Nos. 02-1472 & 03-853

IN THE

Supreme Court of the United States

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,

Petitioners,

v.

TOMMY G. THOMPSON,
Secretary of Health and Human Services, *et al*.,

Respondents.

TOMMY G. THOMPSON,
Secretary of Health and Human Services,

Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth Circuit and for the Federal Circuit

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, AND THE AEROSPACE INDUSTRIES ASSOCIATION IN SUPPORT OF THE CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Once A Contract Is Properly Awarded, The Government Cannot Avoid Its Financial Obligation Under That Contract By Exhausting The General Lump-Sum Appropriation Account From Which The Obligation Is To Be Paid 5

A. The Government's Position Is Contrary To More Than 120 Years Of Settled Law 5

B. The Government's Position Would Be Devastating To Government Contractors And The Government Alike And Is Flatly Contrary To Congressional Intent 12

1. The government's position would render many government contracts illusory, leaving contractors in an untenable position and undermining the government's ability to contract 12

2. The Antideficiency Act does not support the government's position 15

3. The fact that the contracts are "subject to the availability of appropriations" does not support the government's position 19

TABLE OF CONTENTS - continued

II. Congress Cannot Limit Retroactively The Government's Contract Liability After That Liability Is Fixed 24

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539 (Ct. Cl. 1980) 27

Bradley v. United States, 98 U.S. 104 (1878) 10

City of Detroit v. Detroit Citizens' Street Railway Co., 184 U.S. 368 (1902) 13

Corliss Steam-Engine Co. v. United States, 10 Ct. Cl. 494 (1874), *aff'd*, 91 U.S. 321 (1875) 24

Delta Data Systems Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984) 9

Department of Revenue v. ACF Industries, Inc., 510 U.S. 332 (1994) 18, 19

Diamond v. Chakrabarty, 447 U.S. 303 (1980) 17

Dougherty v. United States, 18 Ct. Cl. 496 (1883) 7, 8, 11, 15

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 17

Ferris v. United States, 27 Ct. Cl. 542 (1892) 6, 7

Franconia Associates v. United States, 536 U.S. 129 (2002) 13, 24

Gibney v. United States, 114 Ct. Cl. 38 (1949) 23

Jones v. R. R. Donnelley & Sons Co., 124 S. Ct. 1836 (2004) 18

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 18

Lincoln v. Vigil, 508 U.S. 182 (1993) 9

TABLE OF AUTHORITIES - continued

Lynch v. United States, 292 U.S. 571 (1934)............. 14, 25

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982).. 17

Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) 23, 24

Murray v. City of Charleston, 96 U.S. 432 (1878) 13

New Jersey v. Yard, 95 U.S. 104 (1877).......................... 13

New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966) 8, 23

New York Central & Hudson River Railroad v. United States, 21 Ct. Cl. 468 (1886)................................ 8

New York Central Railroad Co. v. United States, 65 Ct. Cl. 115 (1928), *aff'd*, 279 U.S. 73 (1929)............ 8

Office of Personnel Management v. Richmond, 496 U.S. 414 (1990).. 11

Perry v. United States, 294 U.S. 330 (1935)..................... 26

Seatrain Lines, Inc. v. United States, 99 Ct. Cl. 272 (1943).. 27

Shipman v. United States, 18 Ct. Cl. 138 (1883) 11

South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982) 6

Sutton v. United States, 256 U.S. 575 (1921) 10

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).. 17

United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, 484 U.S. 365 (1988) 18

TABLE OF AUTHORITIES - continued

United States v. Langston, 118 U.S. 389 (1886)........... 9, 10

United States v. Winstar Corp., 518 U.S. 839 (1996)... 5, 14, 23, 26

STATUTES AND REGULATIONS

25 U.S.C. § 450j-1(b)... 19

31 U.S.C. § 1304... 3

31 U.S.C. § 1341... 2

31 U.S.C. § 1341(a)(1)(A) 6, 16

31 U.S.C. § 1341(a)(1)(B) 6, 16, 22

31 U.S.C. § 1342... 18

48 C.F.R. § 31.203 15

48 C.F.R. § 32.702 21

48 C.F.R. § 32.703-2... 12, 21

48 C.F.R. § 32.704(c)... 18

48 C.F.R. § 32.705-1... 19, 21

48 C.F.R. § 52.232-18.. 19

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998) 24, 25

COMPTROLLER GENERAL OPINIONS

21 Comp. Gen. 335 (1941).. 22

21 Comp. Gen. 864 (1942).. 20

28 Comp. Gen. 163 (1948).. 22

38 Comp. Gen. 93 (1958).. 22

TABLE OF AUTHORITIES - continued

39 Comp. Gen. 340 (1959).. 19, 21

Comptroller General Letter to Senator Alan Cranston, 1990 WL 10007871 (Aug. 24, 1990) 22

MISCELLANEOUS

Herbert L. Fenster & Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Pub. Contr. L.J. 155 (1979) 8, 10, 14

2 United States General Accounting Office, *Principles of Federal Appropriations Law* (2d ed. 1992) 9, 11, 15, 18, 22

INTEREST OF *AMICI CURIAE*

Amici Curiae are the Chamber of Commerce of the United States of America ("the Chamber"), the National Defense Industrial Association ("NDIA"), and the Aerospace Industries Association ("AIA").[1]

The Chamber is the largest association of businesses, companies, and associations in the world, representing an underlying membership of more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. Many of the Chamber's members provide goods and services to the United States under military and civilian government contracts. The Chamber initiates and enters litigation involving issues of national concern to the American business community, and it regularly advocates its members' views in this Court and other appellate forums.

