

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KEN L. SALAZAR, SECRETARY OF THE :

4 INTERIOR, ET AL., :

5 Petitioners : No. 11-551

6 v. :

7 RAMAH NAVAJO CHAPTER, ET AL. :

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 Washington, D.C.

 Wednesday, April 18, 2012

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 The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:11 a.m.

APPEARANCES:

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General, Department of Justice, Washington, D.C. ;
on behalf of the Petitioners.

CARTER G. PHILLIPS, ESQ., Washington, D.C. ; on behalf of
the Respondents.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	MARK R. FREEMAN, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	CARTER G. PHILLIPS, ESQ.	
7	On behalf of the Respondents	29
8	REBUTTAL ARGUMENT OF	
9	MARK R. FREEMAN, ESQ.	
10	On behalf of the Petitioners	58
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(10:11 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-551, Salazar, Secretary of the Interior v. Ramah Navajo Chapter.

Mr. Freeman.

ORAL ARGUMENT OF MARK R. FREEMAN

ON BEHALF OF THE PETITIONERS

MR. FREEMAN: Mr. Chief Justice, and may it please the Court:

The funding dispute in the -- in this case is the result of two distinctive features of the ISDA's statutory scheme. On the one hand, Congress has required the Secretary of the Interior to accept every self-determination contract proposed by an Indian tribe, provided that the contract meets the requirements of the Act, without regard to the total number of contracts into which the Secretary must enter.

On the other hand, in every fiscal year since 1994, Congress has enacted an explicit statutory cap on the amount of money that the Secretary may use to pay contract support costs under the ISDA and under those contracts.

Now, we think under the circumstances, Congress intended the Secretary to resolve these -- the

1 relationship between these provisions in exactly the way
2 that the Secretary has.

3 JUSTICE SOTOMAYOR: Excuse me, but could the
4 Secretary have done anything else?

5 MR. FREEMAN: I'm sorry. I couldn't hear
6 Your Honor.

7 JUSTICE SOTOMAYOR: Could the Secretary have
8 done anything else? There's an allegation that the
9 Secretary in fact pays some contractors more than their
10 pro rata share, that it pays some nothing --

11 MR. FREEMAN: Right.

12 JUSTICE SOTOMAYOR: -- so that it's in
13 effect acting -- I don't want to use the word
14 "arbitrarily" -- but acting in whatever its best
15 interest is. So what protects the contracting party
16 from that -- from that conduct, assuming it were to be
17 correct?

18 MR. FREEMAN: Yes, Your Honor. Well, the
19 Secretary has promulgated a formal nationwide policy.

20 JUSTICE SOTOMAYOR: It says it has a policy.

21 MR. FREEMAN: Yes, and --

22 JUSTICE SOTOMAYOR: But the allegation is,
23 is that it's not following it, that it's choosing to pay
24 people some more than others.

25 MR. FREEMAN: Right. And let me address

1 that. The allegation is, I think, at page 9 to 10 of
2 Respondents' brief. Those allegations are, as a factual
3 matter, false. For example, they've given a couple of
4 examples where 0 percent contract support costs were
5 paid. One of those examples is a contract where it had
6 been entered into in that particular year. New
7 contracts are paid under a different appropriation.
8 Another example is they give a case of a tribe that was
9 paid 352 percent of its contract support costs.

10 And let me explain, because I think it's
11 important to understand how --

12 JUSTICE GINSBURG: Before you do that --

13 MR. FREEMAN: Yes.

14 JUSTICE GINSBURG: It was my understanding
15 that that system that has been described as arbitrary
16 was not the one that was applicable to the years in
17 question.

18 MR. FREEMAN: That's right. At -- at the
19 time of the district court's ruling in this case, from
20 1994 to about 2006, the Secretary followed a uniform pro
21 rata distribution methodology according to the needs of
22 each of the individual tribes. Now, that's what we
23 thought the tribes wanted. We thought that was the
24 fairest way to do it.

25 JUSTICE KENNEDY: All within the -- all

1 within the dollar amount that was specified by the
2 Congress in the "not to exceed" language.

3 MR. FREEMAN: That's exactly right, Your
4 Honor. Yes. So each tribe has an amount of need. This
5 is the amount that is estimated. It's a negotiated
6 figure between the Secretary and each tribe. And it is
7 undisputed that the amounts that Congress has been --
8 has appropriated have never been enough to pay 100
9 percent of each of those figures for each member of the
10 Respondent class.

11 JUSTICE SCALIA: Didn't we have similar
12 language in Cherokee Nation? Didn't we say that that
13 language in Cherokee Nation, which was in the general
14 appropriations statute, although not on each contract,
15 didn't mean that the Secretary could refuse to pay?

16 MR. FREEMAN: No, Your Honor. We did not
17 have similar language in Cherokee, if you mean the
18 Appropriations Act. It was under the same --

19 JUSTICE SCALIA: No, I don't mean the
20 Appropriations Act. I mean -- I mean the general
21 statute that governed this program.

22 MR. FREEMAN: No, that's right. And maybe
23 it would be helpful if I could --

24 JUSTICE SCALIA: So why does it mean one
25 thing there and mean something else when -- in the

1 Appropriations Act?

2 MR. FREEMAN: Well -- I may not be
3 understanding Your Honor's question, but I -- I think it
4 might be helpful if I explain what was at issue in
5 Cherokee. In Cherokee, the government was not in this
6 Court making Appropriations Clause arguments. We were
7 here making a very different argument. It was
8 undisputed in Cherokee that Congress had appropriated
9 enough money for the unobligated available funds,
10 lawfully available funds, for the Secretary to pay all
11 of the contracts that were at issue.

12 Our argument -- and to be sure, we thought
13 we were right -- our argument was that Congress had in
14 other provisions of the Act allowed us to set aside a
15 certain amount of money that, albeit lawfully available
16 to pay the contracts, we thought we could use to fund
17 the agency's inherent Federal operations. And the Court
18 said: No, no, no. These are contracts. The money was
19 lawfully available for you to pay, and there was no
20 statutory restriction against you paying it, so you had
21 to pay it.

22 And this case involves the circumstance
23 that --

24 JUSTICE SOTOMAYOR: Well, how -- what was
25 our reference in acceptance of the Ferris doctrine? And

1 the Ferris doctrine was almost identical to this
2 situation, where Congress allotted a certain amount to
3 the building of a particular dam, and the same -- we
4 applied the Ferris principle and said even though they
5 gave it to one type of contract, the dam, they were
6 paying 1 percent less than others.

7 MR. FREEMAN: No -- no, Your Honor.

8 JUSTICE SOTOMAYOR: Where they had an
9 allotment adequate enough to cover that individual.

10 MR. FREEMAN: No. I think that's not quite
11 an accurate characterization of Ferris. And it's
12 important to understand what Ferris --

13 JUSTICE SOTOMAYOR: I know what the Federal
14 Circuit said. I don't think the Federal Circuit's
15 right. If you read Ferris, that there was an
16 appropriation for the dam.

17 MR. FREEMAN: Ferris was an appropriation
18 for -- I think it was 40-some thousand dollars for
19 improvements to the Delaware River. And the government,
20 the Army Corps of Engineers, let out a contract for
21 \$37,000 to dredge the river. Then after the contract
22 had been let out -- and this is critical. If you stop
23 the movie at the time the contract was issued, there was
24 sufficient funds to pay that contract. They were
25 lawfully available. We obligated them to the -- to the

1 contractor.

2 And then what happened in Ferris was, after
3 that lawful binding agreement was entered, agency
4 officials decided in their discretion that they'd prefer
5 not to spend the money on that, and they instead built a
6 wharf or something.

7 And what the Court said in Ferris -- and
8 this is -- we're not -- we have no quarrel with this
9 principle -- is that when the funds are lawfully
10 available and you obligate them to a contractor without
11 some contingency, then you can't just decide to spend it
12 on something else. That's a breach. And it's not a
13 defense to the breach that at the end of the -- that at
14 the end, once you've breached the contract, there isn't
15 enough money left in the appropriation to go back and
16 pay them what you should have.

17 That's different from this case, that there
18 is not enough lawfully available money to pay every
19 Respondent.

20 JUSTICE SCALIA: No, but -- but there wasn't
21 in Ferris either. I mean, that was the problem. If the
22 appropriations had been enough to cover that plus the
23 later expenditures, there would have been no problem.

