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.*,
Respondents.

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

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AND A COALITION OF INDIAN TRIBES AND TRIBAL ORGANIZATIONS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE

The National Congress of American Indians was founded in 1944 and is the oldest and largest tribal government organization in the United States.[1] NCAI serves as a forum for consensus-based policy development among its membership of over 250 tribal governments from every region of the country. Its mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments. NCAI and its members have considerable experience with the history and operation of self-determination contracts under the Indian Self-Determination and Education Assistance Act.

Amici the Alaska Native Tribal Health Consortium, the Chickasaw Nation of Oklahoma, the Choctaw Nation of Oklahoma, the Confederated Tribes of Grand Ronde, the Kodiak Area Native Association, the Southcentral Foundation, the SouthEast Alaska Regional Health Consortium, and the Tanana Chiefs Conference are Tribes and tribal organizations that, like respondents, have contracted with the federal government under the Indian Self-Determination and Education Assistance Act to operate various facilities and activities of the U.S. Indian Health Service, the Bureau of Indian Affairs, or both, and that have damage claims pending against the government arising out of unpaid contract support costs.

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[1] No counsel for a party authored this brief in whole or in part. No person other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been submitted to the Clerk.

Amici submit this brief in order to help the Court understand why ordinary rules relating to the recovery of damages by unpaid government contractors apply here with particular force given the specific history of the ISDA and the federal policy of tribal self-determination.

SUMMARY OF ARGUMENT

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*, directs the Secretary of the Interior to enter into contracts with Indian tribal governments providing for, among other things, the full payment of specified contract support costs. The Secretary argues that those contracts do not actually obligate the government to pay a Tribe the amount of support costs specified in the contract, if the total of the costs incurred by all contracting Tribes in a given year exceeds the total amount included for this purpose in the appropriation for the Department of the Interior for that year. In that event, the government contends, the Secretary may allocate available funds among contracting Tribes, deciding in his discretion whether to pay each Tribe's costs in full, in part, or not at all. The ISDA's history helps show the error of that contention.

First enacted in 1975, the ISDA was a significant practical step in Congress's turn away from failed policies of the past and toward a policy of promoting tribal independence and self-determination. In support of that goal, the Act envisioned transferring to each willing Tribe both the responsibility for implementing federal programs benefiting the Tribe and the resources necessary for that purpose.

This brief traces relevant changes in the ISDA through two significant congressional revisions, in 1988

and 1994. In amending the Act, Congress more and more clearly required the Secretary to undertake, in each ISDA contract, a legal obligation to pay full contract support costs. Congress chose to require the making of those contractual commitments with the express intention that a contracting Tribe would have the same legal remedy for non-payment as would be available to a contractor for the breach of any other government contract. And in doing so, Congress also eliminated all secretarial discretion in the funding of self-determination contracts.

Against these general and specific historical backdrops, the argument offered by the Secretary here is not a plausible way of reconciling Congress's emphatic directions that the Secretary agree to pay each Tribe's full contract support costs with the limitations it has separately imposed, in particular years, on the overall amount available to the Secretary for that purpose. In particular, the Secretary's assertion of administrative discretion to pick and choose which contracting Tribes will be reimbursed for their costs and in what amounts is antithetical to the text and history of the ISDA. Moreover, if there were any ambiguity in that regard, the doubt would have to be resolved against the government based on interpretive principles that are both incorporated in the text of the ISDA and deeply rooted in federal Indian law. Accordingly, the government must be held to the agreements it has made with each ISDA Tribe. If annual appropriations are collectively inadequate to fund full payment under all ISDA contracts and the Secretary thus cannot pay a particular Tribe, that Tribe has a claim for breach of contract and a right to recover damages for the breach, just as would any other government contractor.

ARGUMENT

The ISDA "direct[s]" the Secretary to enter into a self-determination contract with each qualified Tribe that wishes to assume direct operation of a federal program that would otherwise be administered by the Secretary for the benefit of that Tribe and its members. 25 U.S.C. §450f(a)(1). As amended in 1988 and 1994, the Act imposes very specific requirements concerning the amounts the Secretary must agree to pay under such a contract. *Id.* § 450j-1. In particular, the Secretary "shall add" to each contract "the full amount of funds to which the contractor is entitled under" the Act, *id.* § 450j-1(g), and that amount "shall" include "contract support costs" as defined in the Act, *id.* § 450j-1(a)(2). These requirements are reflected in every ISDA contract the Secretary signs with an individual Tribe. *See id.* § 450*l*(c) (model agreement § 1(c)(2)).