NDIA is a non-partisan, non-profit organization with a membership of more than 1,100 companies and 32,000 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.

AIA is the premier aerospace industry trade association, representing the nation's major manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, materials, and related

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[1] No one other than *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of Record for the parties consented to the filing of this brief, and letters of consent have been filed with the Clerk.

components and equipment. AIA represents the interests of its members to ensure that the U.S. aerospace industry remains preeminent in a changing global market.

The issues presented in this case could have profound implications for the members of the Chamber, NDIA, and AIA. The government here claims a right to be free from its contractual obligations whenever the contracting agency exhausts congressional appropriations prior to payment on a government contract, even when there were sufficient appropriations to make full payment at the time the contract was awarded. That claimed right – which would leave contractors at the mercy of the contracting agency for payment on many government contracts – is contrary to more than 120 years of consistent case law and would upset the settled expectations of government contractors.

Adopting the government's newly-minted arguments for absolute discretion to determine the scope of its contractual liability would impact the entire government contracting community. Because of the Antideficiency Act, 31 U.S.C. § 1341, virtually every contract with the government depends upon congressional appropriations for its validity, and virtually all contractors rely on congressional appropriations for payment in the usual course. Moreover, the specific language on which the government places a substantial portion of its argument – the language stating that a contract is "subject to the availability of appropriations" – is a staple of government contract law, appearing frequently in statutory schemes, procurement regulations, and government contracts.

Amici Curiae have a critical interest in ensuring that this Court reaffirm 120 years of case law and protect settled expectations regarding the government's responsibilities as a reliable contracting partner.

INTRODUCTION AND SUMMARY OF ARGUMENT

From a government contracting perspective, this is an easy case. For more than 120 years, it has been the law that if there are sufficient funds in a general lump-sum appropriation account at the time a government contract is *awarded*, then the contractor has a right to payment that cannot be defeated on the ground that, at the time payment is due, the appropriated funds have been exhausted. The critical question, then, for a contract that is "subject to the availability of appropriations" is whether there is a sufficient appropriation to pay the contract *when the contract is awarded*. If so, the contract is binding. If the contracting agency later exhausts the appropriation by spending the appropriated funds elsewhere, the agency may lack authority to make payments on the contract, but the United States must answer to the contractor in the United States Court of Federal Claims (or a board of contract appeals) in a breach of contract action. Payment of such claims is from the Judgment Fund. *See* 31 U.S.C. § 1304.

These settled principles control this case. The contracts at issue here were to be paid from a general lump-sum appropriation account that in all relevant years exceeded $1.6 billion – vastly more than the contracts at issue. Nevertheless, the government ultimately refused to make full payment on the contracts, claiming that, in light of other agency expenditures, there were insufficient funds to make full payment. In that circumstance, the contractors have a claim for breach of contract that is enforceable in the Court of Federal Claims.

The government takes on these principles directly. In its certiorari filings with this Court, the United States argues that when a contract to be paid from a general appropriation is "subject to the availability of appropriations," the government has no liability to the contractor if the relevant agency exhausts its appropriation. *See, e.g.*, Petition of United States in No. 03-853 at 18 (criticizing Federal Circuit for holding that "[f]unds are 'available' . . . whenever the total lump-sum appropriation exceeds the amount obligated by the agency at the moment of appropriation, without regard for the needs of other programs or the agency's need to operate throughout the year"); United States Brief in Opposition in No. 02-1472 at 17 (defending the Tenth Circuit's decision on the ground that the term "availability" in the phrase "subject to the availability of appropriations" does not mean "*theoretical* [or] *legal* availability, the hypothetical moment after Congress enacts an appropriation, rather than practical availability. To the contrary, 'availability' should be read in a realistic fashion in view of competing claims and priorities"). As the government would have it, a contractor is at the mercy of the contracting agency for payment under an otherwise valid contract.

That argument strikes at the heart of the government's reliability as a contracting partner. By reserving to itself the right to spend down a general appropriation and thereby deprive contractors of their vested right to payment, the government renders many government contracts illusory, harming not only on contractors left without a remedy, but also the government's ability to contract in the future.

The government's argument is also fundamentally misguided. It ignores critical statutory distinctions between the government's authority to make a contract and the government's authority to make payment on a contract, and it conflates the authority of the contracting agency to make payment with the government's ultimate liability to the contractor for breach of contract.

