No. 11-83

IN THE
Supreme Court of the United States

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Petitioner,
v.
KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition For a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

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

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INTEREST OF *AMICI CURIAE*

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

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

NDIA is a non-partisan, non-profit organization with a membership of 1,766 companies and over 90,000 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.

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

The issues presented in this case could have profound implications for Chamber and NDIA members. The decision of the U.S. Court of Appeals for the Federal Circuit, *Arctic Slope Native Assoc., Ltd v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), effectively holds that the government may disregard its contractual promise to pay for goods delivered and services rendered whenever the government inserts a clause stating the contract is "subject to the availability of appropriations" and the government exhausts the funding appropriation. The "subject to availability of appropriations" clause, according to the decision below, trumps the 120-year old Ferris doctrine, which holds that the government is not excused from payment of a contract simply because it has chosen to spend the appropriated funds on another project. *Ferris v. United States*, 27 Ct. Cl. 542 (1892).

The Federal Circuit's decision upsets the settled meaning of the phrase "subject to the availability of appropriations," which had always been understood to mean merely that a contract is operative only if and when the appropriation subsequently is made, and not that funds actually appropriated could be spent elsewhere. *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 634 (2005) ("This kind of language normally makes clear that a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates

funds for that year");[2] *To the Secretary of the Interior*, 39 Comp. Gen. 340, 342 (1959). It also conflicts with the interpretation that the U.S. Court of Appeals for the Tenth Circuit adopted in a case with nearly identical facts. *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054 (10th Cir. 2011). The misinterpretation of this phrase has potentially far-reaching consequences for government contractors and the government itself. This phrase is a staple of government contracts, appearing in many standard clauses in the Federal Acquisition Regulation ("FAR") and its supplements. *Amici* have a critical interest in ensuring that this Court reaffirms the government's reliability as a contracting partner and protects the settled expectations of the government contracting industry regarding the meaning of this common phrase.

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[2] *Amici* also challenged the government's flawed interpretation of "subject to the availability of appropriations" language in *Cherokee*. *See* Brief of *Amici Curiae* the Chamber of Commerce of the United States of America, *et al.*, In Support of the Cherokee Nation and Shoshone-Paiute Tribes, *Cherokee Nation of Okla. v. Thompson*, 543 U.S. 631 (2005) (No. 02-1472), 2004 WL 1386408.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below effectively holds for the first time that the phrase "subject to the availability of appropriations" in a government contract means that the government is not obligated to pay the contractor the stated contract price when the contract has been fully performed but where the government has chosen to spend the available funds on other projects. Pet. App. at 14a. *Amici* write to emphasize that the question presented is of exceptional importance to the entire government contracting community.

In this case, Petitioner had contracted with the United States to provide health services to Indian tribes. Pet. App. at 2a. Although there was no dispute that Petitioner had provided the services pursuant to its contract, the United States declined to pay Petitioner on the ground that it had already spent the funds appropriated for the contract on other tribal health providers. *Id.* at 6a-7a.

In its opinion excusing the United States from its contractual obligation, the Federal Circuit recounted that under the 120-year-old *Ferris* doctrine, reaffirmed by this Court in 2005 in *Cherokee*, 543 U.S. at 641, the government is not free to refuse to pay performing contractors on the ground that it had spent the money elsewhere. Pet. App. at 11a. The court also dutifully acknowledged that this Court had spoken in *Cherokee* to the "subject to the availability of appropriations" language and rejected it as an "excuse" generally for the failure to pay. Pet.

App. at 12a. The Federal Circuit then purported to distinguish this case as somehow different because of the existence of what it terms a "statutory cap," language that the appropriation was "not to exceed" a certain sum. *Id.* at 12a-13a. As Petitioner correctly explains, however, the "not to exceed" language is a red herring because *every* appropriation sets a total amount that an agency may not lawfully exceed. Pet. at 12. The "not to exceed" language simply does not undo the foundational rule that the government may not avoid payment by spending appropriated funds elsewhere. *Id.* at 12-15. It is singularly the government's responsibility to determine – and singularly beyond the power of the contractor to know – whether funds remain available for a contract. *Ferris*, 27 Ct. Cl. at 546.