The government argues in this case—essentially as it did in *Cherokee Nation of Oklahoma* v. *Leavitt*, 543 U.S. 631 (2005)—that these contractual provisions create no binding obligation to pay any given Tribe the amount of contract support costs required by the statute and promised in the Tribe's ISDA contract. *See, e.g.*, Pet. Br. 36-54. Where Congress has appropriated a specific amount for the Secretary to use to pay all contract support costs during a fiscal year and that amount proves insufficient to pay the costs owed to *all* tribal contractors, the government argues that *no* contractor has any enforceable right to even partial payment. *See, e.g.*, *id.* at 45. Rather, it contends, the government's overall liability is capped at the amount of the appropriation; and that amount may be parceled out among contracting Tribes in whatever manner the Secretary, in his discretion, may decide. *See id.* at 8-9, 52.; *see also* Resp. Br. 9-10 (giving examples of disparate allocations

the Secretary has made in practice); Arctic Slope Amicus Br. 3-7.

Respondents' brief explains why this theory that payment may become effectively discretionary cannot be squared either with *Cherokee Nation* or with fundamental principles of government contract law. Among other points, the government's argument was rejected over a century ago in *Ferris* v. *United States*, 27 Ct. Cl. 542, 546 (1892), which holds that the insufficiency of an overall appropriation to cover all contractual obligations incurred by the government for an authorized purpose "does not … cancel" those obligations as to any individual contractor. While it may be true that the Secretary cannot make additional support-cost payments to any ISDA tribal contractor once any overall limit on an appropriation for that purpose has been reached, his inability to "mak[e] … further payments" on an otherwise valid contract with a particular Tribe does not excuse the United States from liability for the consequent breach. U.S. Gov't Accountability Office, II *Principles of Fed. Appropriations Law* 6-44 (3d ed. 2006). Rather, the government's contractual obligation to each unpaid Tribe "remain[s] enforceable in the courts" through a damages action. *Id.*; *Cherokee Nation*, 543 U.S. at 637.

As this brief explains, the ISDA's context and history further highlight the error of the Secretary's contrary contention. The Act is a cornerstone of the national policy of tribal self-determination. The evolution of its provisions from enactment in 1975 through substantial amendments in 1988 and 1994 reveals that Congress repeatedly *stripped* the implementing federal agencies of any discretion, including specifically with respect to the full payment of contract support costs. It sought instead to compel implementation by requiring

the Secretary to undertake binding contractual commitments, subject to ordinary remedies for breach. Against this background, it is clear that the Secretary's proposal of a *de facto* return to broad administrative discretion in the payment of ISDA contract support costs is inconsistent with congressional intent.

I. CONGRESS HAS PROGRESSIVELY CONSTRAINED ADMINISTRATIVE DISCRETION UNDER THE ISDA, INCLUDING BY REQUIRING INCLUSION OF FULL CONTRACT SUPPORT COSTS IN ISDA CONTRACTS

A. The ISDA Was Initially Enacted As A Cornerstone Of A New Federal Policy Of Tribal Self-Determination

As this Court is well aware, federal policy concerning relations with the Indian Tribes has passed through many phases over time. *See*, *e.g.*, *United States* v. *Lara*, 541 U.S. 193, 201-203 (2004). The important point for present purposes is that when the ISDA was enacted in 1975, it embodied a radical change in previous policies that had reflected at best an enervating federal paternalism and at worst an express policy of terminating the legal recognition of tribal identity. In a landmark message to Congress in 1970, President Nixon called for a new approach, "explicitly affirm[ing] the integrity and right to continued existence of all Indian tribes."[2] Under the new regime, the United States reaffirmed its responsibility to Indian peoples, but increasingly sought to discharge that responsibility by rebuilding tribal leadership and institutions and inter-

[2] Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 567 (July 8, 1970); *see also*, *e.g.*, Cohen, *Handbook of Federal Indian Law*, § 1.07, at 97-113 (5th ed. 2005).

acting with Tribes on a government-to-government basis. *See Lara*, 541 U.S. at 202; *Ramah Navajo Sch. Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 840 (1982) ("in the early 1970's the federal policy shifted toward encouraging the development of Indian-controlled institutions on the reservation"). For the last forty years, federal Indian law has embodied and sought to further that policy of tribal self-determination.

The self-determination policy found concrete expression in a number of new federal statutes, including the ISDA. *See, e.g.*, *Ramah*, 458 U.S. at 840.[3] In enacting the Act in 1975, Congress found that:

> [T]he prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities[.]

Pub. L. No. 93-638, §(2)(a)(1), 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 450(a)(1)). Congress recognized the "obligation of the United States to … assur[e] maximum Indian participation in the direction of … Federal

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[3] *See also* Cohen, *supra* n.2, § 1.07, at 103-113 (discussing the ISDA and other "Self-Determination Era" statutes, such as the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341; the Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 450a-458aa; and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, among others).

services to Indian communities so as to render such services more responsive to the needs and desires of those communities." *Id.* § 3(a), 88 Stat. 2203-2204 (codified at 25 U.S.C. § 450a(a)) (App. 1a). And it

> declare[d] its commitment to … the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

Id. § 3(b), 88 Stat. 2204, (codified at 25 U.S.C. § 450a note) (App. 1a).[4]