Similarly unpersuasive is the argument that Congress has the power to extinguish a contractor's vested right to payment by passing legislation years after the contract is finished that retroactively eliminates the right to payment. That argument is flatly contrary to *United States v. Winstar Corp.*, 518 U.S. 839 (1996), and other decisions of this Court that deny Congress exactly that power.

This Court should thus reject the government's effort to evade settled contracting law and, as this Court has done repeatedly and as the Federal Circuit did below, should hold the government to its contractual obligations.

ARGUMENT

I. Once A Contract Is Properly Awarded, The Government Cannot Avoid Its Financial Obligation Under That Contract By Exhausting The General Lump-Sum Appropriation Account From Which The Obligation Is To Be Paid.

The government argues that an agency's exhaustion of its general lump-sum appropriation precludes a government contractor whose contract was to be paid out of that appropriation from obtaining relief at either the agency or the Court of Federal Claims. That argument is contrary to settled case law, would wreak havoc with the government contracting community, and cannot be squared with the text and clear intent of the relevant congressional legislation.

A. The Government's Position Is Contrary To More Than 120 Years Of Settled Law.

The United States seeks to rewrite fundamental principles of government contracting law. For more than 120 years, a contractor who is to be paid from a general lump-sum appropriation that is sufficient at the time the contract is awarded does not lose the right to payment simply because the contracting agency later exhausts the relevant appropriation. In those circumstances, although the agency is generally barred by the Antideficiency Act from making payments to the contractor,[2] the government must still answer to the contractor in an action for breach of contract.

These settled principles form the core of the so-called "*Ferris* doctrine." *Ferris v. United States*, 27 Ct. Cl. 542 (1892), involved dredging services to be provided to the federal government pursuant to a contract that was funded under a general appropriation. The government eventually exhausted the appropriation, and the contractor was told to stop work. The contractor then sued the government for breach of contract.

In holding in favor of the contractor, the U.S. Court of Claims rejected the argument that the exhaustion of the appropriation account excused the government from liability.[3] To the contrary:

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[2] The Antideficiency Act provides in relevant part that a federal employee may not

> **(A)** make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]
>
> **(B)** involve [the federal] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341(a)(1)(A), (B).

[3] The U.S. Court of Claims is a predecessor court to the U.S. Court of Appeals for the Federal Circuit, and decisions of the Court of Claims are binding on the Federal Circuit. *See South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc).

> 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.

27 Ct. Cl. at 546.

The Court of Claims' decision in *Ferris* flowed directly from the decision nearly a decade earlier in *Dougherty v. United States*, 18 Ct. Cl. 496 (1883). In *Dougherty*, the contractor supplied beef to the government under a contract to be paid from a general appropriation account. The Commissioner of Indian Affairs later ordered additional beef under an "add-on" to the contract, and the contractor delivered the beef. The government then discovered that it had exhausted the relevant appropriation account, and it refused to pay.

When the contractor sued in the Court of Claims, the government defended on the ground that "the contract was void because the annual appropriation had, at the time of the purchase, been covered by other contracts." 18 Ct. Cl. at 503. The Court of Claims held in favor of the contractor, stating that "we have never held that persons contracting with the Government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department." *Id.* Distinguishing between the government's authority to make payments and the government's liability for breach of contract, the court stated that "[t]he statutory restraints in this respect apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government." *Id. See generally* Herbert L. Fenster & Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Pub. Contr. L.J. 155, 173-74 (1979).

Since *Ferris* and *Dougherty*, the Court of Claims has repeatedly held that agency exhaustion of a general appropriation account does not preclude a subsequent action by the contractor for breach of contract. *See, e.g.*, *New York Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) ("The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims."); *New York Cent. R.R. v. United States*, 65 Ct. Cl. 115, 128 (1928) ("One of the reasons assigned for the nonpayment is the lack of appropriation, and this may be a sufficient reason for the accounting officers or the Postmaster General if the appropriations for the period in question were exhausted. But it furnishes no reason why this court may not render its judgment for the amount due."), *aff'd*, 279 U.S. 73 (1929); *New York Cent. & Hudson River R.R. v. United States*, 21 Ct. Cl. 468, 473 (1886) ("It does not appear that the appropriations were insufficient to enable the Postmaster-General to fulfill this contract and all others made by him, if any, upon the same authority, and whether they were so or not was no concern of the claimant, provided the contract in question did not exceed the entire annual appropriation.").

The "expert opinion" of the General Accounting Office ("GAO") is to the same effect.[4] The GAO Redbook – the government's own comprehensive summary of federal funding law – notes 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." 2 United States General Accounting Office, *Principles of Federal Appropriations Law* 6-18 (2d ed. 1992) ("GAO Redbook"). Thus, "[w]here a contractor is but one party out of several to be paid from a general appropriation, the contractor is under no obligation to know the status or condition of the appropriation account on the government's books. If the appropriation becomes exhausted, the Antideficiency Act may prevent the agency from making any further payments, but valid obligations will remain enforceable in the courts." GAO Redbook at 6-17.