24 MR. FREEMAN: Your Honor, I think Ferris is
25 correctly understood -- particularly given this Court's

1 subsequent decisions in Sutton, in Bradley, Leiter, and
2 other cases, -- Ferris is correctly understood as
3 saying -- and this is the proposition, incidentally, for
4 which the Court's cited Ferris in Cherokee. Ferris is
5 understood as saying if you've got a binding obligation
6 in which you promised to pay money that is lawfully
7 available, Congress gave it to you, then if you, agency
8 officials, do something in your executive discretion --

9 JUSTICE SCALIA: Available subject to
10 appropriations. I mean, it was subject to
11 appropriations.

12 MR. FREEMAN: Well, in Ferris, there were --
13 in fact, the contract was not made subject to
14 appropriations. And one of the things the Federal
15 Circuit pointed out was that the "subject to the
16 availability of appropriations" language that is now
17 ubiquitous in government contracts was developed in part
18 to make sure that the Ferris situation didn't later
19 arise.

20 But I want to underscore, if we know one
21 thing in this case, we know that Congress intended for
22 the Secretary not to pay any more than the amounts in
23 the statutory caps.

24 JUSTICE KAGAN: Mr. Freeman, could I try a
25 hypothetical on you? And it's -- it really is going to

1 this question of what Ferris means. So suppose that
2 there's a government program, and it's to purchase
3 airplanes. And it's -- the authorization language says
4 this is subject to appropriations, in the same way that
5 this language does. And the government, under this
6 program, enters into 10 contracts of a million dollars
7 each to buy 10 airplanes. But then it turns out that
8 Congress appropriates only \$9 million, not \$10 million.

9 So my question is: Now there are 10
10 contractors and -- but there's a shortfall of a million
11 dollars --

12 MR. FREEMAN: Right.

13 JUSTICE KAGAN: -- do those contractors have
14 contractual rights under Ferris?

15 MR. FREEMAN: I -- Your Honor, it's going to
16 depend on a couple of things. And let me -- let me
17 explain. I think, because by hypothesis in your
18 hypothetical we're entering into the contracts in
19 advance of appropriations, there is no right to be paid
20 until the appropriations are made.

21 JUSTICE KAGAN: Yes. So the appropriation
22 has been made. It's a \$9 million appropriation.

23 MR. FREEMAN: Right. And in that
24 circumstance, the agency cannot pay more than
25 \$9 million, and there is no binding obligation,

1 contractual obligation, on the government to pay more.

2 Let me add something, though, in response --

3 JUSTICE KAGAN: So -- so either one of these
4 airplane manufacturers is going to not have what he
5 contracted for, or all of them are not going to have
6 what they contracted for, because everybody is going
7 to -- their contract is going to be sliced.

8 MR. FREEMAN: And, Your Honor, the reason
9 why this is not a problem in real life is that there are
10 other provisions in your ordinary procurement contracts,
11 under the ordinary kind of contracts that this case is
12 not, that take care of that.

13 And the principal one is --

14 JUSTICE KAGAN: My understanding,
15 Mr. Freeman, is that that is what Ferris said, was that
16 Ferris said in that situation where it turns out that
17 there's a shortfall but where there are contractual
18 commitments, that -- that the government is bound to
19 live up to those contractual commitments. And if
20 there's a shortfall, then it comes out of the Judgment
21 Fund.

22 MR. FREEMAN: No. Your Honor, it -- there
23 are a couple of things there. But let me first explain
24 why as a practical matter that doesn't happen in
25 circumstances that are -- are not like this scheme where

1 we're required to enter into every contract. In your
2 ordinary government procurement scheme, there are
3 termination for convenience provisions.

4 And, in fact, what happens in the
5 circumstances in which Your Honor posits is the
6 government terminates for convenience enough of the
7 contracts to make sure that we have the money to pay.
8 And if we didn't do that, it would be a violation of the
9 Antideficiency Act. And this Court has said many
10 times --

11 JUSTICE SOTOMAYOR: So do the tribes have
12 the right to stop providing the services --

13 MR. FREEMAN: Yes.

14 JUSTICE SOTOMAYOR: -- that they've
15 contracted to?

16 MR. FREEMAN: Yes.

17 JUSTICE SOTOMAYOR: How do they know that
18 until they know what they're getting?

19 MR. FREEMAN: Well --

20 JUSTICE SOTOMAYOR: Meaning they don't know
21 what they're getting.

22 MR. FREEMAN: Well, they do know.

23 JUSTICE SOTOMAYOR: They signed a contract
24 that says you're going to pay them for their services to
25 their members and for their administrative costs. They

1 incur that cost, and then at the end of the year, the
2 government now says to them you've honored your part,
3 but we're not going to honor ours.

4 MR. FREEMAN: No -- no, Your Honor.
5 That's -- that's not correct, and let me explain why.

6 First, every contract that the -- every
7 member of the Respondent class signed in this case says
8 that the contractor's obligation to perform the services
9 that are at issue is subject to the availability of
10 appropriated funds. That's Section (1)(c)(iii) of the
11 model agreement that is read into every ISDA contract.

12 They further have the availability under
13 Section (1)(b)(v) of that model agreement to stop at any
14 point if they're worried that there's not going to be
15 enough money, and seek assurances from the Secretary
16 that there will be.

17 Now, as to whether they know and when they
18 know how much money they're going to get, that was the
19 point of the 2006 distribution policy that the Secretary
20 adopted. Under the pro rata system that we used for the
21 first many years, the tribes said, look, we don't know
22 how pro rata is going to work out. So, in consultation
23 with the tribes, and, indeed, with the aid of several of
24 the counsel for the Respondent class, we drafted a
25 policy that --

1 JUSTICE SOTOMAYOR: What does the system do
2 to the 50-odd contracts that Arctic Slope, in its amici
3 brief, points to that are similar to these? Does this
4 now mean that moving forward, that every government
5 contractor who has a "subject to appropriations"
6 language takes the risk that at some point in the middle
7 of the contract, the government's going to dishonor its
8 obligation and pay it less than it said it would?

9 MR. FREEMAN: No. No, Your Honor. And this
10 is my --

11 JUSTICE SOTOMAYOR: So how do -- how do we
12 differentiate those 50 other contracts?

13 MR. FREEMAN: Well, I think they were citing
14 a number of different statutes in which the statutes
15 provide that funding is subject to the availability of
16 appropriations.

17 Now, it's important to underscore, that's
18 why I started with this point. I don't believe in any
19 of those statutory schemes is the government obligated
20 to enter into every contract that comes in the door.
21 And --

22 JUSTICE KAGAN: Well, but that's partly why
23 I asked you my hypothetical, Mr. Freeman, because I sort
24 of wanted to see whether you would distinguish the
25 hypothetical on that basis --

1 MR. FREEMAN: Right.

2 JUSTICE KAGAN: -- but you didn't. You said
3 no, it really doesn't matter. Even if the government is
4 not obligated to enter into contracts, if the government
5 has entered into too many, too bad; we can't make those
6 additional appropriations.

7 MR. FREEMAN: And, Your Honor, it is -- the
8 unique features of this statutory scheme are absolutely
9 important, but I want to -- I took Your Honor's question
10 to be under the general appropriations principles that
11 we are describing, what would the result be? And I
12 think I'm right, but I should also add, as I said
13 before, there are very strict fiscal controls in 31
14 U.S.C. 1501, et sequitur, that make clear and prevent
15 the circumstance that Your Honor describes --

16 JUSTICE BREYER: I'm sorry, I'm not clear on
17 what this hypothetical is. I thought her
18 hypothetical -- Justice Kagan's -- was a situation where
19 the statute says, Mr. Secretary, you can spend no money
20 beyond what is appropriated.

21 MR. FREEMAN: Right.

22 JUSTICE BREYER: But the contract doesn't
23 mention it. That's Ferris.

24 I thought that the -- the real world is, in
25 contracting, you typically have both a statute that says

1 don't pay more than is appropriated --

2 MR. FREEMAN: Right.

3 JUSTICE BREYER: -- and in the contract, it
4 says, "subject to appropriation," putting the
5 contracting party on notice.

6 MR. FREEMAN: That's right. And -- and --

7 JUSTICE BREYER: So which were you
8 answering?

9 MR. FREEMAN: I -- with respect to
10 Justice Kagan, I believe we had a colloquy in which I
11 said that because in her hypothetical we were entering
12 into the contract in advance of appropriations, they
13 would have to be made express -- the contracts
14 themselves would have to be subject to the availability
15 of appropriations in the contracts.