Toward that end, Congress "directed" the Secretaries of the Interior and of Health, Education, and Welfare "to enter into a [self-determination] contract or contracts" with any qualified Tribe that so requested. *Id.* §§ 102-103, 88 Stat. 2206-2207 (App. 1a-2a). These contracts were designed to transfer to the Tribe the responsibility and resources "to plan, conduct, and administer [federal] programs" that would otherwise be provided for Indians by the Secretaries, either directly or through similar contracts with States or state agencies. *Id.*

In keeping with this purpose, the Act included extensive provisions to facilitate the transfer of federal personnel to tribal supervision or employment. *Id.* § 105, 88 Stat. 2208-2210; *see* 25 U.S.C. § 450i & codifi-

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[4] For the Court's convenience, we have reprinted in an appendix to this brief selected provisions of the ISDA, as originally enacted and then as amended in 1988 and 1994.

cation note. As to funding, it provided that the amount paid under each contract "shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof" covered by a contract. ISDA § 106(h), 88 Stat. 2211-2212 (App. 3a). Finally, as to administration, the Act initially gave the relevant Secretaries broad discretion to determine how best to effectuate Congress's goals. *See id.* § 107(a), 88 Stat. 2212 (App. 3a) (subject to certain consultation requirements and time limits, Secretaries "are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title").

It is important to emphasize that nothing in the ISDA was intended to transfer the ultimate responsibility for *funding* contracted programs from the federal government to the Tribes. These were still *federal* programs. What the ISDA aimed to change was the way that these federal programs were administered. It was a direction to the federal agencies that had been running them to turn their operation over, on request, to tribal governments—thus reducing the agencies' own operations. Perhaps not surprisingly, that policy turned out to be more easily articulated than enforced.

B. In Its First Review Of ISDA Implementation, Congress Concluded That Federal Agencies Had Failed To Reimburse Tribes For Indirect Costs Of Administering Federal Operations

A dozen years after the initial enactment of the ISDA, Congress undertook a "comprehensive reexamination" of the Act. S. Rep. No. 100-274, at 1 (1987) (1988 Rep.). That review of how the Secretaries had implemented the Act during its first decade led to a number of

pointed revisions. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988 Amendments); *see* App. 5a-13a.

The Senate Report addressing the 1988 Amendments first noted that the ISDA was intended "to assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities." 1988 Rep. 1.[5] The Committed recognized "remarkable progress" toward that goal (*id.* at 6; *see id.* at 4-6), but also identified significant problems with the implementation of the Act (*id.* at 6-8).

The Committee stressed that when Congress passed the ISDA, it "envisioned a clear-cut transfer [to Tribes] of federal responsibilities as well as federal financial, administrative, technical and other resources." 1988 Rep. 6. The Act's original provisions, however, relied heavily on administrative discretion, and required only that contract funding be "not less than" the amount a Secretary would have provided for his "direct operation" of a program (88 Stat. 2211 (§ 106(h)); App. 3a). In light of experience, the Committee identified two principal obstacles that had "interfered with the contractual relationship contemplated by the Act." 1988 Rep. 7.

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[5] The 1988 amendments originated in the House of Representatives as H.R. 1223. The Senate Report addressed a companion bill, S. 1703. The Senate ultimately passed the House bill after amending it to conform in large part to the Senate bill. 134 Cong. Rec. 12860-12862 (1988). The House concurred in part in the Senate amendments, and the Senate accepted the House's changes. 134 Cong. Rec. 23335-23341, 24038-24043 (1988); *see* 102 Stat. 2298 legis. hist. note; 1988 Rep. 1.

First, "[i]nappropriate application of federal procurement laws and federal acquisition regulations to self-determination contracts ha[d] resulted in excessive paperwork and unduly burdensome reporting requirements." 1988 Rep. 7. This increased the cost of transferring functions under the Act (*see id.* at 7-8, 9), created a federal "contract monitoring bureaucracy" (*id.* at 7), reduced the funds available to the Tribes for the federal functions they had contracted to discharge, and "inject[ed] uncertainty into the planning and management of tribal programs" (*id.* at 8).

Second, the Committee identified "[p]erhaps the single most serious problem with implementation of the Indian self-determination policy" as "the failure of the [Secretaries] to provide funding for the indirect costs associated with self-determination contracts." 1988 Rep. 8; *see id.* at 8-13. It explained (*id.* at 8-9):

> The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. Tribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility.

In this regard, the Committee emphasized that under self-determination contracts, Tribes were "operating federal programs and carrying out federal responsibilities." 1988 Rep. at 9. They "should not be forced

to use their own financial resources to subsidize federal programs." *Id.* Moreover, to the extent that contracting with Tribes might entail additional administrative costs at the tribal level, such expenditures directly served a "fundamental objective of the federal policy of Indian self-determination," which is "to increase the ability of tribal governments to plan and deliver services appropriate to the needs of tribal members." *Id.* at 5; *see id.* at 4 (improvement in tribal government administrative capabilities was financed in part by "indirect cost reimbursement associated with self-determination contracts"). Finally, the Committee repeatedly faulted the Secretaries for "fail[ing] to request from the Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts." *Id.* at 9; *see id.* at 12, 13.