Nothing in this Court's opinions is to the contrary. Although this Court has had few if any relevant cases addressing contracts to be paid from general appropriations, this Court has rejected the United States' extreme position that Congress' failure fully to appropriate funds inevitably caps the liability of the United States at the appropriated amount. In *United States v. Langston*, 118 U.S. 389 (1886), for example, the minister resident and general counsel to Haiti – then John M. Langston – was entitled to a salary of $7,500 a year. Congress nevertheless appropriated "for ministers resident and consuls general to Liberia, [Haiti],

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[4] The opinions of the General Accounting Office, as expressed in Principles of Federal Appropriations Law ("GAO Redbook"), are not binding, but they do reflect an "expert opinion" that the courts should "prudently consider." *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984) (Scalia, J.); *see also Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (relying on GAO Redbook).

Switzerland, Denmark and Portugal, at $5,000 each, $25,000." *Id.* at 391 (internal quotation marks and citation omitted). Notwithstanding the limited appropriations, this Court held that Langston was entitled to the full $7,500.

Cases such as *Sutton v. United States*, 256 U.S. 575 (1921), and *Bradley v. United States*, 98 U.S. 104 (1878) are not to the contrary. *Sutton*, for example, involved a contract for work relating to a channel in Florida from Clearwater Harbor to Tampa Bay. When the contractor sought to recover amounts above those that had been specifically appropriated, the Court of Claims denied relief. This Court affirmed, concluding that the Secretary of War was "without power to make a contract binding the government to pay more than the amount appropriated," and "those dealing with him must be held to have notice of the limitations upon his authority." 256 U.S. at 579; *see also Bradley*, 98 U.S. at 114-17 (United States not liable for rent payments above amount specifically appropriated by Congress for that purpose).

But the issues presented in cases such as *Sutton* and *Bradley* differ in at least one critical respect from the issues presented here and in *Ferris* and *Dougherty*: *Sutton* and *Bradley* involved a specific line-item appropriation designated for a single contract or project, rather than (as was the case in *Ferris* and *Dougherty*) a general appropriation for a number of contracts. *See generally* Fenster & Volz, 11 Pub. Contr. L.J. at 167-74.

That distinction is critical. When a contract is funded by a specific line-item appropriation, the contractor can determine exactly what the government is obligated to pay and, because the contractor is the only one to be paid from the appropriation, can easily track the funds remaining in the appropriation. In contrast, when a contract is to be paid from a general appropriation, the contractor cannot track government spending on all of the myriad activities to be funded from the account. As a practical matter, then, the contractor is powerless to know how much money remains in the relevant account. *See* GAO Redbook at 6-18 (noting that requiring contractor to know how much of an appropriation remains available for it at any given time "would place an unreasonable burden on the contractor").

Government contract jurisprudence sensibly reflects these differences. The Court of Claims and the Federal Circuit have long held that *Ferris* and *Dougherty* do not apply when there is a specific line-item appropriation, rather than a general lump-sum appropriation; indeed, that distinction is reflected in *Dougherty* itself. *See Dougherty*, 18 Ct. Cl. at 503 ("[W]hen one contract on its face assumes to provide for the execution of all the work authorized by an appropriation, the contractor is bound to know the amount of the appropriation, and cannot recover beyond it."); *see also Shipman v. United States*, 18 Ct. Cl. 138, 146-47 (1883) (amount appropriated in specific appropriation authorizing construction was the limit of contractor's recovery).

The GAO Redbook reflects this same distinction, noting that a contract that is funded from a specific line-item appropriation "is valid only up to the amount of the available appropriation. Exhaustion of the appropriation will generally bar any further recovery beyond that limit." GAO Redbook at 6-18. [5]

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[5] Nothing in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) is to the contrary. In that case, Congress "appropriated no money for the payment of the benefits that respondent seeks." 496 U.S. at 424. Here, in contrast, Congress appropriated sufficient funds to make the required payments.

In short, settled law makes resolution of the government contract issues presented here straightforward. When a contract is to be funded from a general appropriation account and there are sufficient funds in that account to pay the contractor at the time the contract is awarded, the government's exhaustion of the appropriation may prevent payment to the contractor by the agency, but does not relieve the government of its liability on the contract.

B. The Government's Position Would Be Devastating To Government Contractors And The Government Alike And Is Flatly Contrary To Congressional Intent.

The government asks the Court to overturn this body of settled law. Doing so, however, would have grave consequences for contractors and the government alike, and cannot be squared with any sensible reading of the relevant statutes.

1. The government's position would render many government contracts illusory, leaving contractors in an untenable position and undermining the government's ability to contract.

At the outset, it is critical to understand the practical effect of the government's position. Under the government's view, when a contract to be funded from a general lump-sum appropriation contains a "subject to" clause – as many such government contracts do, *see* 48 C.F.R. § 32.703-2 (describing requirements for contracts conditioned upon availability of funds) – the contractor is obligated to perform the contract fully, yet bears the risk that the agency will for

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Only the agency's failure to pay sufficiently close attention to its expenditures caused the shortfall.

whatever reason exhaust its general appropriation, leaving the contractor not only without payment but also without any legal remedy against the government. The contractor would be forced to rely, in other words, not on Congress' appropriations, but on the uncertain financial management of the agency.