16 JUSTICE BREYER: The words in the contract
17 are "subject to appropriations."

18 MR. FREEMAN: Yes. And without that, it
19 would be a violation of the Antideficiency Act --

20 JUSTICE BREYER: Yes.

21 MR. FREEMAN: -- yes.

22 JUSTICE BREYER: Okay. So in that world --
23 now we get to the question -- in that world, what
24 happens when 15 people each enter into such a contract
25 for \$100,000 each, and the appropriation turns out to be

1 too small to pay all of them, but big enough to pay
2 some?

3 MR. FREEMAN: And, Your Honor, what I was
4 trying to answer is that, in your ordinary contractual
5 scheme, the government solves that problem in a very
6 straightforward way. We terminate for convenience the
7 contracts -- enough of those contracts to ensure that we
8 have no obligations beyond the available appropriations.

9 Now, we can't do that here, which is why
10 this is ultimately a question of congressional intent.

11 JUSTICE SOTOMAYOR: So why don't we let
12 Congress fix it? Because there are so many ways that
13 Congress could fix this problem directly. By doing a
14 line item allocation, it could take away the obligation
15 to enter into these contracts and fully fund. It could
16 be much more direct --

17 MR. FREEMAN: Even your --

18 JUSTICE SOTOMAYOR: -- than it's being,
19 given the interpretation that you're advancing.

20 MR. FREEMAN: Your Honor, I think it's
21 important to understand what -- and maybe it would help
22 if I took a minute to explain this -- what Congress was
23 trying to do in this statutory scheme.

24 JUSTICE SOTOMAYOR: It was trying -- it was
25 trying to tell the tribes, we're honoring our obligation

1 by paying you the costs, but we're really not going to
2 do it because we're going to let the government give you
3 less?

4 MR. FREEMAN: No. Look, Congress could --

5 JUSTICE SOTOMAYOR: I have to assume
6 Congress intends what it says. It intends to obligate
7 you to enter into contracts that -- that give -- make
8 you commit to paying their costs, correct?

9 MR. FREEMAN: Not with -- yes. But
10 450j-1(b) says, "notwithstanding any provision of this
11 Act, all funding under this Act is subject to the
12 availability of appropriations."

13 And let me explain why Congress would
14 have wanted to enact this statute that has some unusual
15 features. Congress, of course, could have said, we want
16 to give every tribe the opportunity to enter -- to
17 provide services in its own name to its own people, but
18 we're going to do this on a regular contract basis,
19 meaning we'll just give us -- some to the Secretary.
20 The Secretary signs contracts as they come in until he
21 doesn't have any money left. And then any tribe after
22 that who asks for a -- for a contract, the Secretary
23 says no, we don't have the money to do it.

24 But Congress chose a -- a different
25 approach. Congress wanted, as a matter of

1 self-determination, to require the Secretary to give
2 every tribe who wants the ability to do this the
3 opportunity to do it. But if it didn't then say all
4 funding is subject to the availability of
5 appropriations, the result would be that the government
6 would be exposed to a liability that Congress could not
7 estimate, because the ability of these tribes to pay for
8 overhead costs and whatever varies tremendously from
9 tribe --

10 JUSTICE GINSBURG: To what extent do you --
11 do you rely on -- you haven't mentioned it up until now,
12 but Congress, in these appropriations, said "not in
13 excess of."

14 MR. FREEMAN: Yes.

15 JUSTICE GINSBURG: It wasn't just a general
16 "subject to appropriations." It was a specific amount,
17 the Secretary shall not pay in excess of a certain
18 dollar amount for these costs.

19 JUSTICE KENNEDY: I had exactly the same
20 question. The "not to exceed" language, which I think
21 is the word, "not to exceed," hasn't been mentioned by
22 you yet because -- maybe you haven't had time.

23 MR. FREEMAN: Right.

24 (Laughter.)

25 MR. FREEMAN: That would be it.

1 JUSTICE KENNEDY: But -- but I thought that
2 was what Judge Dyk said --

3 MR. FREEMAN: Yes.

4 JUSTICE KENNEDY: -- was the critical -- the
5 difference between this and even the Cherokee case.

6 MR. FREEMAN: Right.

7 JUSTICE KENNEDY: And so my question is --
8 is the same as Justice Ginsburg's. Isn't a principal
9 part of your argument that this contract said not to
10 exceed, and then the sums differ from year to year, but
11 let's say \$95 million?

12 MR. FREEMAN: That -- that's exactly right,
13 Your Honor.

14 I mean -- and what I -- what I tried to
15 answer to a question earlier, it is absolutely clear
16 what Congress was trying to do here. Congress said not
17 to exceed a specific sum from year to year --

18 JUSTICE KENNEDY: When the Congressional
19 Budget Office, or whatever agency it is that figures out
20 whether there's a deficit and, if so, of how much, do
21 they look at "not to exceed," and do they take that
22 amount seriously? Or --

23 MR. FREEMAN: Oh, oh, absolutely,
24 Your Honor. And --

25 JUSTICE KENNEDY: But the -- but the

1 position of the Respondents is that it makes no
2 difference.

3 MR. FREEMAN: No difference at all.

4 JUSTICE KENNEDY: Congress is saying nothing
5 at all.

6 MR. FREEMAN: Yes, yes.

7 JUSTICE GINSBURG: It really --

8 CHIEF JUSTICE ROBERTS: So the consequence
9 on the ground is that, if I'm a tribe and I want this
10 money, and I figure out that this is going to cost me
11 \$80,000 --

12 MR. FREEMAN: Yes.

13 CHIEF JUSTICE ROBERTS: -- I sign a contract
14 and say, this is going to cost me \$100,000, because I
15 know there isn't going to be \$100,000. There's only
16 going to be \$80,000, and that's what I need, right?

17 MR. FREEMAN: Well, in fact, it can't work
18 that way, Your Honor, because the amounts are limited by
19 statute to the reasonable and allowable costs that are
20 not duplicative of the principal program funds, the
21 funds to run the program --

22 CHIEF JUSTICE ROBERTS: Well, but it's --
23 well, if 80,000 is reasonable, the only way to get that
24 is to ask for 100?

25 MR. FREEMAN: Right. And if a tribe thinks

1 that we haven't put in to the -- we haven't offered them
2 enough money for their contract support costs, they are
3 allowed to decline the offer that we make. And they
4 can -- unusually, for government contractors, they can
5 file a separate lawsuit before entering into the
6 contract to litigate whether the terms are sufficient.

7 JUSTICE GINSBURG: Mr. Freeman, where did
8 these caps come from? Did the agency initiate them?
9 Or, there's a chart -- perhaps I don't understand it
10 correctly. It's on page 210 of the joint appendix. It
11 does -- it does seem to indicate that it was the BIA
12 that proposed the cutbacks.

13 MR. FREEMAN: The caps come from Congress,
14 Your Honor. Respondents have make -- have made an
15 argument at the end of their brief that the government
16 should be liable here notwithstanding the caps because
17 the BIA hasn't requested sufficient funding from
18 Congress -- or, rather, the President hasn't requested
19 sufficient funding from Congress.

20 That argument, we think, is baseless for a
21 number of reasons. And just as a factual matter, the
22 GAO has done some studies of this. There are reports in
23 the joint appendix explaining why BIA has not in every
24 year asked for what turned out to be enough money.

25 And that's because these -- this funding is

1 done on a prospective estimated basis. And because
2 we're required to take into -- we are required to accept
3 every contract that comes in the door, BIA may estimate
4 and make its best available estimate, and OMB and the
5 President may accept that if he chooses, but it still
6 turn may turn out not to be enough.

7 JUSTICE SCALIA: That's not really relevant
8 here anyway, is it?

9 MR. FREEMAN: No, it is not. It is not
10 relevant, Your Honor. No. That's right.

11 JUSTICE SCALIA: What I don't understand is
12 why the language "not to exceed" is any different from
13 Congress appropriating \$900,000. You mean the world
14 changes if -- if Congress, instead of just appropriating
15 \$900,000, authorizes the Secretary to expend not to
16 exceed \$900,000? Why --

17 MR. FREEMAN: I don't think in that
18 circumstance there would be any difference. Here, the
19 reason why it's different is that this is ultimately a
20 question of what Congress was trying to do. There's no
21 constitutional argument that Congress can't enact these
22 kind of caps, and we know from the "not to exceed"
23 language that Congress was being as emphatic as it
24 could.