In sum, the Committee expressed frustration with the way the Secretaries had administered the largely discretionary funding provision of the original Act:

> The Federal Government would not consider it proper to short-change funding for contracts with private suppliers of goods and services. When the Bureau of Indian affairs and the Indian Health Service contract with Indian tribes, however, they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities. Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.

1988 Rep. 13. In response, it declared its intention to amend the ISDA in a manner designed "to require the [Secretaries] to comply with the requirement of the Act

that indirect costs be added to the amount of funds available for direct program costs." *Id.* at 12.

C. The 1988 Amendments Cut Back Sharply On Secretarial Discretion Regarding The Administration And Funding Of ISDA Contracts

The 1988 Amendments themselves directly reflect Congress's concern with furthering the transition from federal to tribal administration, while ensuring proper funding of the indirect costs incurred by Tribes because of that transition. The amendments also added important provisions reaffirming the contractual nature of ISDA agreements and expressly providing that they were to be enforceable in the same manner as other government contracts.

1. Promoting transition to tribal administration

To begin with, the amendments added a new sentence to the Act's "declaration of policy": "In accordance with this policy [of self-determination], the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 1988 Amendments § 102, 102 Stat. 2285 (amending ISDA § 3(b), 25 U.S.C. § 450a(b)); App. 5a. This newly articulated commitment reflects Congress's understanding that ISDA funds spent on the indirect costs that tribal governments incur in administering federal contracts serve the ISDA's purpose of enhancing tribal self-determination.

At the same time, Congress took a number of steps to streamline, clarify, and expand the scope of federal programs and functions subject to transition to Tribes

under ISDA contracts.[6] As part of that effort, the Senate Committee sought to counteract administrative reluctance to transfer certain programs or functions. It explained, for example, that in light of the amendments the Secretaries were "not to consider any program or portion thereof to be exempt from self-determination contracts," and that contracted operations could include a wide range of administrative tasks that would otherwise be performed by the federal agencies. 1988 Rep. 23-24.

The 1988 Amendments also responded to the Secretaries' failure to use their previous discretionary authority to exempt ISDA contracts from federal procurement procedures. *See* 1988 Rep. 7. Congress now specified that "no contract entered into pursuant to this Act shall be construed to be a procurement contract," 1988 Amendments § 103, 102 Stat. 2286 (adding ISDA § 4(j)), and added a proviso directing that, except for construction contracts, "the Office of Federal Procurement Policy Act … and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts." 1988 Amendments § 204, 102 Stat. 2291 (redesignating and amending ISDA § 105(a), codified as later further amended at 25 U.S.C. § 450j(a)).

In addition, in three places Congress mandated that any federal administrative requirement for entering into or monitoring ISDA contracts, including record-keeping and reporting requirements, must be promulgated through notice-and-comment rulemaking.

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[6] *See, e.g.*, 1988 Amendments § 201, 102 Stat. 2288 (amending ISDA § 102 and repealing or redesignating § 103; consolidating sections dealing with different federal agencies) (codified as later further amended at 25 U.S.C. § 450f(a)(1)); App. 7a-8a.

1988 Amendments §§ 104, 207, and 208, 102 Stat. 2287, 2295, 2296 (amending and redesignating ISDA §§ 5, 107, and 108, codified as later further amended at 25 U.S.C. §§ 450c, 450k, and 450c(f)); *see* App. 6a, 12a. As the Senate Committee explained at some length, these amendments were intended in part "to prevent Federal agencies from imposing unnecessary contract compliance and reporting requirements on tribal contractors through the use of administrative policy directives," internal manuals, and the like. 1988 Rep. 20; *see id.* at 20-22, 39. They also provided a framework and schedule for the Secretaries to cooperate with Tribes in developing appropriate regulations to replace the cumbersome procurement rules that the Secretaries had previously applied. *Id.* at 38. The Committee noted its expectation that the new regulations would be "relatively simple, straightforward, and free of unnecessary requirements o[r] procedures." *Id.* The Act itself required that they be promulgated within 10 months. 1988 Amendments § 207(b), 102 Stat. 2295-2296 (amending ISDA § 107(b), codified as later further amended at 25 U.S.C. § 450k(b)); App. 12a.

2. Contract funding

As to the question of contract funding, central here, the 1988 Amendments replaced the original Act's one-sentence subsection dealing with funding with a lengthy new section, largely concerned with contract support costs. 1988 Amendments § 205, 102 Stat. 2292 (adding a new ISDA § 106, codified as later further amended at 25 U.S.C. § 450j-1); App. 9a-11a. As noted above, the original provision had merely specified that contract funding must "not be less" than the relevant Secretary would have spent on a contracted operation—essentially leav-

ing other funding questions to the relevant Secretary's discretion. ISDA § 106(h), 88 Stat. 2211; App. 3a.