Stripped of the fig leaf of a "statutory cap," which does nothing to alter the reasonable expectations of the contracting party or the government's obligation to pay, Pet. at 13, the Federal Circuit's opinion is revealed for what it is, an exercise in rejecting this Court's decision in *Cherokee* and upending the settled meaning of the contract clause "subject to the availability of appropriations." Until now, that language had always been understood to make the contract operative only if and when the appropriation is subsequently made. *Cherokee*, 543 U.S. at 643; *Interior*, 39 Comp. Gen. at 342. The Federal Circuit's decision effectively rejected this understanding by holding for the first time that the subject-to-availability language in a contract can excuse the government from payment when it spends

funds that have been apportioned and allocated to a contract on other projects.

It is this upheaval of settled law that lies at the heart of the Federal Circuit's decision and is the focus of *amici's* attention. The ruling below does not merely upend the settled understanding of a common contractual provision; it makes contracts containing that provision illusory by giving the government a broad right to refuse payment for services rendered. This regime is grossly unfair to contractors, but it also does not serve well the government, which will find it difficult to find contracting partners willing to take on such risk.

That the Federal Circuit issued the decision below is of particular concern to *amici* because that is the jurisdiction in which most government contract disputes are decided. But the destabilizing effect of the decision is compounded by the fact that the Tenth Circuit has reached precisely the opposite conclusion, on precisely the same facts, in a recent opinion. *See Ramah*, 644 F.3d at 1072-73. A contractor's right to payment for services rendered should not depend on the happenstance of where that dispute is litigated. Only this Court can resolve that conflict, and *amici* urge it to do so.

REASONS FOR GRANTING THE PETITION

I. THE RULING BELOW UPENDS THE SETTLED UNDERSTANDING OF THE GOVERNMENT CONTRACTING CLAUSE "SUBJECT TO THE AVAILABILITY OF APPROPRIATIONS."

As Petitioner explains, it has been the consistent and universal understanding in the government contracting community for decades under the *Ferris* doctrine that the government may *not* be excused from payment on the ground that it has spent appropriated funds elsewhere. *See* Pet. at 13 (citing *Ferris* and other authority). The *Ferris* doctrine reflects the reality that in most situations a government contractor will have no way of knowing that the government has spent appropriated funds on other contractors. *Id.* As such, placing on the contractor the risk of the government's overdrawing the appropriation would be grossly unfair, particularly when the government's contracting officials have ready access to, and control over, the details of the appropriation's administration.

The Federal Circuit held that the *Ferris* doctrine is inapplicable where a government contract contains a provision stating that it is "subject to the availability of appropriations," apparently believing that language would adequately warn contractors that the government will choose to spend the appropriation on other projects. Pet. App. at 17a. But that phrase – which is found in countless

government contracts – has never been intended to have that meaning.[3]

Instead, it has been the consistent understanding of the government contracting community and the government itself for decades that phrases of that type merely allow the government to fix the terms of the contract in advance of appropriations – and in advance of actually awarding a contract – without violating the Anti-Deficiency Act's prohibition on obligating funds in advance of Congress appropriating those funds, 31 U.S.C. § 1341(a)(1)(B); *see also* 48 C.F.R. § 32.700 et seq. That is, once Congress makes the appropriation and it becomes legally available, the condition imposed by the "subject to the availability of appropriations" clause is satisfied and the contract becomes binding. "Availability" in turn, carries the reasonable presumption that the government has fulfilled the requirements of 31 U.S.C. §§ 1511-1514 in apportioning and allocating the appropriated funds in such a manner as to avoid precisely what happened in this case, namely the exhaustion of the appropriated funds before all the contract payment provisions could be satisfied.

The Comptroller General, recognized as an expert authority in the area of appropriations and government contract law, has explained on

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

numerous occasions that the effect of such language is to make the contract "operative only if and when the appropriation subsequently is made." *Interior*, 39 Comp. Gen. at 342; *see also Comptroller General Warren to the Postmaster General*, 21 Comp. Gen. 864, 864-65 (1942). And indeed, this Court noted the common understanding of the contractual language in *Cherokee*.[4] 543 U.S. at 643 ("This kind of language normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year."); *see also Ramah*, 644 F.3d at 1067-68 (same). This is entirely consistent with the limited use of the phrase in the FAR. *See* 48 C.F.R. §§ 32.702, 32.703-2, 32.705-1; *see also* 48 C.F.R. § 52.232-18 (explaining that such provisions can be used to award a contract prior to the beginning of the fiscal year in which funds for the contract become legally available).