Government contracts and statutory schemes authorizing such contracts cannot reasonably be construed to force a contractor to bear that risk. The government argues to the contrary, suggesting that Congress granted each contracting agency a unilateral option to pay or not as that agency sees fit. But the contracts resulting from such a scheme would be entirely illusory, and this Court has repeatedly rejected constructions that would render government contracts illusory. *See, e.g.*, *Franconia Assocs. v. United States*, 536 U.S. 129, 142 (2002) (rejecting government's interpretation of contracts established by statutory scheme when government's interpretation would render the government's obligation "meaningless" and would result in a contract that was "illusory"); *City of Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U.S. 368, 384 (1902) (rejecting as "hardly . . . credible" the city's suggestion that the fare rate agreed on with railroad company, which "amounted to a contract," would be "subject to change from time to time" at the city's pleasure); *Murray v. City of Charleston*, 96 U.S. 432, 445 (1878) (A government contract "should be regarded as an assurance that [a sovereign right to withhold payment] will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise is an absurdity"); *New Jersey v. Yard*, 95 U.S. 104, 116-17 (1877) (same).

In the world urged by the government, the private contractor would find itself in an untenable position. As noted, a contractor is powerless to track the agency spending of a lump-sum appropriation. *See supra* pp. 10-11. The contractor thus could never know prior to performance whether or not the government would ultimately make payment. Given the size of many government contracts, the uncertainty (and inevitable lack of payment on at least some contracts) would be devastating for contractors; indeed, it is hard to see how a contractor could justify to its owners or shareholders contracting with the government.

The negative impact of the government's approach thus would not fall solely on the private contractors. Expanding the Government's ability to avoid its contractual obligations in the way the United States now proposes would, like the Government's position in *Winstar*, "produce the untoward result of compromising the Government's practical capacity to make contracts," *Winstar*, 518 U.S. at 884 (plurality opinion), and have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." 518 U.S. at 884; *see also Lynch v. United States*, 292 U.S. 571, 580 (1934) (Brandeis, J.) ("Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors"). The net result is that the government would undermine its "own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Winstar*, 518 U.S. at 883; *see also id.* at 913 (Breyer, J., concurring) (limiting ability of United States to avoid contractual obligations is appropriate because "in practical terms it ensures that the government is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting").

Nor is that the only burden that the government's argument would place on contracting agencies. Requiring a contractor to track government spending – and requiring that the government permit the contractor to do so – would surely constitute "a nuisance for the government as well." GAO Redbook at 6-18; *see also Dougherty*, 18 Ct. Cl. at 503 (noting that requiring the contractor to "know the condition of the appropriation account at the Treasury or on the contract book of the Department" might well "block the wheels of the Government").

An additional problem arises with respect to integrated contracts in which performance of fully funded work is not easily segregated from unfunded work. Consider, for example, a contract in which indirect costs are calculated as a fixed percentage of direct costs (as is often the case, *see, e.g.*, 48 C.F.R. § 31.203). In that situation, a contractor cannot incur direct costs without also incurring indirect costs. If funding for the indirect costs is put in doubt (because, for example, the agency is threatening to exhaust its appropriation), the contractor cannot simply stop work on the "indirect cost portion" of the contract. The effect of the government's approach, therefore, would be to require the contractor to stop work on the entire contract. *See, e.g.*, Fenster & Volz, 11 Pub. Contract L.J. at 179-80 (describing and illustrating the problem of applying the government's approach to integrated contracts).

2. The Antideficiency Act does not support the government's position.

Unsurprisingly, given this precedent and these myriad practical problems, nothing in the Antideficiency Act compels the government's implausible position. Indeed, the government's position is precisely contrary to congressional intent, because the approach articulated by the Court of Claims and GAO is fully consistent with, and flows directly from, that Act.

The Antideficiency Act was passed by Congress to rein in spending by the Executive Branch. The Act provides in relevant part that a federal employee may not

> **(A)** make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]
>
> **(B)** involve [the federal] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341(a)(1)(A), (B). Section § 1341(a)(1)(B) thus prevents a federal employee from *entering a contract* or binding the federal government in advance of congressional appropriations. And § 1341(a)(1)(A) prohibits an employee from *making a payment* that would exceed the amount available in an appropriation made by Congress. Violation of the Act can result in criminal sanctions.

The *Ferris* doctrine as articulated by the Court of Claims and the GAO fully implements the Act. As required by § 1341(a)(1)(B), no contract binds the United States unless and until Congress makes the relevant general appropriation. And as required by § 1341(a)(1)(A), an agency official is powerless to make payments on the contract once appropriations have been exhausted.

What the Court of Claims and the GAO have declined to add – and what the government now asks seeks from this Court – is a provision that Congress has not seen fit to add, such that exhaustion of an appropriation that was ample at the time the contract was awarded somehow frees the government from contractual liability. For a number of reasons, this Court should not rewrite the statute.