In stark contrast, the new provision specifically recognized that contracting Tribes would incur "contract support costs," and required that those costs "be added to" the base funding amount—if the tribal contractor requested the addition. 1988 Amendments § 205, 102 Stat. 2294 (codified as later amended at 25 U.S.C. § 450j-1(a)(2), (g)) ("Upon the approval of a self-determination contract and at the request of an Indian tribe or tribal organization, the Secretary shall add the indirect cost funding amount"); App. 9a, 11a. It further set out, in remarkable detail, a number of grounds that a Secretary was specifically *prohibited* from advancing as justifications for reducing the contract funding provided to a Tribe. *See* 25 U.S.C. § 450j-1(b) (App. 9a-10a). These forbidden grounds included "mak[ing] funding available for contract monitoring or administration by the Secretary"; "pay[ing] for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring"; and "pay[ing] for the costs of Federal personnel displaced by a self-determination contract." *Id.*

The amendments thus imposed strict statutory prohibitions against what had previously been treated as funding allocations lying within the Secretaries' discretion. They also added several provisions addressing specific indirect-cost issues, including requiring the Secretary to submit an annual report to Congress that was to detail, among other things, "any deficiency of funds needed to provide required indirect costs to all contractors for [each] fiscal year." 1988 Amendments § 205, 102 Stat. 2293 (adding ISDA § 106(c)-(i), including § 106(c)(2), codified as later further amended at 25

U.S.C. § 450j-1(c)-(i), including § 450j-1(c)(2)). As the Senate Report confirms, these changes were intended to "protect[] contract funding levels provided to tribes, and prevent[] the diversion of tribal contract funds to pay for costs incurred by the Federal government." 1988 Rep. 30; *see id.* at 30-34.[7]

3. Contract enforcement

A final aspect of the 1988 Amendments of special significance here is Congress's approach to the question of contract enforcement. The Senate Report indicates that the Committee:

> considered deleting the term "contract" and using another term such as "self-determination grant" or "intergovernmental agreement." Ultimately, however, the Committee determined that the use of the term "contract" is important to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party.

1988 Rep. 19. Indeed, the 1988 Amendments reinforced the contractual nature of ISDA funding, adding to the statute a new section expressly providing for applica-

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[7] The 1988 Amendments also introduced two limited qualifications on the government's obligations: "the provision of funds under this Act 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" under the ISDA. 25 U.S.C. § 450j-1(b); App. 10a. The government relies heavily on these provisions in this case. *See, e.g.*, Pet. Br. 40. Respondents' brief explains in detail why that reliance is misplaced. *See, e.g.*, Resp. Br. 25-27, 49.

tion of the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, and judicial enforcement in either district courts or what is now the Court of Federal Claims. 1988 Amendments § 206, 102 Stat. 2294-2295 (adding ISDA § 110, codified as later further amended at 25 U.S.C. § 450m-1); App. 13a. The Senate Committee explained that these provisions would afford "ISDA contractors the procedural protections now given other federal contractors by that Act." 1988 Rep. 36.

The Committee made clear its conclusion that these provisions were "necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the [ISDA]." 1998 Rep. 37. Indeed, the Committee put the point bluntly:

> The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated *particularly in the area of funding indirect costs*. Existing law affords such contractors no effective remedy for redressing such violations.

Id. (emphasis added).

In sum, the 1988 Amendments sought to promote the transition from federal to tribal administration of federal programs; directed the Secretary to pay for the tribal indirect costs entailed by that transition; and expressly gave ISDA Tribes the right to pursue powerful contract remedies on a par with other government contractors. These amendments substantially constrained the discretion that the Secretaries had previously exercised in implementing the ISDA. They were, however,

"necessary in order to meet the challenge presented by the tribes: to fully support the successful implementation of the federal policy of Indian Self-Determination." 1988 Rep. 13.

D. The 1994 Amendments Reflect Congress's Final Decision To Eliminate Executive Discretion With Respect To ISDA Contracts And To Provide For Full Contract Support Costs

In 1994, Congress again reviewed the Secretaries' performance in implementing the ISDA. It did not like what it found.

The 1994 Senate Report tersely recalls the same Committee's 1988 conclusion that the ISDA had "failed to meet its goal of reducing the federal bureaucracy and ending the federal domination of Indian programs," and had instead "spawned an increase in federal officials who were employed to monitor self-determination contracts." S. Rep. No. 103-374, at 2 (1994) (1994 Rep.). The 1988 amendments had been required because "the original goal of ensuring maximum tribal participation in the planning and administration of federal services" had been "undermined by excessive [federal] bureaucracy and unnecessary contract requirements." *Id.*