25 JUSTICE SCALIA: Well, I -- I would think

1 \$900,000 is pretty emphatic, if that's all you
2 appropriate.

3 MR. FREEMAN: Right. And just -- it's just
4 this is the way, as an ordinary matter, that in
5 appropriations Congress expresses an internal cap. It
6 said --

7 JUSTICE KAGAN: But that runs you right into
8 Ferris. Then you're saying that there's no difference
9 between the standard Ferris-type appropriation, which is
10 just an amount of money, and this kind of appropriation,
11 which is up to or not to exceed that amount of money.

12 MR. FREEMAN: Your Honor, Ferris we think is
13 inapplicable just to this type of statutory scheme where
14 we're required to enter into the contracts, and there's
15 a limited sum available. That's Judge Dyk's reasoning
16 in the Federal Circuit. But let me put that aside for
17 the moment and address Ferris directly.

18 As I said before, Ferris is about the
19 circumstance in which there are enough available funds
20 in the first instance to pay the contractual
21 obligations.

22 Now, Ferris does not and cannot stand for
23 the proposition that an executive officer, looking at
24 the amount Congress made available in the first
25 instance, can bind the Treasury to pay more than

1 Congress has expressly stated he may bind it to. This
2 Court has said many, many times --

3 JUSTICE KENNEDY: I take it the Respondents'
4 position is that the contracting officer says, now, this
5 is going to go over the not to exceed amount, but not to
6 worry, just sue us under the Judgment -- just sue us
7 under the Judgment Act.

8 MR. FREEMAN: Right. And there is no reason
9 to think that Congress contemplated such a scheme, which
10 would amount to essentially giving full contract support
11 cost funding, but only for the tribes who have the
12 resources and sophistication to sue, minus litigation
13 costs. That makes no sense at all. When Congress says
14 "not to exceed," a certain amount of money may come out
15 of the Treasury --

16 CHIEF JUSTICE ROBERTS: It makes sense if
17 you're looking at the reality of the budgeting process
18 because in one case, that line item appears on the
19 Department of Interior budget; and in the other case, it
20 appears somewhere else in the Judgment Fund budget. And
21 they can say it's not our fault. The Judgment Fund --
22 the Court made us do it --

23 MR. FREEMAN: Well, I don't think so,
24 Your Honor. The Judgment Fund is not a new thing. The
25 Judgment Fund is available only to pay judgments validly

1 entered against the United States.

2 Now, we don't dispute that it's available to
3 pay breach of contract damages. But of course, a breach
4 of contract requires a violation of -- a violation, a
5 failure to perform a binding contractual promise.

6 Now, we think we've performed our promise
7 here because our -- our promise was to pay the sums that
8 Congress made lawfully available. And we think that, to
9 the extent Respondents think we promised to pay more
10 than Congress explicitly said couldn't be available, the
11 Secretary had no authority to enter into that promise.

12 Now --

13 JUSTICE SOTOMAYOR: But that's true of every
14 contract. That's where I'm getting stuck on what your
15 theory is. The Antideficiency Act says you can't spend
16 more than you're given.

17 MR. FREEMAN: Yes.

18 JUSTICE SOTOMAYOR: So every single
19 contractor, under your logic, should know that when they
20 sign a contract, the government can break it because if
21 it doesn't have enough funds, it can't pay.

22 MR. FREEMAN: And, Your Honor, that --

23 JUSTICE SOTOMAYOR: But -- so there's no
24 real logic to your argument, other than to say we
25 can't -- we're -- if the contract says "subject to

1 appropriations," let's do away with Ferris, let's do
2 away with Cherokee Nation, and --

3 MR. FREEMAN: No, no --

4 JUSTICE SOTOMAYOR: -- it just means that we
5 pay you what we can.

6 MR. FREEMAN: No. That -- that is
7 emphatically not true. As -- as an initial matter, as
8 I've tried to explain before, there are very strict
9 requirements in the government's contracting processes,
10 such as the Federal Acquisition Regulations, that limit
11 the ability of the government to make many promises it
12 can't keep, particularly with regard to funding.

13 JUSTICE SOTOMAYOR: But what you're saying
14 is you make two promises on the ISDA. We're going to
15 pay you your support costs, your administrative costs,
16 in full, and we're going to retain the right to break
17 that promise. That's really what you're saying the ISDA
18 says.

19 MR. FREEMAN: No. That's not right,
20 Your Honor. And I -- I'll answer this, and then I'd
21 like to reserve the balance of my time.

22 The ISDA says our promise is to pay you what
23 Congress lets us pay you. It's not breaking our promise
24 to limit it to appropriation. It is keeping our
25 promise.

1 JUSTICE SOTOMAYOR: So you ignore all the
2 language where it says we're going to pay you X amount,
3 all the law that says you have to be reimbursed -- the
4 tribes have to be reimbursed for all their costs.

5 All of that is going to be ignored.

6 MR. FREEMAN: Well, it's not that it's
7 ignored, it's that section 450j-1(b) says,
8 "notwithstanding any other provision of this Act," and
9 we think that's fairly clear.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Phillips.

12 ORAL ARGUMENT OF CARTER G. PHILLIPS

13 ON BEHALF OF THE RESPONDENTS

14 MR. PHILLIPS: Thank you, Mr. Chief Justice,
15 and may it please the Court:

16 I guess I'd like to start on the Ferris
17 doctrine, because it seems to me that is the fundamental
18 issue in this case.

19 And the principle of Ferris -- and it's
20 interesting to me that counsel for the government never
21 once makes any reference to the Comptroller General's
22 interpretation of the Ferris doctrine, which in the
23 Redbook says, as plain as day, that in circumstances
24 like this one, where the government has more contractors
25 than it had -- than one, and those contractors are

1 subject to an appropriation, and it cannot exceed that
2 appropriation -- I think all of that language, frankly,
3 is implied anyway -- the contract --

4 JUSTICE KENNEDY: So you think now -- you
5 say you don't want us to mention "not to exceed" in our
6 opinion --

7 MR. PHILLIPS: Oh, no. This --

8 JUSTICE KENNEDY: -- other than to say that
9 it's irrelevant?

10 MR. PHILLIPS: No. "Not to exceed" has a
11 very significant role to play, Justice Kennedy,
12 because --

13 JUSTICE KENNEDY: Does the Redbook talk
14 about "not to exceed" as being any different from
15 general appropriations?

16 MR. PHILLIPS: The place where "not to
17 exceed," I think, carries particular significance is
18 that in the ordinary situation, we would be entitled to
19 seek injunctive relief to take money from other sources
20 within -- within the budget and get an injunction. And
21 that's very unique to the -- to this context.
22 Ordinarily, government contractors cannot seek
23 injunctive relief. This "not to exceed" language --

24 JUSTICE KENNEDY: Does the Redbook --

25 MR. PHILLIPS: -- deprives us of that.

1 JUSTICE KENNEDY: Does the Redbook refer to
2 "not to exceed" -- the "not to exceed" language?

3 MR. PHILLIPS: I'm sorry, Justice Kennedy?

4 JUSTICE KENNEDY: Does the Redbook have --
5 refer to the "not to exceed" language?

6 MR. PHILLIPS: The Redbook doesn't -- well,
7 actually, the Redbook does say that all of these phrases
8 are essentially the same, which is that they --

9 JUSTICE BREYER: I saw -- I read the
10 Redbook. I might have missed the part that you're about
11 to cite to, because I'd like you to tell me where in the
12 Redbook it says that a contractor who has a contract
13 that says "subject to appropriations" and is then
14 dealing with the law of Congress which says the
15 appropriation will not exceed X million is then entitled
16 to be paid on a contract where he and like contracts do
17 exceed X million. Where does it say that in the
18 Redbook?

19 MR. PHILLIPS: The Redbook --

20 JUSTICE BREYER: I couldn't find it.

21 MR. PHILLIPS: Well, the Redbook talks about
22 subject to appropriations. It talks about up through --

23 JUSTICE BREYER: I did read it. I just
24 would like to know what page you want me to read again.

25 I read the Chamber of Commerce brief. The

1 Chamber of Commerce brief says everybody knows the
2 contractors are paid in this situation. So I looked up
3 the authorities that they cited. Okay?