First, the Antideficiency Act is a finely reticulated statute that reflects the government's substantial interests on both sides of the issue. That is, just as Congress has an interest in limiting unauthorized expenditures, it also has a substantial long-term interest in treating its contracting partners fairly. When Congress has balanced those interests and concluded that the interests of private parties merit particular protection, this Court should hesitate to disrupt that balance. *See, e.g.*, *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) ("The choice we are urged to make is a matter of high policy for resolution within the legislative process . . . . That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives."); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981).

Second, the government here seeks to overturn settled judicial precedent of which Congress is surely aware. The *Ferris* doctrine has been the law for more than 120 years. Over that period, Congress has repeatedly amended the Antideficiency Act, yet has never sought to modify (much less overrule) *Ferris*. When Congress has tacitly approved a judicial interpretation in this manner, this Court should leave to Congress the job of making any necessary changes. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (noting that "the force of precedent here is enhanced" by Congress's decision to amend the statute without modifying earlier court decisions on the same subject); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379-82 (1982) (same).

Third, the government is not dependent on this Court to vindicate its interests. If the government concludes that, notwithstanding 120 years of history, the *Ferris* doctrine is somehow unworkable, the government is fully capable of making its concerns known to, and seeking effective relief from, Congress.

Fourth, abandoning *Ferris* at this stage would disrupt the substantial reliance interests and settled expectations of the government contractors who have made countless contracts on the firm understanding that *Ferris* provides the relevant legal framework. *See, e.g.*, *Jones v. R. R. Donnelley & Sons Co.*, 124 S. Ct. 1836, 1845 (2004) (rejecting interpretation of a statute that would disrupt settled expectations and adopting interpretation which "protect[s] settled interests"); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (noting that "settled expectations should not be lightly disrupted").

Finally, the government's approach would place § 1341 in some tension – if not outright conflict – with 31 U.S.C. § 1342. Section 1342 bars a contracting officer from creating an agreement under which the contractor becomes a "volunteer" of his services. Section 1342 thus makes it illegal for the government to enter into contracts under which the contractor provides goods or services for which it will not receive compensation. *See generally* GAO Redbook at 6-55 to 6-71 (describing "voluntary services"); 48 C.F.R. § 32.704(c). Adopting the government's interpretation would bypass the appropriations process and result in contractors' providing goods and services to the government "voluntarily" without compensation. *See, e.g.*, *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (statutory construction is a "holistic endeavor" in which the meaning of a provision "is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law"); *Department of Revenue v. ACF Indus., Inc.*, 510 U.S.

332, 343 (1994) (interpreting one provision of a statute to avoid incompatibility with other provisions).

In short, there is no justification for this Court to read the Antideficiency Act other than as written.

3. The fact that the contracts are "subject to the availability of appropriations" does not support the government's position.

Nor is there any merit to the government's argument that the implausible interpretation it offers is mandated by the qualification that contracts under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n ("ISDA"), are "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b). The government suggests, for example, that the "subject to the availability of appropriations" clause in both the ISDA and the contracts themselves placed the risk of insufficient appropriations on the contractors. *See* United States Brief in Opposition in No. 02-1472 at 20. But the question before the Court is exactly what risk the contractors took. For more than 120 years, the risk borne by contractors has been that Congress will limit appropriations – either by a zero-funding clause or by capping funding in a specific line-item appropriation – not that the agency will exhaust appropriated funds without meeting its contractual obligations. Once Congress provides a general lump-sum appropriation that is sufficient to cover the contract, the contingency covered by the "subject to" clause has been met, and the clause has no further import. *See, e.g.*, 39 Comp. Gen. 340 (1959) (noting that agreement becomes operative "if and when the appropriation subsequently is made"); *see also* 48 C.F.R. § 32.705-1; *id.* § 52.232-18. That is particularly the case here, where statutory contracts are at issue and award is *required* upon passage of appropriations. There is simply no basis in law or policy for the government's novel contention that the clause – standard in statutes and government contracts – was intended to put the risk of agency overspending on the contractor. Indeed, from the contractors' standpoint, entering a contract with such a clause would be suicide. *See supra* pp. 12-14.

The government is also wrong that application of the *Ferris* doctrine would somehow render the "subject to the availability of appropriations" language in the statute "largely superfluous." Petition of the United States in 03-853 at 18.

First, the "subject to" language implements § 1341(a)(1)(B)'s prohibition on making a contract before Congress appropriates funds, while allowing the government to fix the terms of dealing in advance of the appropriation. That is, the government often wants to fix the terms of a contract before appropriations are available. The government may, for example, wish to lock in certain coal prices in May, without waiting until appropriations are made on October 1 at the start of the fiscal year. Any contract that obligated the government to purchase or accept delivery of coal prior to the appropriation would, however, violate the Antideficiency Act.