In 1988, Congress had acted to "remove … administrative and practical barriers." 1994 Rep. 2. The Committee had expected new implementing regulations to be issued quickly, and to be "relatively simple, straightforward, and free of unnecessary requirements." *Id.* (internal quotation marks omitted). Yet, although the Act required that those regulations be issued within 10 months (*see* 1988 Amendments § 207, 102 Stat. 2296 (enacting ISDA § 107(b)(4), codified as later further amended at 25 U.S.C. § 450k); App. 12a, the Secretaries had not published even proposed regu-

lations until January 20, 1994. Moreover, those proposed rules contained "hundreds of new requirements," and were in many instances "more restrictive than existing regulations and raise[d] new obstacles and burdens for Indian tribes." 1994 Rep. 3 (internal quotation marks omitted); *see id.* at 14 (Secretaries "fail[ed] … to respond promptly and appropriately to the comprehensive amendments developed by this Committee six years ago …. It is this unfortunate experience that is a major impetus for this bill.").

Congress's reaction was unequivocal. Disregarding the Executive's "strong[] oppos[ition]" (1994 Rep. 16), it passed a second extensive revision of the ISDA. Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, tit. I, 108 Stat. 4250 (1994 Amendments); *see* App. 14a-25a. The express purpose of the amendments was to "limit the promulgation of regulations under the [ISDA] and to prescribe the terms and conditions which must be used in any self-determination contract." 1994 Rep. 1. The changes addressed familiar concerns, but with a new unwillingness to entrust any part of their resolution to secretarial discretion.

The original ISDA, for example, had required contracting Tribes to submit annual reports including "such … information as the appropriate Secretary may request." ISDA § 108, 88 Stat. 2212; App. 4a. The 1988 Amendments restrained the burdensomeness of such "request[s]" by requiring that they be made through public rulemaking. 1988 Amendments § 208, 102 Stat. 2296; App. 6a. In 1994, Congress simply specified one particular form of required audit. 1994 Amendments § 102(2), 108 Stat. 4250-4251 (codified at 25 U.S.C. § 450c(f)); App. 14a. Beyond that, the 1994 amendments permitted the Secretary to collect additional in-

formation only to the extent he was able to "negotiate" such a requirement with the tribal contractor. *Id.*

Similarly, the 1988 Senate Report had indicated an intent that the Secretaries accept tribal proposals to contract for administrative functions, no matter at what organizational level the Secretary would have performed them. 1988 Rep. 23-24. The 1994 Amendments spelled the requirement out in statutory text—indeed, in two key places. *See* 25 U.S.C. § 450f(a)(1), as amended by 1994 Amendments § 102(5), 108 Stat. 4251 ("The programs, functions, services, or activities that are contracted … shall include administrative functions … without regard to the organizational level within the [federal] Department that carries out such functions.") (App. 15a); 25 U.S.C. § 450j-1(a)(1), as amended by 1994 Amendments § 102(14), 108 Stat. 4257 (contract funding "shall not be less than the … Secretary would have otherwise provided for the [contracted] operation … without regard to any organization level within the [federal] Department … at which the [operation] … , including supportive administrative functions that are otherwise contractable, is operated") (App. 18a).

The 1994 Amendments also substantially tightened direct statutory control over the standards and process under which the Secretary may decline to enter into an ISDA contract proposed by a Tribe. *See* 1994 Amendments § 102(6)-(7) and (9), 108 Stat. 4251-4253 (amending or adding ISDA § 102(a)(2) and (4), (b)(3), and (e), codified as later further amended at 25 U.S.C. § 450f(a)(2) and (4), (b)(3), and (e)); App. 15a-17a. For example, the amended Act now requires the Secretary to base any such decision on "controlling legal authority" or on specific evidence "clearly" demonstrating a statutory ground for declination; to approve any severable portion of a proposal; and to carry "the burden of

proof to establish by clearly demonstrating the validity of the grounds for declining." 25 U.S.C. § 450f(a)(2) & (4), (e)(1); App. 15a-17a. Moreover, if a Tribe's contract proposal is declined in whole or in part—or if, as had happened in the past, the Secretary purports to approve a request, but then does not take the steps necessary to implement the contract—the Tribe may bypass any administrative appeal and proceed straight to district court, seeking "immediate injunctive relief to reverse a declination finding … or to compel the Secretary to award and fund an approved self-determination contract." 25 U.S.C. §§ 450f(b)(3) and 450m-1(a), as amended by the 1994 Amendments §§ 102(7) & 104(2), 108 Stat. 4252-4252, 4268; App. 17a, 25a.

Perhaps most strikingly, Congress denied the Secretaries the authority to promulgate the terms and conditions for ISDA contracts, and actually mandated a statutory form of contract. *See* 1994 Amendments § 103, 108 Stat. 4260-4268 (enacting ISDA § 108, codified as later further amended at 25 U.S.C. § 450*l*); App. 22a-24a; *see also* 1994 Rep. 3. In that prescribed form, it included at the outset a special rule of construction:

> Each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the … related functions, services, activities, and programs (or portions thereof) [listed in the Contract], that are otherwise contractable under section 102(a) of such Act [25 U.S.C. § 450f(a)], including all related administrative functions, from the Federal Government to the Contractor[.]