4 I read the Redbook. I read my other case of
5 Cherokee. I read Ferris. I read Sutton. I can't say
6 I'm perfect at reading --

7 MR. PHILLIPS: Okay.

8 JUSTICE BREYER: -- but I couldn't find it.

9 MR. PHILLIPS: Justice Breyer --

10 JUSTICE BREYER: So I would appreciate your
11 referring me to those citations.

12 MR. PHILLIPS: 2 GAO Redbook 6-44 --

13 JUSTICE BREYER: Okay.

14 MR. PHILLIPS: -- says --

15 JUSTICE BREYER: I have it in front of me,
16 by coincidence.

17 (Laughter.)

18 JUSTICE BREYER: Here it is.

19 MR. PHILLIPS: This is -- this is in our
20 brief at page --

21 JUSTICE BREYER: No, no. You know I have
22 the Redbook 6-44.

23 CHIEF JUSTICE ROBERTS: What page, for those
24 of us who don't have it in front of us?

25 MR. PHILLIPS: In my brief, it's on page 31.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 JUSTICE BREYER: I'm not saying it isn't
3 there. I just read through these pretty quickly. I
4 just need a little refresher.

5 MR. PHILLIPS: Yes. If you look at -- I'm
6 sorry -- 2 GAO -- well, I think you can use either of
7 these: 2 GAO Redbook 6-28 to -29 talks --

8 JUSTICE BREYER: Oh, I don't have that.

9 MR. PHILLIPS: -- talks about "for" followed
10 by a purpose and an amount has the, quote, "same effect
11 as" -- quote -- "words like 'not more than' or 'not to
12 exceed.'" "

13 So, I mean, what they're saying is that
14 all of this --

15 JUSTICE SOTOMAYOR: Could you give me that
16 cite again?

17 MR. PHILLIPS: I'm sorry. I apologize, Your
18 Honor.

19 2 GAO Redbook 6-28 to -29. And I think the
20 same --

21 JUSTICE BREYER: No. That isn't quite my
22 question. My question was: I would like the authority
23 for the proposition that when you have a set of
24 contractors, and they read their contract, and it says
25 "subject to appropriation," and then you read the law,

1 and it says they will not be paid, it shall not exceed
2 \$4 million, and then you discover that the amount of the
3 contracts of the same kind in this category are more
4 than \$4 million, I want to know where in the Redbook it
5 says that they get paid more than \$4 million.

6 That's all. That's fairly simple.

7 And if that's -- if that's normal practice,
8 it must be there's a lot of authority for it. So I -- I
9 just want to know what to read.

10 MR. PHILLIPS: Well, here, 6-45 says, "if a
11 contract is but one activity under a larger
12 appropriation, it is not reasonable to expect the
13 contractor to know how much of that
14 appropriation remains available."

15 JUSTICE BREYER: But they aren't talking
16 about there where it says specifically in the contract
17 "subject to appropriations." At least I think they're
18 not.

19 Now, I would like you right now to tell me,
20 no, you're wrong; it does say that.

21 MR. PHILLIPS: Well, it says, if Congress
22 appropriates a specific dollar amount for a particular
23 contract --

24 JUSTICE BREYER: They're distinguishing
25 Sutton from Ferris.

1 MR. PHILLIPS: I'm sorry?

2 JUSTICE BREYER: They're trying to use that
3 to distinguish Sutton from Ferris, and it's filled with,
4 well, we're not sure about this because Sutton, which is
5 Brandeis, which comes out the opposite way, did have a
6 line appropriation. And I thought that just refers to
7 the fact that because there's a line appropriation, the
8 contractor's on notice.

9 MR. PHILLIPS: Right. Exactly.

10 JUSTICE BREYER: Exactly.

11 And when you do business with the government
12 over a period of years, and it says "subject to
13 appropriation," not necessarily you but your lawyer,
14 who's a good lawyer, should look up and see what the
15 appropriation is or whether it was made. I mean, that's
16 what I gather --

17 MR. PHILLIPS: Justice Breyer, as a matter
18 of policy -- you know, if Congress --

19 JUSTICE BREYER: No, no, not as a matter of
20 policy. I'm putting it as a question because that was
21 my first reaction. And I expect you to say, no, Justice
22 Breyer --

23 MR. PHILLIPS: Well, clearly --

24 JUSTICE BREYER: -- you're wrong, and that
25 isn't the practice, and here is what I read to show that

1 isn't the practice. That's all I'm asking.

2 MR. PHILLIPS: Well, I guess I don't
3 understand exactly how to answer that question, Justice
4 Breyer, because --

5 JUSTICE BREYER: By showing me where in the
6 law it says -- and I don't want to repeat the question
7 for the third time, but it says --

8 JUSTICE SCALIA: I wish you would. I've
9 lost the question.

10 (Laughter.)

11 JUSTICE BREYER: Well, here sometimes not
12 everyone pays sufficient attention to these very clear
13 questions.

14 (Laughter.)

15 MR. PHILLIPS: I'm doing my best,
16 Justice Breyer.

17 JUSTICE BREYER: Where -- look,
18 hypothetical. Four people, four identical contracts,
19 the words appear, "subject to appropriation."

20 MR. PHILLIPS: Right.

21 JUSTICE BREYER: Each is for a million
22 dollars.

23 Then you read the appropriation that was
24 later made, and in that statute, it says, we hereby
25 appropriate \$3 million, and -- it is, the payments are

1 not to exceed \$3 million.

2 Okay? Something like that.

3 MR. PHILLIPS: Right.

4 JUSTICE BREYER: All I want is the authority
5 that says each of those four people can come in and get
6 the \$1 million, totaling \$4 million. I want the
7 authority that says that.

8 MR. PHILLIPS: I mean, I would read Ferris
9 as if --

10 JUSTICE BREYER: No. It did not say
11 anything about it in the contract.

12 MR. PHILLIPS: Well, I mean, Ferris has a
13 limitation. The -- the government has already told us
14 that "subject to appropriation" is implicit in every --
15 in every agreement anyway, so there's nothing special
16 about putting in the words "subject to appropriation."

17 JUSTICE BREYER: Oh, there certainly is.
18 Putting in the words gives the lawyer notice.

19 MR. PHILLIPS: Well, again, the only notice
20 it gives is that there has to be enough money when you
21 look at the appropriation to cover your contract.

22 JUSTICE SCALIA: Ferris did not say, as I
23 recall, that you can't expect the contractor to have
24 notice that appropriations have been limited. It said
25 you can't expect them to have notice as to how much of

1 the expenditures under that appropriated act have been
2 spent. Isn't that the only thing it required notice of?

3 MR. PHILLIPS: Right. That's --

4 JUSTICE SCALIA: I would think, if you sign
5 a contract, you better be sure that there are
6 appropriations for it.

7 MR. PHILLIPS: Clearly. And that -- I mean,
8 and, Justice Breyer, the Court's opinion in Cherokee
9 said that the primary purpose of the subject to
10 availability clause is to deal with the situation where
11 you enter into the agreement ahead of the fiscal year,
12 and so everybody knows that if Congress, for whatever
13 reason, decides not to appropriate any money, there's no
14 deal, and nothing happens.

15 JUSTICE KENNEDY: So, in your view, if the
16 tribe comes to the government, and they say, look, we've
17 been looking at what you've done with the other tribes,
18 you've appropriated \$95 million, and the appropriation
19 says "not to exceed \$95 million," but go ahead and make
20 this contract with us anyway, no one cares. And you
21 say, go ahead and make it. Right?

22 MR. PHILLIPS: Well, I mean, it seems to me
23 it's the government's problem to sort it out.

24 JUSTICE KENNEDY: That's your -- that's your
25 position, isn't it?

1 MR. PHILLIPS: Right. But, again, put it in
2 the context, Justice Kennedy, of the individual tribe.

3 JUSTICE GINSBURG: You can't get it from
4 Cherokee. I mean, yes, there's Ferris, and then
5 Cherokee --

6 MR. PHILLIPS: Right.

7 JUSTICE GINSBURG: -- is relying on Ferris.
8 But Cherokee is very careful to point out that there
9 were funds to cover --

10 MR. PHILLIPS: No question about it, Justice
11 Ginsburg. I don't think this case is controlled by
12 Cherokee.

13 I do think Cherokee answers the question of
14 how far can you carry the "subject to availability"
15 language. I don't think it gets the government anywhere
16 near home.