The inclusion of the "subject to" language in the statute or contract permits the government to set the terms of dealing between the United States and the contractor, while avoiding liability under the Antideficiency Act by ensuring that the contract does not become operative – and thus imposes no liability on the United States – unless and until there is a subsequent congressional appropriation. *See, e.g.*, 21 Comp. Gen. 864, 864-65 (1942) (holding that there is "no objection to the award of a conditional contract to receive and pay for coal as long as the contract "provides by its terms that the Government's liability thereunder is contingent upon the future availability of appropriated moneys with which to make payment for the coal"); 39 Comp. Gen. 340 (1959) ("[A] conditional contract may be entered into prior to enactment by the Congress of an appropriation therefore – that is a contract which specifically provides by its terms that the government's liability thereunder is contingent upon the future availability of appropriated moneys with which to make payment for the contract purposes. Such a contract, of course, would become operative only if and when the appropriation subsequently is made.") (internal citation omitted). Indeed, federal procurement regulations expressly require the "subject to" language for exactly that purpose. *See* 48 C.F.R. § 32.702 (requiring contracting officer to "obtain written assurance from responsible fiscal authority that adequate funds are available" or "expressly condition the contract upon availability of funds"); *id.* § 32.703-2 (describing contracts conditioned on availability of funds); *id.* § 32.705-1 (contracting in advance of funds).[6] Once Congress has made the appropriation, the condition imposed by the "subject to" clause has been satisfied, the contract becomes operative, and the "subject to" clause becomes largely irrelevant.

Second, the "subject to" language makes clear that the agency lacks authority to enter into a contract in the absence of appropriations. Section 1341(a)(1)(B) generally permits contracts to be made in even in the absence of appropriations

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[6] That mechanism was apparently used here. ISDA contracts are apparently "negotiated" and "signed" at least 90 days before the start of the fiscal year (and thus before the appropriation). By including the term "subject to the availability of appropriations," the ISDA allows the government to reach agreement with the Tribes in advance of appropriations.

when those contracts are "authorized by law." *See* § 1341(a)(1)(B). Certain statutory provisions that use mandatory contracting language or that specifically reference authority to contract notwithstanding appropriations have been held to fall within the "authorized by law" exception. *See generally* GAO Redbook at 6-54 to 6-55 (providing examples); *see also* 21 Comp. Gen. 335 (1941) (concluding, in light of the absence of language making Library of Congress' statutory duty contingent on appropriations, that the Antideficiency Act allowed the Library to implement a statute that provided for mandatory within-grade salary advancements even though doing so would create a deficiency); 38 Comp. Gen. 93 (1958) (finding no violation of the Antideficiency Act for complying with statute requiring the transfer of funds to an Indian Tribe even though the agency did not have sufficient unobligated funds to pay the Tribe).

When Congress includes the "subject to" language, an agency unambiguously lacks authority to bind the United States in the absence of a subsequent congressional appropriation, and it is clear that a zero funding restriction or other specific congressional appropriations limitation overrides even an otherwise unqualified agency payment obligation. *See, e.g.*, 28 Comp. Gen. 163, 165-66 (1948) (distinguishing between language that giving agency authority to enter a "firm contract" and authority pursuant to which no legal authority exists unless and until appropriation is made); Comptroller General Letter to Senator Alan Cranston, 1990 WL 10007871, at *3-*4 (Aug. 24, 1990) (concluding that "subject to" language in statute that required Department of Veterans Affairs ("DVA") to provide for the collocation of at least three regional offices with DVA medical centers deprived the DVA of "contract authority" to enter into obligations for leases in excess of appropriations or available funds). Inclusion of the "subject to" language thus avoids the difficult questions regarding the interplay of mandatory statutory duties and specific funding restrictions in appropriations statutes that have produced unfunded mandates and bedeviled the lower courts. *See, e.g.*, *New York Airwaves, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966); *Gibney v. United States*, 114 Ct. Cl. 38 (1949).

The remaining arguments available to the government fare no better. *Ferris* does not, for example, create insurmountable practical difficulties for agencies or for Congress, as 120 years of uninterrupted practice make clear. To the contrary, the agency is capable of managing its money so it does not exceed its appropriation. The agency can, for example, determine its needs in advance and can issue the contracts in lesser amounts. Contracting agencies do that all the time when dealing with defense contractors and contractors in other industries, and such advance planning has long provided a sensible way to manage contracting costs in a way that is fair to both the contractor and the government. Indeed, encouraging such pre-contract budgeting is one of the principal purposes of 31 U.S.C. §§ 1512-1514.

Nor can the government intone with talismanic effect that contractors must "turn square corners" when dealing with the government. That obligation is a two way street. *See Winstar*, 518 U.S. at 886 n.31 (citing cases). Indeed, "when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Winstar*, 518 U.S. at 895 (plurality opinion; quotation marks and citation omitted); *accord Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000); *Franconia*, 536 U.S. at 141. Yet what the government seeks here – a unilateral right to limit its contractual obligations by spending appropriated money elsewhere – finds no parallel in private contracts; indeed, it is antithetical to fundamental principles of private contract law.

