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Pub. Cont. L.J. 155 (1979).

Cherokee, the contractor will have an action for damages because "[a]s long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on the grounds of 'insufficient appropriations.'" *Cherokee*, 543 U.S. at 637-38 (citing *Ferris*, 27 Ct. Cl. at 546).

The *Ferris* case itself is illustrative of the principle. In *Ferris*, Congress appropriated $45,000 "[f]or improving the Delaware River below Bridesburg, Pennsylvania." Act of Mar. 3, 1879, 181, 20 Stat. 363, 364. The contractor entered into a $37,000 contract with the U.S. Army Corps of Engineers to dredge the river, but before the contractor completed performance, the Corps ordered him to stop because the appropriated funds had been spent elsewhere. When the contractor sued for damages, the Court of Claims rejected the government's argument that it was excused from performance because the appropriation was exhausted and held that the contractor was entitled to full damages.

> A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation *per se* merely imposes limitations *upon the Government's own agents*; it is a definite amount of money intrusted to them for distribution; *but its*

> *insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.*

Ferris, 27 Ct. Cl. at 546 (emphases added)

The *Ferris* doctrine has been applied literally dozens of times by the Court of Claims and its successor courts since it was first announced.[5] And the GAO Redbook states that it "is *settled* that contractors paid from a general appropriation are not barred from recovering for breach of contract even though the appropriation is exhausted." GAO Redbook 6-44 (emphasis added).

But the most relevant evidence of the vitality of the *Ferris* doctrine is surely this Court's recent decision in *Cherokee*. That case, like this one, considered an argument by the government that it should be excused from paying performing tribal contractors because it had spent the appropriated funds on other objectives. After citing the *Ferris* line of authority, this Court rejected that argument because

> it amounts to no more than a claim that the agency has allocated the funds to another

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[5] *E.g.*, *Ross Constr. Corp. v. United States*, 392 F.2d 984, 986-87 (Ct. Cl. 1968); *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966); *Lovett v. United States*, 66 F. Supp. 142, 146 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303 (1946); *Whitlock Coil Pipe Co. v. United States*, 71 Ct. Cl. 759, 761-62 (1931); *see also Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 570 (1997) (same); *N.Y. Cent. R.R. v. United States*, 65 Ct. C1. 115, 128 (1928) (same), *aff'd*, 279 U.S. 73 (1929); *N.Y. Cent. & Hudson River R.R. v. United States*, 21 Ct. C1. 468, 473 (1886).

> purpose, albeit potentially a very important purpose. If an important alternative need for funds cannot rescue the Government from the binding effect of its promises where ordinary procurement contracts are at issue, it cannot rescue the Government here, for we can find nothing special in the statute's language or in the contracts.

543 U.S. at 642. Accordingly, this Court recognized that although the over-obligation of funds by the government was improper, the contractor was still entitled to enforce the government's promise to pay for services rendered. Indeed, the Court cited the government's obligations under the Antideficiency Act to fully fund contracts before entering into them as a reason why the contractor is entitled to recover. *Id.* at 643 (citing 31 U.S.C. §§ 1341(a)(1)(A), (B)).

II. There Is No Material Distinction Between This Case and *Cherokee*, And It Would Have A Seriously Destabilizing Effect On Government Contracting If This Court Were To Adopt The Government's Arguments Now.

It is against this backdrop that the government argues that it should be excused from its promise to pay the tribal contractors in this case because it overcommitted its appropriation. The government contends that it is not liable because "federal officers have no authority to obligate the United States to pay money in excess of authorized appropriations." Br. of United States at 30.

As we have just seen, however, the fact that a federal officer is not supposed to obligate the United

States to pay amounts in excess of an available appropriation does not mean that the United States is excused from paying a performing contractor when it does over-obligate government funds. Regardless whether the government has acted illegally itself, under the *Ferris-Cherokee* line of cases, the performing contractor is entitled to recover damages for breach of contract.