17 And then the question is, what do you do
18 with the "not to exceed" language. And I would suggest
19 there is that, that's no different, frankly, from Ferris
20 or any other situation, because what the -- Congress
21 operates against the backdrop of Ferris, which is a
22 120-plus-year-old doctrine that has been allowed to stay
23 in place by Congress for that entire time. And as the
24 Chamber of Commerce tells us, this is a rule that every
25 contractor takes as an article of faith in dealing with

1 the United States Government.

2 JUSTICE SCALIA: Well, am I correct that
3 what the government is arguing is that the fact that
4 this limitation was included in the particular contract
5 makes it different from Ferris?

6 MR. PHILLIPS: Well, it's hard to make that
7 argument because the -- the "not to exceed" language, at
8 least, that comes out of the -- that's in the
9 appropriations provision. That's not in the contract
10 itself. The contract itself simply says "subject to
11 appropriations."

12 JUSTICE SCALIA: Which Ferris did not. Did
13 the Ferris contract say that?

14 MR. PHILLIPS: It's -- Ferris doesn't have
15 the "subject to appropriation," but the Ferris contract
16 says the appropriation limit is X.

17 JUSTICE BREYER: It does? Where do you
18 get -- I couldn't find the contract. The language in
19 Ferris is, "a contractor who is one of several persons
20 to be paid out of an appropriation is not chargeable
21 with knowledge of its administration." True.

22 Now, Dyk says, in his opinion, that one
23 difference from Ferris is they wrote the idea into the
24 contract, saying you're subject to appropriation to
25 get to make that lawyer chargeable with knowledge.

1 And the second thing in Ferris is that it
2 was an individual who went off on his own in the
3 administration and paid money that he shouldn't have
4 paid. It should have been over here for the contract.

5 In this case, it is an instance where
6 Congress itself required the money to be paid, as it was
7 paid, and didn't provide enough. Okay.

8 So that's where I am with Ferris, which is a
9 big question mark. And I guess you could talk about
10 that, but all I wanted to know is what is well
11 established in this field.

12 MR. PHILLIPS: Well --

13 JUSTICE BREYER: I don't want to write
14 something that suddenly upsets what is well established.

15 MR. PHILLIPS: Okay. Well, I take this,
16 then, straight from the Redbook again. "It is settled
17 that contractors paid from a general appropriation are
18 not barred from recovering for breach of contract, even
19 though the appropriation is exhausted."

20 And so even though -- and there's
21 nothing in -- there's no limitation --

22 JUSTICE BREYER: And that means that as it
23 says in the contract, you are barred, you are barred
24 from recovering if we don't appropriate enough money.
25 Should it say that wouldn't matter? Is that right?

1 MR. PHILLIPS: Well, it would say that if
2 you don't appropriate enough money for the specific
3 contract, yes. I think that's clearly what Sutton
4 holds. Is that if -- if Justice Scalia and I have an
5 agreement, and the -- the appropriation goes to \$100 for
6 our agreement, and the contract says \$500, I'm out of
7 luck for the extra \$400.

8 JUSTICE SOTOMAYOR: Mr. Phillips, this is an
9 unusual situation with the tribes, because in the normal
10 not to exceed appropriation by Congress, the government
11 rightly says we have the power to not contract. And in
12 military contracts and others, we have a for convenience
13 cancellation. We have all sorts of things that protect
14 us from the deficiency.

15 But this is a unique situation because the
16 government, on the one hand, despite their protestations
17 to the contrary, are forced to accept these contracts.

18 MR. PHILLIPS: Right.

19 JUSTICE SOTOMAYOR: And on the other hand,
20 Congress is saying, don't pay more on them. We're
21 telling you to accept more payment than we're going to
22 give you.

23 MR. PHILLIPS: Right.

24 JUSTICE SOTOMAYOR: Should we create a
25 special rule for this -- why shouldn't we create a

1 special rule for this unique situation?

2 MR. PHILLIPS: Because essentially what
3 you're doing is putting the backs of this problem --
4 putting the burden of this problem on the backs of -- of
5 innocent contractors who --

6 JUSTICE SCALIA: Well, is it --

7 MR. PHILLIPS: Who entered into in good
8 faith these agreements.

9 JUSTICE SCALIA: Well, isn't it just a
10 question of our creating a new rule, or rather, is the
11 proposition whether the tribes, when they entered into
12 this, should have realized that because of the
13 peculiarity of these contracts that they had to be
14 entered into, that the rule which otherwise would apply
15 does not apply? It ought to be a question of
16 expectation of the tribe, should it not?

17 MR. PHILLIPS: Well, I would -- I would
18 suggest a couple things about that. I mean, I think in
19 general it's reasonable to look for the -- obviously,
20 the intent of the parties and the expectations of the
21 parties.

22 This case went off on summary judgment that
23 we lost. I mean, even on a -- so we didn't have an
24 opportunity for any analysis of this. But the reality
25 is, is that from the tribe's perspective, they

1 recognize, because of Ferris, and because of the way the
2 Comptroller General has interpreted Ferris, that they
3 are under a duty to make sure that there is an
4 appropriation that covers this contract, that the
5 amount, purpose, time requirements are all satisfied
6 with enough money to accomplish that.

7 And then, of course, we have the obligation
8 to perform, which, of course, that's the other half of
9 the equation here.

10 And, Justice Sotomayor, that's why I
11 wouldn't say --

12 JUSTICE GINSBURG: But you don't -- you
13 don't have the obligation to perform. I mean -- right?
14 In a term of the contract, that if there are lack of
15 sufficient appropriations, performance by either party
16 is excused.

17 MR. PHILLIPS: Well, that -- yes,
18 Justice Ginsburg. But the problem is, we don't know the
19 answer to that until after the year of performance is
20 done, or at least months into the performance. And
21 sometimes, literally after we've already performed --

22 JUSTICE KENNEDY: Suppose you did know.
23 Suppose the tribe knew that the 95 million -- let's
24 assume that that's the not to exceed amount -- had
25 already been obligated. Could the tribe then go ahead

1 and make the government -- a contract with the
2 government, and would the government have to make that
3 contract, in your view?

4 MR. PHILLIPS: I mean, that -- that is the
5 Southern Ute case. And I -- and certainly, you can make
6 an argument to that. The government has an argument on
7 the other side.

8 JUSTICE KENNEDY: Is it your argument that
9 the answer to that is yes?

10 MR. PHILLIPS: The argument is, it appears
11 that Congress intended to require them to enter into
12 that agreement. You know, the idea of Congress
13 requiring the -- an official to enter into an agreement
14 that violates a criminal statute is at least a -- a
15 difficult concept to sort of wrap your mind around.

16 JUSTICE KENNEDY: Isn't this more specific
17 language than the general language? Doesn't this
18 specific language, "not to exceed," supersede the
19 general obligation to make the contract? Otherwise,
20 it's meaningless. The "not to exceed language" is
21 meaningless.

22 MR. PHILLIPS: No, but --

23 JUSTICE KENNEDY: You say it's meaningless.

24 MR. PHILLIPS: No, Justice Kennedy. I told
25 you what the meaning of the "not to exceed" language is.

1 The "not to exceed" language ensures that we
2 cannot turn to the BIA or anyone else at the Interior
3 and say, give us money from another source in order to
4 pay for our contract. And we can't use the injunctive
5 relief that's otherwise available to us for that
6 purpose.

7 So that language has very significant
8 importance in limiting what our options are --

9 JUSTICE GINSBURG: Mr. Phillips --

10 MR. PHILLIPS: -- in a circumstance where we
11 are not being paid enough under the -- the agreement.

12 JUSTICE GINSBURG: -- do I understand your
13 position to be that, yes, the cap has meaning, because
14 in order to exceed the cap, the tribe has to sue? So,
15 any tribe that sues, for any tribe that sues, the cap is
16 meaningless? It's only for the ones who are not
17 sophisticated enough to sue. They're just stuck with
18 what Congress said.

19 So it seems to me that would be a very
20 bizarre scheme to say that, that you have a cap, but the
21 cap is meaningless if you bring a lawsuit.

22 MR. PHILLIPS: No. I -- I mean, I -- it
23 seems to me that we can't -- I mean, aside from bringing
24 a lawsuit, I mean, we -- we could go to the Secretary
25 and say, we don't have enough money to satisfy our

1 contract, would you take money from some other source in
2 order to accomplish that.

3 Because, in the ordinary course, that's not
4 uncommon to re -- re-jigger the -- the appropriation.

5 JUSTICE SCALIA: Do you think it protects
6 these -- these unsophisticated tribes who don't know
7 enough to sue by not allowing anybody to sue?