When the government makes a contract and Congress appropriates sufficient money to pay for that contract, the government should be held to its bargain.

II. Congress Cannot Limit Retroactively The Government's Contract Liability After That Liability Is Fixed.

The Tenth Circuit below offered an alternative rationale to defeat the contractors' claims. In the years at issue in these cases, Congress had included in committee reports, but *not* in the appropriations acts themselves, recommended limits on the money available to fund portions of the ISDA contracts. In October 1998 (for fiscal year 1999), after the contracts at issue here had been fully performed and after the right to payment had vested, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998). Section 314 of that Act provided, in relevant part, as follows:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes . . . .

Pub. L. No. 105-277, § 314, 112 Stat. at 2681-468. The Tenth Circuit held that, in light of Section 314, the recommendations in the earlier committee reports were retroactively binding and capped the funds available to fund ISDA contracts.[7]

The Tenth Circuit's decision is meritless. Even assuming that a statutory cap on available appropriations would be binding, Congress may not impose such a cap retroactively.

This Court has made clear repeatedly that Congress lacks power to repudiate retroactively the government's contractual obligations. In *Lynch v. United States*, 292 U.S. 571 (1934), for example, Congress passed legislation seeking to invalidate "war risk" insurance policies. When that legislation was challenged, this Court ruled in favor of the insureds. The Court noted that the "war risk policies, being contracts, are property and create vested rights" that are protected by the Fifth Amendment. 292 U.S. at 577. The Court noted that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.* at 579. Accordingly, "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts . . . would be . . . an act of repudiation," with "all the wrong and reproach that term implies." *Id.* at 580.

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[7] It is unclear whether the government intends to raise this argument in precisely this form. The Federal Circuit noted expressly that "the Secretary does not directly argue that section 314 retroactively limits the amount of funds available in the earlier years," Pet. App. in No. 03-853 at 26a, and the government's filings thus far in this Court are somewhat ambiguous on this point. *Amici* briefly address the argument in the event the United States seeks to resurrect the argument here.

Perry v. United States, 294 U.S. 330 (1935), is to the same effect. There, Congress sought by joint resolution to eliminate its obligations to redeem certain bonds in gold. This Court invalidated the congressional action, rejecting the government's argument that "Congress can disregard the obligations of the government at its discretion" and holding that "[w]e do not so read the Constitution." 294 U.S. at 350; *see also id.* (rejecting notion that "when the government borrows money, the credit of the United States is an illusory pledge").

The continuing vitality of *Lynch* and *Perry* was reaffirmed unambiguously in *Winstar*. In *Winstar*, the Court rejected the argument that Congress has authority to avoid the government's contractual liability at will. The Court held that "allowing the Government to avoid contractual liability merely by passing any 'regulatory statute' would flout the general principle that, '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" 518 U.S. at 895 (quoting *Lynch*, 292 U.S. at 579); *see also id.* at 912-13 (Breyer, J., concurring) (relying on *Lynch* and *Perry*); *id.* at 924 (Scalia, J., concurring) (citing *Lynch* and *Perry* and noting that "the Government may not simply repudiate its contractual obligations"). Indeed, the government lacks the power to "abrogate one of its contracts by a statute abrogating the legal enforceability of that contract, government contracts of a class including that one, or simply all government contracts." 518 U.S. at 879 n.22.

Unsurprisingly, the Court of Claims and Federal Circuit have held for more than a century that when a right to payment has vested, Congress is powerless to eliminate that right retroactively through limitations on appropriations or other similar legislation. *See, e.g.*, *Corliss Steam-Engine Co. v. United States*, 10 Ct. Cl. 494, 501-20 (1874) (invalidating effort by Congress to avoid terms of settlement agreement), *aff'd*, 91 U.S. 321 (1875); *Seatrain Lines, Inc. v. United States*, 99 Ct. Cl. 272, 314-15 (1943) (appropriations rider providing that "no part of the money appropriated should be paid" on the contract at issue could not divest the contractor of his right to payment because the "valid contract is protected by the Fifth Amendment and cannot be taken away without making just compensation"); *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 553 (Ct. Cl. 1980) (legislation seeking to preclude payment enacted after payment fell due was "a violation of the Government's contract obligation").

Nothing in the "subject to" language changes that analysis. *See, e.g.*, *Blackhawk*, 622 F.2d at 542 (holding that legislation enacted after payment came due was insufficient to defeat right to payment despite clause providing that "[t]he Government's obligation hereunder is contingent upon the availability of appropriated funds from which payment in full can be made"). The "subject to" language makes clear that the contractor has no vested right to payment – indeed no operative contract at all – unless Congress has made sufficient appropriated funds legally available. However, once Congress has made such an appropriation and the contractor has a vested right to payment under the contract, the "subject to" language does not give Congress the continuing right to pass legislation that extinguishes the right to payment.

CONCLUSION

The decision of the Federal Circuit that neither exhaustion of a general appropriation account nor retroactive legislation can relieve the government of its contractual obligations should be affirmed.

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