25 U.S.C. § 450*l*(c) (model contract § 1(a)(2)); App. 22a-23a. That rule was expressly intended to "incorporate[]

the longstanding canon of statutory interpretation that laws enacted for the benefit of Indians are to be liberally construed in their favor." 1994 Rep. 11.

Seeking to ensure that "there is no diminution in program resources when programs, services, functions, or activities are transferred to tribal operation," 1994 Rep. 9, Congress specifically addressed contract support costs both in the revised text of the Act and in the new prescribed form of contract. It amended the definition of "contract support costs" to include both indirect and direct program operation expenses. 1994 Amendments § 102(14), 108 Stat. 4257-4258 (amending ISDA § 106(a)(3), codified as amended at 25 U.S.C. § 450j-1(a)(3)); App. 18a-19a. It further prescribed, in the model contract, that "the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement …. Such amount shall be no less than the applicable amount determined pursuant to Section 106(a) [25 U.S.C. § 450j-1(a)]." 25 U.S.C. § 450*l*(c) (model contract § 1(b)(4)); *see also id.* (model contract § 1(b)(6)(B)(i)) ("the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement"); *id.* (model contract § 1(c)(2)) ("The total amount of funds to be paid under this Contract pursuant to section 106(a) … shall be incorporated into this Contract."); App. 23a-24a. The statutory contract thus expressly incorporates contract support costs into funding agreements. *See* 1994 Rep. 11 ("Section 1(b)(3) of the model contract … references the funding amounts provided in Section 106(a) of the Act [25 U.S.C. § 450j-1(a)]. That section provides that the Contractor shall receive no less than [the secretarial amount], plus funding for contract support cost needs.").

Correspondingly, Congress amended the Act to prescribe that "the Secretary *shall add* to the contract *the full amount* of funds to which the contractor is entitled under section 106(a) [25 U.S.C. § 450j-1(a)]," which includes support costs. 1994 Amendments § 102(17), 108 Stat. 4259 (amending ISDA § 106(g), codified as amended at 25 U.S.C. § 450j-1(g)); App. 19a. Like the statutory contract terms, this amendment replaced a system under which a Tribe had to *request* the addition of contract support costs to its contracts with provisions *mandating* that each tribal contractor have a contractual entitlement to the payment of such costs.

Finally, Congress expressly stripped the Secretaries of any authority to "promulgate any regulation, [or] impose any nonregulatory requirement, relating to self-determination contracts"—with the exception of one unified set of regulations that could address only specified topics, had to be vetted with Tribes through a "negotiated rulemaking" process, and had to be issued in final form within 18 months (later expanded to 20) after enactment of the 1994 Amendments. *See* 1994 Amendments § 105, 108 Stat. 4269-4270 (amending ISDA § 107, codified as later further amended at 25 U.S.C. § 450k); App. 20a-21a. The Senate Committee emphasized that, "[b]eyond the areas specified …, no further delegated authority is conferred." 1994 Rep. 14.[8]

In short, in its 1988 and 1994 ISDA amendments, Congress progressively *eliminated* federal administra-

[8] Congress's tight restriction of the Secretaries' regulatory authority in these respects is in keeping with its similar approach under separate titles of the ISDA. *See* 25 U.S.C. §§ 458ggg, 458aaa-16(e); *see also, e.g.*, H.R. Rep. No. 106-477, at 32 (1999) (discussing the "limited authority" given to the Secretary "to promulgate regulations implementing Title V").

tive discretion and *strengthened* the mandate that ISDA contracts both provide for the payment of full contract support costs and be enforceable in the same way as other government contracts.

II. THE GOVERNMENT'S POSITION CANNOT BE RECONCILED WITH THE HISTORY AND CONTEXT OF THE ISDA

A. Congress Reframed The ISDA Expressly To Ensure Each Contracting Tribe An Enforceable Right To Payment Of Full Contract Support Costs And To Eliminate Secretarial Discretion

In this case, the government essentially argues that a contracting Tribe has no enforceable right to payment of the full contract support costs specified in an ISDA contract. Instead, it contends, if Congress limits the appropriations available to the Interior Department to pay such costs to an amount that is not sufficient to pay all the costs incurred by all contracting Tribes, then the Secretary may effectively pick and choose, in his discretion, which Tribes will receive what amount of reimbursement. *See, e.g.*, Pet. Br. 36-43, 52-54. Three features of the ISDA's unique history are especially significant in evaluating that position.