8 MR. PHILLIPS: Well, that -- yes, there
9 is --

10 JUSTICE SCALIA: Does that make their
11 situation better somehow?

12 MR. PHILLIPS: To be sure, that would not
13 make our situation any better, but --

14 JUSTICE GINSBURG: My question is whether
15 the cap was meaningless. And I think your answer is,
16 yes, for anyone who sues, the cap is meaningless.

17 MR. PHILLIPS: No. No. It -- I don't -- I
18 don't think it does that. It -- it places inherent
19 limitations -- I mean, it says specifically that the
20 Secretary is not authorized to shift money around in
21 order to take care of this particular problem in this
22 particular year that otherwise would be available to us.

23 JUSTICE KENNEDY: You just go to the
24 Judgment Fund --

25 MR. PHILLIPS: I'm sorry?

1 JUSTICE PHILLIPS: You just go to the
2 Judgment Fund --

3 MR. PHILLIPS: Of course. Then, we --

4 JUSTICE KENNEDY: -- which makes it
5 meaningless.

6 MR. PHILLIPS: Well, ultimately, it means
7 that the burden of it will not fall on the tribes. It
8 is -- it does mean that.

9 But -- and let's be clear about this. The
10 Judgment Fund -- this is not simply going to the
11 Judgment Fund and asking for our contract support costs
12 to be paid. Our argument here is that there has been a
13 breach of contract, and we're entitled to the damages
14 for the breach of contract, whether those are reliance
15 damages or restitutionary damages, whether we -- whether
16 we're supposed to get what we expected out of the deal,
17 or put back in the position we would have been in --

18 JUSTICE KAGAN: Mr. Phillips, if you look at
19 this situation, it seems pretty clear that Congress did
20 want to do something, which was to limit the amount of
21 money that was going to the tribes under these
22 contracts.

23 Do you think that there's a way that
24 Congress can do that --

25 MR. PHILLIPS: Oh, sure.

1 JUSTICE KAGAN: -- consistent with this
2 scheme that's set up by the statute?

3 How could Congress do that? You know, if --
4 if -- if they can't do it this way, how could they?

5 MR. PHILLIPS: Well, the easy way would be
6 to impose specific limitations in -- in every one of the
7 contracts, which -- which, frankly, if you read
8 appropriations bills, which I hate to say I have
9 occasionally done --

10 JUSTICE KAGAN: When you say "specific
11 limitations," what would that look like?

12 MR. PHILLIPS: It would look like -- for the
13 agreement between the United States and Ramah Navajo
14 for -- for contract support costs in this
15 particular -- for taking over the police department, the
16 contract support costs shall not exceed \$150,000,
17 period. That's the total appropriation.

18 And if we look at our contract -- and
19 there's a specific number in the contract -- and that
20 contract number says \$174,000, then we know that we're
21 out of luck for the \$24,000. We've been put on specific
22 notice --

23 JUSTICE ALITO: For any particular year, are
24 they all entered into it at about the same time?

25 MR. PHILLIPS: What's that, Justice Alito?

1 JUSTICE ALITO: For any particular fiscal
2 year, are all of these contracts entered into by a
3 particular date?

4 MR. PHILLIPS: Yes. Nothing is all that
5 easy, obviously. Some of them enter into it on a fiscal
6 year basis. Some of them enter into it on a -- on
7 a -- on a calendar year basis.

8 And, frankly, the -- part of the problem is
9 when does the government get around to signing these
10 agreements.

11 And, also, there are 12 regions. I mean,
12 part of the reason -- I would like to spend a second
13 talking about the comment that, you know, we have this
14 fair and equitable scheme in place in which we're
15 allocating moneys out, when the reality is, is that
16 there is substantial evidence in the record, even though
17 we have not had an opportunity to make a full record,
18 that the -- that the -- that the Bureau makes mistakes
19 in 40 percent of these contractual arrangements.

20 And I know my -- my colleague's going to
21 dispute that, but the truth is we've known that for
22 years. They just make mistakes, and people get
23 impaired -- their contract rights are impaired on that
24 basis.

25 This is not some kind of an equitable scheme

1 that's operating here. There are 12 different regions
2 operating in 12 different ways. Some people get money,
3 some people get 300 percent of theirs, some people get
4 0 percent of theirs.

5 JUSTICE SOTOMAYOR: Mr. Phillips, how does
6 the Congress do this without upsetting the entire
7 scheme? Knowing that these contracts are not all signed
8 on one day, that there are 12 regions, that the
9 negotiations go over time, how could Congress achieve
10 the scheme that the government wants now? How would it
11 write this contract?

12 MR. PHILLIPS: Right. Well, the easy way
13 would be to take away the requirement that the
14 government has to enter into all of these contracts at
15 the request of the tribe. And -- and -- and that's
16 clearly available. If they want to go down that path,
17 they can do that in a heartbeat. And then they have all
18 of the discretion they want -- they want to apply under
19 these circumstances.

20 So, I mean, there's -- obviously, there is a
21 bit of, as we said in the brief, schizophrenia. And I
22 have -- I have some misgivings about describing Congress
23 that way, but there is some schizophrenia in how they
24 approach this problem.

25 JUSTICE SCALIA: Do you have to solve it

1 contract by contract? Couldn't there be a -- a
2 provision in the -- in the law which -- which says that,
3 where appropriated funds are inadequate to cover the
4 totality of -- of costs under this statute, it will be
5 apportioned as follows?

6 MR. PHILLIPS: Yes. Congress could --

7 JUSTICE SCALIA: Or the Secretary will
8 apportion it? That's all it would take. You wouldn't
9 even have to do it contract by contract. Right?

10 MR. PHILLIPS: Right. I -- I mean, I think
11 that would --

12 JUSTICE SCALIA: You would prefer contract
13 by contract for your clients.

14 MR. PHILLIPS: Well, I just think it's been
15 noted --

16 JUSTICE SCALIA: Oh, absolutely --

17 MR. PHILLIPS: -- but, you know, I don't
18 disagree with that.

19 Look, and as we argued in our brief, there
20 are three or four different ways that Congress can fix
21 this problem going forward. But -- and that's -- and
22 that's the message, I thought, from Justice Sotomayor,
23 is why don't we let Congress fix the problem and allow
24 the background principles of Ferris, as interpreted by
25 the Comptroller General, to apply in this case in order

1 to resolve the contract dispute that's properly,
2 obviously, before the Court at this point.

3 I'm sorry, Mr. Chief Justice.

4 CHIEF JUSTICE ROBERTS: I think -- I think
5 this may have been asked, and I'm not sure of the -- I
6 understood the answer.

7 This is -- is this on an ongoing,
8 forward-looking basis? In other words, you enter into
9 the contracts, and then you wait and see whether there
10 are appropriations?

11 MR. PHILLIPS: Yes. Typically what happens
12 is you enter into the agreement sometime just before the
13 appropriation comes down. It's -- it's usually pretty
14 close, because --

15 CHIEF JUSTICE ROBERTS: Well, so doesn't it
16 make -- I mean, doesn't the system that the government
17 is operating under make a lot of sense? Because let's
18 say the tribe says, look, we need a million dollars.
19 The Secretary agrees to it. And then I assume the two
20 of them get together and say, well, we'll try to get the
21 appropriation for it. You know, you understand we may
22 not get it, but this is how much you need, we'll go back
23 and get it. If you get it, that's great. If you don't,
24 well, then that's --

25 MR. PHILLIPS: And again -- and, Mr. Chief

1 Justice, if they did that on a -- on a tribe-by-tribe,
2 contract-by-contract basis, I -- I wouldn't have any
3 problem with that, because then you're on notice.

4 But when they say to you, okay, fine,
5 here's -- you know, this is -- here is your contract
6 support cost provision, there's a specific number in
7 there, 1.3.78 dollars and 63 cents, that's what you
8 ought to get, and we get an appropriation that comes
9 back in that says the government will -- that, you know,
10 we have appropriated \$100 million for contract support
11 costs.