Now, however, under the rule of the decision below, "subject to availability" clauses play a far broader role. They would allow the government to refuse to pay a performing contractor on the ground that the appropriated funds were spent on another contract paid out of the same appropriated fund. In other words, the clause has been transformed from one that is concerned with ensuring that no contract becomes effective prior to an appropriation, to one

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

that excuses the government from payment after the contract has gone into effect and the funds *have* been appropriated. *See Ramah*, 644 F.3d at 1073 (expressly disagreeing with decision below and holding that the government is freed from liability "only when congressional decisions standing alone – not discretionary agency actions – make funds unavailable for a specific contract").

II. BECAUSE "SUBJECT TO THE AVAILABILITY OF APPROPRIATIONS" CLAUSES ARE UBIQUITOUS IN GOVERNMENT CONTRACTS, THE RULING BELOW WILL HAVE AN ENORMOUS AND DESTABILIZING IMPACT ON GOVERNMENT CONTRACTING .

The ruling below will have a dramatically broad sweep. The phrase "subject to the availability of appropriations" is commonplace in government contracts, appearing in contracts large and small, and in almost every field in which the government enters into contractual relations. For example, federal regulations require an "availability" clause in every cost reimbursement contract awarded by the federal government, except construction and architect-engineer contracts and those for which a substitute clause is prescribed by agency regulation. 48 C.F.R. § 32.700 et seq.; 48 C.F.R. § 52.232-18. As such, major research and development contracts for future defense systems, among other programs, and particularly risky production contracts generally will include this clause.

In another common use, "availability" clauses are used to permit the government to negotiate and fix the terms of a contract, in advance of actually awarding a contract and in the fiscal year preceding that in which funds for the contract will become legally available, as noted above. *See supra* at 8-9. The FAR expressly permits contracting officers this flexibility so that basic service, supply, rental, and utility contracts funded with annual appropriations may begin without interruption on the first day of the fiscal year, provided they use a standard FAR clause that subjects the government's liability to the availability of appropriations. 48 C.F.R. § 32.703-2(a) ("The contracting officer may initiate a contract action properly chargeable to funds of the new fiscal year before these funds are available, provided that the contract includes the clause at 52.232-18, Availability of Funds."). Section 52.232-18 of Title 48 of the Code of Federal Regulations is thus widely used by the government's contracting officers to avoid the need to fix the terms of dozens of contracts on October 1, the first day of the fiscal year.

The effect of the ruling below is also heightened by the fact that most contract disputes are litigated in tribunals governed by the precedents of the Federal Circuit. In particular, the decision below will bind both the Court of Federal Claims and the two boards of contract appeals, which are the exclusive avenues of appeal of a contracting officer's

final decision under the Contract Disputes Act of 1978 (with minor exceptions), 41 U.S.C. § 7104.[5]

As a result, the decision below has the potential to be highly destabilizing to government contracts. A contractor has no way of knowing whether the government has chosen to spend a contract's obligated amount on other projects. Responsible firms negotiating with the government will have no choice but to reject the inclusion of such a clause or build a factor into all contract pricing to account for the possibility of the government walking away from its payment obligation with respect to any particular contract. In either case, the government's interests are disserved. In the former, it will threaten its ability to contract in advance of appropriations. In the latter, it will undermine the pricing discounts it enjoys as a result of its reputation as a reliable bill-payer. Review is warranted by this Court to avoid this outcome

Finally, review is also warranted because there is a square split on this issue. As just explained, the Federal Circuit is the most important jurisdiction for government contract disputes, but it is not the only jurisdiction that hears them. As noted above, the Tenth Circuit has rejected the reasoning of the

[5] This case presents one of those minor exceptions. The Indian Self-Determination Act, 25 U.S.C. § 450m-1, the statute that authorizes the contracts at issue here, grants concurrent jurisdiction to the district courts, the Civilian Board of Contract Appeals, and the Court of Federal Claims. Most federal contractors may only resort to the Court of Federal Claims or the boards of contract appeals.

decision below, and has specifically held that "subject to availability" clauses do not excuse non-payment in this context. It does not make any sense to have the government's payment obligations depend on the jurisdiction in which the claim is decided. Only this Court can resolve that split of authority.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant certiorari to review the decision below.

Respectfully submitted,

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