The government acknowledges this line of authority, but contends that it does not apply to this case because the appropriation in question contained special features that indicated Congress's intent not to follow the normal *Ferris* rule. But this argument does not withstand scrutiny. The ostensibly distinguishing features the government identifies are routinely found in government contracts; indeed, some are present in *every* government contract. There would no longer be a *Ferris* doctrine – and *Ferris* and *Cherokee* themselves would have come out the other way – if the government's view were correct. Accordingly, this Court should reject the government's attempt to retract the protections for contractors that *Cherokee* reaffirmed.

We discuss each of the supposedly distinguishing features in turn.

1. "*Subject to the availability of appropriations*." The government argues at length that the contractors are not entitled to recover because the appropriation directed to their program included the language that the contract was "subject to the availability of appropriations." Br. of the United States at 30-32. The government contends

that this phrase indicates that the government was not promising to fund the contract fully to the extent that the appropriation was insufficient to cover it. *Id.*

This is a remarkable argument. The very same language was present in *Cherokee* and, although the government's brief does not mention the fact, this Court squarely held that it did not excuse payment by the government. *Cherokee* discussed the term in some detail, observing that the "subject to the availability of funds" clause "normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year." The Court went on to reject the "special interpretation" urged by the government that such language amounted to a "grant of authority to the Secretary to adjust funding levels based on appropriations." 543 U.S. at 643-44. The Court concluded that the government's position amounted to a claim that it "had the legal right to disregard contractual promises," and it rejected it. *Id.* at 644.

The Court was correct to hold that a "subject to availability of funds" clause does not excuse the government from paying a performing contractor, and should not accept the government's contrary argument now. As the Comptroller General has stated, the effect of such language is to make the contract operative only when there is an

appropriation made sufficient to cover it.[6] *To the Secretary of the Interior*, 39 Comp. Gen. 340, 342 (1959); *see also Comptroller General Warren to the Postmaster*, 21 Comp. Gen. 864, 864-65 (1942). This is entirely consistent with the limited use of the phrase in the FAR. *See* 48 C.F.R. §§ 32.702, 32.703-2, 32.705-1; *see also* 48 C.F.R. § 52.232-18 (explaining that such provisions are to be used where a contract document is prepared for a planned award but funds for such contract will not become available until after the beginning of a new fiscal year). And it helps ensure that the government complies with its obligations under the Anti-Deficiency Act by not awarding a contract and obligating its funds until an appropriation covering the contract is made and sufficient funds are available. *See* 31 U.S.C. §§ 1341(a)(1)(B), 1511-1519.

"Subject to availability" clauses are commonplace in government contracting, and it would upend the settled expectations of government contractors of all stripes if this Court were to change course now and hold that they imbue the government with the power to refuse to pay a performing contractor to the extent the government wishes to spend the appropriated funds elsewhere. To take one example, such clauses are particularly common in defense contracts dependent on appropriation to be made, if at all, in a

[6] The concept is variously expressed as "subject to the availability of funds," "subject to the availability of appropriations," and "contingent upon the availability of appropriated funds," among other formulations. There is no material difference in the effect of these phrases.

future fiscal year. *See* 48 C.F.R. §§ 32.703-2 & 32.705-1.[7] For all the reasons discussed above, a contracting officer cannot obligate funds to exercise an option in a later fiscal year until the relevant appropriation is made. But by using a subject to availability clause, the government can reserve the right to exercise that option if and when the appropriation is made at a later date. That is an entirely different interpretation than the one the government urges here, which is that the government has the right to escape payment once the funds have been appropriated and it *has* exercised the option.

2. "*Not to exceed.*" The government also contends that it is excused from paying the performing contractors because the appropriation states that it is "not to exceed" a given amount. Br. of United States at 26. This, too, is a remarkable argument because virtually *every* appropriation, by definition, sets a total amount that an agency may not lawfully exceed. And thus there would be no *Ferris* doctrine at all if such language were sufficient to allow the government to claim that it never promised to pay the contractor. Whether the phrase "not to exceed" is used or some other implied limitation is in place, appropriations are limited by their stated amount. As the GAO instructs, this formulation has the "same effect" as "[w]ords like

[7] This case, like *Cherokee*, concerns a genre of contracts not subject to the FAR but, as this Court recognized in that case, FAR provisions are expressive of the intent of government contracts in general. *Cherokee*, 543 U.S. at 640.