First, the statute's evolution reflects an unmistakable congressional decision to treat ISDA contracts as binding promises. As this Court explained in *Cherokee Nation*, the ISDA "uses the word 'contract' 426 times to describe the nature of the Government's promise." 543 U.S. at 639. The "word 'contract,'" moreover, "normally refers to 'a promise or a set of promises for the breach of which the law gives a remedy.'" *Id.* (quoting *Restatement (Second) of Contracts* § 1 (1979)). Congress's choice of that term was deliberate: In 1988

it "considered deleting the term 'contract' and using another terms such as 'self-determination' grant," but instead "determined that the use of the term 'contract' was important to convey the sense of a legally binding instrument." 1988 Rep. 19. In making that choice, Congress was quite aware that it was also making the "strong remedies" of the Contract Disputes Act available to address breaches of ISDA agreements. *Id.* at 37. It consciously decided to "affor[d] self-determination contractors the procedural protections … given other federal contractors." *Id.* at 36.

The government's position cannot be reconciled with that congressional decision. ISDA contracts create real obligations. Where a particular appropriation proves insufficient to satisfy all of the Secretary's obligations under such contracts, any Tribe that has not received payment has the ordinary recourse of enforcing those obligations against the United States under the Contract Disputes Act.

Second, the ISDA's evolution shows a consistent, extended congressional effort to require the full payment of contract support costs. Originally, the Act was silent with respect to contract support costs, effectively leaving the issue to administrative discretion. In 1988, Congress expressly addressed "the need to fully fund" contract support costs, 1988 Rep. 12, by requiring that they be added to ISDA contracts *on request* by a contracting Tribe. *See* 1988 Amendments, § 205; App. 11a. Finally, in 1994, faced with the Secretaries' persistent failure to implement these directives, Congress expressly prescribed full funding of contract support costs. It mandated use of a specific form of ISDA contract that requires including full contract support costs as part of the government's contractual obligation, *see* 25 U.S.C. § 450*l*(c) (model contract § 1(b)(4), (b)(6)(B)(i))

(App. 23a-24a); and for good measure it amended 25 U.S.C. § 450j-1(g) to require the Secretary to "add to the contract the full amount of funds to which the contractor is entitled under [§ 450j-1(a)]," which includes such costs (*see* App. 19a). This text and history refute the government's newly-minted theory that the promises in ISDA contracts are illusory. *See* Pet. Br. 36-38.

Third, Congress's successive amendments to the ISDA show a plain intent to eliminate federal administrative discretion, including with respect to the payment of contract support costs. As described in detail above, the history is one of uniform, progressive movement in that direction. Yet, the government argues here that if the overall amount Congress appropriates to the Secretary to pay support costs in a given year proves insufficient to fund all ISDA obligations, the ISDA leaves each contracting Tribe at the mercy of whatever system of distribution the Secretary may deem "equitable." *See, e.g.*, Pet. Br. 52; *compare* Resp. Br. 9-10 (describing range of payments of support costs, from nothing to well over 100%, made by Secretary to particular Tribes in actual practice); Arctic Slope Amicus Br. 3-7. Such an understanding of a government "contract" would be exceptionally odd in any context. Here, it is wholly untenable.

B. In The Context Of The ISDA, Any Doubt Must Be Resolved In Favor Of The Tribe

Finally, if the text and history of the ISDA left the matter in any doubt, any ambiguity in ISDA contracts, in the ISDA itself, or in related appropriation acts would have to be resolved in favor of each contracting Tribe.

When Congress lost patience with federal administrators and prescribed a statutory form for ISDA contracts in 1994, it expressly required each contract to state that both "[e]ach provision of the [Act] and each provision of this Contract shall be liberally construed for the benefit of the Contractor," to transfer the contracted federal functions and related funding to the contracting Tribe. 25 U.S.C. § 450*l*(c) (agreement § (1)(a)(2)); App. 22a-23a; *see also* 25 C.F.R. § 900.3(a)(5). Moreover, in prescribing that rule of statutory and contractual construction, Congress was consciously "incorporat[ing]," 1994 Rep. 11, the more general "principle deeply rooted in this Court's Indian jurisprudence" that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (internal quotation marks and alterations omitted); *see also*, *e.g.*, Cohen, *supra* n.2, § 2.02[3], at 124-125 (collecting cases). There could hardly be a more appropriate context for application of that principle than interpretation and application of the ISDA—as explained above, a cornerstone of modern federal Indian policy.

The government's self-serving construction of each ISDA contract and the ISDA itself treat tribal contractors under the ISDA worse than other government contractors and deny all or many of them payment for services concededly rendered under their contracts. It would allow the Secretary to decide, in his discretion, whether any given Tribe would receive all, some, or none of the contract support costs promised by its contract. In contrast, respondents' straightforward application of clear contractual and statutory language and conventional government contract principles would re-

quire the Secretary to pay each Tribe its full support costs, as agreed, to the extent of the funds available to him for that purpose in any given year, and leave any unpaid or underpaid Tribe with a claim for breach of contract and resulting damages under the Contract Disputes Act—precisely as contemplated by the amended ISDA, *see* 25 U.S.C. 450m-1(d); App. 13a. Respondents' position is correct without regard to any special rule of construction. If, however, there were any ambiguity on that score, then both the text of the ISDA and this Court's cases would require that it be resolved in favor of the contracting Tribes.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted.

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