'not more than' or 'not to exceed.'" GAO Redbook 6-29; *see also id.* 6-32 (describing the phrase "not to exceed" as "the most effective way to establish a maximum" sum available for a specified purpose).

The problem for the government is that *all* appropriations are limited. The *Ferris* doctrine would never have existed if this ubiquitous limitation barred recovery by a performing contractor. One need look no further than *Ferris* itself to see the point. In *Ferris*, the relevant appropriations language was: "For improving the Delaware River below Bridesburg, Pennsylvania, forty-five thousand dollars." Act of Mar. 3, 1879, 181, 20 Stat. 363, 364; *see Ferris*, 27 Ct. Cl. at 544. That appropriation clearly was not to exceed "forty-five thousand dollars" and yet the Court of Claims recognized that the government was still obligated to pay in full its contractors for the work they performed.

The government is thus simply wrong when it contends that "[t]he statutory 'not to exceed' caps distinguish this case from *Cherokee*." Br. of United States at 26. According to the government, this Court's decision on that case turned on the fact that Congress had "'appropriated sufficient *legally unrestricted* funds to pay the contracts at issue.'" *Id.* at 27 (quoting *Cherokee*, 535 U.S. at 636, 637) (emphasis added by government). But the funds in *Cherokee* were not "legally unrestricted" in the sense that the contracting officers were free to spend in excess of the appropriated amounts. In *Cherokee*, as here, and as with all government contracts, Congress

appropriated a certain amount of funds for the program. In *Cherokee*, those funds were unrestricted in the narrow sense that the agency could spend them on a variety of enumerated ends encompassed within the stated objectives of the program. But they were "capped" in the important sense that the agency could not spend *more* than the appropriation on those ends. It was against that backdrop that this Court concluded that even though the agency could not spend more than the lump sum that was appropriated to it, under *Ferris* the contractors were entitled to recover damages from the judgment fund for the work they performed under the *Ferris* doctrine.

The ramifications of the government's argument are stark and alarming to the government contracting community. The government seeks to take a defining feature of appropriations – that they are limited – and turn it into a license to escape a promise to pay for services rendered. No contractor could contract with any confidence with the government under such a regime, and this Court should reject the government's attempt to impose it.

3. "*Unrestricted lump sum*." The government also lays heavy stress on the fact that *Cherokee* involved a "lump sum" appropriation. Br. of United States at 49. Again, the government misunderstands the relevant contracting and funding concepts. A lump sum appropriation is one in which the contracting entity is free to divide the appropriation – but not amounts in excess of the appropriation – as it sees fit among approved objectives. GAO Redbook 6-5. The

government deems the appropriation here a "line item appropriation." But even if that terminology were correct (and it is not, *see* Br. of Respondents at 34),[8] a line item appropriation may *also* be spent on a variety of approved objectives, depending on the nature of the line item. That was precisely what occurred here. GAO Redbook 6-26. The appropriation at issue here, in entirely typical fashion, was intended to pay multiple tribal contractors. There is no material difference between such an appropriation and a "lump sum" appropriated to pay multiple contractors. Thus, just as this Court observed in *Cherokee* that the "Government normally cannot back out of a promise to pay on grounds of insufficient appropriations … even if an agency's total lump sum appropriation is insufficient to pay *all* the contracts the agency has made," 543 U.S. at 637, so too the government cannot back out of its promise where the appropriation takes the form of a line item dedicated to multiple contractors.

To be sure, some appropriations are not subject to this rule. Where an appropriation is designated for a single purpose to be accomplished by a single contract, then the contractor necessarily has notice, at the time of contracting, that the appropriated

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[8] See also 2 GAO Redbook at 6-15 (explaining that the "$244 million appropriation in the *Newport News* case could be viewed as a line-item appropriation in relation to the broader 'Shipbuilding and Conversion' category, but it was also a lump-sum appropriation in relation to the two specific vessels included").

amount must be sufficient to cover the contract. A contractor who performs knowing that the appropriation is insufficient does not have a right to recover under *Ferris*. Instead, under the rule announced in *Sutton v. United States*, the contractor has no recourse for damages if the funds appropriated are insufficient to satisfy the government's payment's obligation. 256 U.S. 575, 577-79 (1921).

In sum, there is nothing in this case to distinguish it from *Ferris, Cherokee*, or any of the dozens of other government contracting cases over the years that have not excused the government from liability when it is unable to perform because it has spent appropriated funds elsewhere. And there is nothing in the contract language or form of the appropriation in this case to distinguish it from a huge number of existing government contracts, across industries undertaken by contractors large and small. Were the Court to adopt the government's view, the government's obligation to perform under all of those contracts would be called into doubt. Again, this Court should reject the government's invitation to undo settled principles that contractors rely upon every day.

III. The Government's Proposed Rewriting Of Government Contracting Law Would Harm Private Contractors, Undermine The Government's Reliability As A Contracting Partner, And Increase The Costs Of Government.

In the absence of any distinguishing features in this case, *see supra* Part II, the government is effectively asking this Court to reverse the *Ferris* doctrine itself. But this doctrine has not just been the law for 120 years, it is also sound policy. On the one hand, it recognizes that Congress has numerous tools to prevent wayward agencies from contracting in excess of their appropriations. On the other hand, the doctrine recognizes that if the government could escape its contractual obligations simply by spending appropriated funds on other projects, then government contracts would in effect be illusory. In such a world, contractors would of course suffer, but so would the government, which would find it difficult to attract contracting partners to serve its needs.

First, under *Ferris*, a performing contractor has the right to be paid, and to hold the government liable for breach if it does not perform. But this does not mean that Congress's power of the purse is compromised. On the contrary, Congress has a wealth of tools at its disposal to curb the over-obligation of government funds. Most obviously, Congress may appropriate funds in ways that leave no doubt about the amount of money obligated to a particular contract. A contractor who enters into a

contract with a payment in excess of that appropriation has no claim for additional payment when the appropriation turns out to be insufficient. *See supra*.

On top of this, the Antideficiency Act imposes a rigorous set of procedures to minimize deviations, and the contracting agent who over-obligates federal funds may expose himself to criminal sanctions and adverse personnel consequences, such as termination or leave without pay. *See supra*. These penalties provide a strong deterrent, and they are joined by the political pressures that Congress may bring to bear on a wayward agency. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("[W]e hardly need note that an agency's decision to ignore congressional expectations may expose it to grave political consequences.").

The alternative espoused by the government in this case is far more problematic. If the government may escape performance after promising to perform, then it has not promised anything at all. Such a contract is illusory. *United States v. Winstar Corp.*, 518 U.S. 839, 913 (1996) (Breyer, J., concurring) ("A promise to pay, with a re-served right to deny or change the effect of the prom-ise, is an absurdity." (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878))). The effects of such a rule could be devastating to the contracting community, and in the long run to the government, which purchases $425 billion of goods and services each year, including nearly $100 billion from small businesses. *See* http://archive.sba.gov/contractingopportunities/index.html; http://www.

sba.gov/category/navigation-structure/counseling-training/online-small-business-training/contracting.

The risks are plain. For contracts already in existence, adoption of the government's position could cause massive injury to the contractor, who may now have no recourse when the government informs the contractor that it has spent the appropriated funds it owes elsewhere. And going forward, even assuming a contractor is willing to take on the risk of contracting with the government at all in the face of such uncertainty, it will have no choice but to insist on contractual language that will bind the government – assuming the government would even accept such language under its new view – or demand a risk premium. In either case, the government's interests are disserved. In the former, it will threaten its ability to contract in advance of appropriations. In the latter, it will undermine the pricing discounts it enjoys as a result of its reputation as a reliable bill-payer. In sum, upending settled law here will undermine government reliability for decades to come – causing some government contractors to forgo the process altogether, and the ones who remain to factor the risk into their contract prices. No one – not contractors, nor the government, nor the public – will benefit from the undoing of *Ferris*, and this Court should reject the government's invitation to go down that path.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision below.

Respectfully submitted,

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