12 There are 330 other tribes out there
13 potentially with contracts that are involved here. It
14 is -- and -- and just to put it in context, we are
15 talking about -- you know, many of these tribes are in
16 incredibly remote situations. They don't have access to
17 all the other information about what's going on. And
18 the real question is, should you impose --

19 CHIEF JUSTICE ROBERTS: Are you
20 suggesting that --

21 MR. PHILLIPS: -- that on the tribes?

22 CHIEF JUSTICE ROBERTS: Are you suggesting
23 that Congress has to go through each of those contracts
24 and say, this is how much we're going to appropriate,
25 this is how much --

1 MR. PHILLIPS: I think that's -- I actually
2 think that would be the fairer way to do it. And I
3 don't think it would be as burdensome as -- as your
4 question implies, because, again, what else does staff
5 have better to do than to sit down and put all those
6 appropriations together?

7 CHIEF JUSTICE ROBERTS: Well, the question
8 is whether it's the staff in Congress that's going to do
9 it or the staff at the Department of the Interior?

10 MR. PHILLIPS: Well --

11 CHIEF JUSTICE ROBERTS: And I suppose
12 Congress can reasonably determine that the people at
13 Interior know better about how to do it than we do.

14 MR. PHILLIPS: Right. But then -- then they
15 could do it by -- by -- expressly by reference.

16 I mean, if, in fact, Interior has set it out
17 that way and has it all done, then they can just
18 incorporate it into the statute anyway.

19 I mean, there are simple ways to do it.
20 There are broader ways to do it. And as I said to
21 Justice Sotomayor, clearly Congress could simply, you
22 know, absolve the government of its responsibility to
23 enter into any contract that a -- that a -- when an
24 Indian tribe shows up at their doorstep.

25 All of those seem to me preferable than

1 saying to the tribes, after they have fully performed
2 their side of the deal, okay, I'm sorry, we're not going
3 to pay you.

4 The -- the other thing that's odd about
5 this --

6 JUSTICE SOTOMAYOR: I'm sorry. You keep
7 saying that, but I thought in your earlier answer, you
8 said that the contracts are generally signed by the time
9 of the appropriation.

10 MR. PHILLIPS: Right.

11 JUSTICE SOTOMAYOR: Where is that in the
12 cycle of performance? Is that at the beginning of
13 performance?

14 MR. PHILLIPS: That's at the beginning of
15 performance. But -- but what we find out about the
16 notices that we are -- that we have later received is at
17 some point, we're sending you 75 percent in some
18 situations, or we're going to send you exactly the same
19 amount of money you got last year, even though that
20 won't cover it.

21 JUSTICE SOTOMAYOR: So the tribes -- even
22 when the appropriation comes out, they don't know how
23 much the Department has contracted with other tribes.

24 MR. PHILLIPS: Right. We haven't --

25 JUSTICE SOTOMAYOR: So they're performing

1 until they get that notice later on.

2 MR. PHILLIPS: Exactly. And, candidly,
3 assume that -- either one of two things will happen.
4 Either we will ultimately be paid in full, which has
5 happened -- I mean, the last year, they were in fact
6 paid in full. Or alternatively, that they will have
7 access to the Judgment Fund in order to -- to get the
8 recovery they are otherwise entitled to.

9 JUSTICE KAGAN: Mr. Phillips, do you
10 think -- and the long question here is what did Congress
11 want. And what -- one answer might be Congress wanted
12 exactly what the government says it wanted. But another
13 answer might be something different, that actually,
14 Congress wanted there to be unlimited funds for these
15 tribes, but that it wanted to shift the costs of some of
16 those funds to the Judgment Fund outside of the Interior
17 budget.

18 MR. PHILLIPS: Right.

19 JUSTICE KAGAN: Do you -- I mean, do you
20 contest the government's view of what Congress wanted
21 here? And if so, how?

22 MR. PHILLIPS: Well, I think the question is
23 it's unclear what Congress really wanted in this case,
24 and therefore, you ought to construe the -- the scheme
25 in a way that is most favorable to the tribes. And if

1 that means that the scheme operates so as to protect the
2 integrity of the appropriations process and the spending
3 process for a particular year, and prevents us from
4 being able to seek relief outside of this contract
5 support cost appropriation limitation, that makes
6 perfect sense to me, leaving open obviously the
7 availability of the Judgment Fund at the end of the day
8 so that the tribes do not in fact have to bear the full
9 burden of -- of this arrangement as opposed to -- as
10 opposed to anyone else.

11 I mean, that's -- again, we do
12 provide -- we've performed the services. We don't know.
13 We do it in good faith. Under those circumstances, it
14 seems to me that's the classic situation in which we
15 should receive full compensation.

16 If there are no further questions, Your
17 Honor, thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Phillips.

20 Mr. Freeman, you have 4 minutes remaining.

21 REBUTTAL ARGUMENT OF MARK R. FREEMAN

22 ON BEHALF OF THE PETITIONERS

23 MR. FREEMAN: Thank you, Mr. Chief Justice.

24 JUSTICE SOTOMAYOR: Do you dispute

25 Mr. Phillips' statement that the tribes don't know how

1 much they're getting until some point further into the
2 performance cycle?

3 MR. FREEMAN: In part, Your Honor. Let me
4 explain. As I mentioned earlier, for the first many
5 years in this scheme, we did a uniform pro rata
6 distribution methodology. The tribes came to us and
7 said, look, that's a problem for us because we don't
8 have any budget transparency; we can't see how much
9 we're going to get. So we adopted this policy in 2006.
10 And one of the principal elements of that policy is that
11 it guarantees that, if -- as long as Congress
12 appropriates as much money as it did in the previous
13 fiscal year, which it generally has, the tribe will get
14 immediately, like within 2 weeks, the exact amount of
15 money that it received in the previous year. And that
16 money comes immediately. They can use it however they
17 want. It's not subject to apportionment. Unlike most
18 Federal agencies, we don't dole it out. They get it
19 right away.

20 Now, the question then becomes what to do
21 with any additional money that Congress has
22 appropriated, and the policy provides for distribution
23 of that money on what we call a bottoms-up basis. We
24 give it to the tribes that are the farthest away from
25 100 percent of funding. That resolution was negotiated

1 with the tribes and, indeed, with some counsel for
2 Respondents. It's, we think -- and I might be wrong
3 about this -- but we think that that's the solution that
4 the tribes want, if the caps have any effect. There
5 are --

6 JUSTICE KAGAN: I guess what I don't
7 understand about the government's argument, Mr. Freeman,
8 is exactly what the contractual rights of the tribes
9 become. I mean, as I -- this is supposed to be a
10 contract, and we've held that it's a contract, and
11 usually contracting parties have rights to something.

12 MR. FREEMAN: Yes.

13 JUSTICE KAGAN: So what do they have a right
14 to, in your view?

15 MR. FREEMAN: Well, first of all, let's make
16 clear -- let's make sure that we're not --

17 JUSTICE KAGAN: That was -- that was a
18 straightforward question.

19 (Laughter.)

20 MR. FREEMAN: Well, they have a right, Your
21 Honor, in the first instance to the principal promise
22 that's under any ISDA contract, which is we give the
23 amount of money that the Secretary would have provided
24 for the program funds, for operational --

25 JUSTICE KAGAN: No, but what do they have a
60

1 right to with respect to these additional overhead
2 costs?

3 MR. FREEMAN: Contract support costs. They
4 have a right as a class to the distribution of every
5 dollar that Congress appropriates, and for every
6 contractor --

7 JUSTICE KAGAN: What does each individual
8 tribe have a right to?

9 MR. FREEMAN: A proportionate share based on
10 the Secretary's policy for the distribution of these in
11 light of the caps. Let me --

12 JUSTICE KAGAN: So you think they do have a
13 right to a pro rata share?

14 MR. FREEMAN: We think that --

15 JUSTICE KAGAN: In other words, the
16 Secretary could not say, oh, you know, these tribes have
17 been doing a better job, so we'll give it to them; or
18 these tribes need it more, so we'll give it to them.
19 You think that there's a contractual right to a pro rata
20 share.

21 MR. FREEMAN: We think there's a contractual
22 right to -- and, in fact, the contracts often reference
23 these policies directly. For example, page 123 of the
24 joint appendix, one of the contracts in this case says
25 you'll be paid according to the distribution policy as

1 adopted by the Secretary. So in that case, yes, we
2 bound ourselves --

3 CHIEF JUSTICE ROBERTS: I'm sorry. I didn't
4 think that was responsive. Does the Secretary --
5 Justice Kagan can defend her own question -- but does
6 the Secretary have the discretion to adopt something
7 other than a pro rata distribution when there are not
8 sufficient appropriations?

9 MR. FREEMAN: We think within a range of
10 reasonable solutions after consultation with the tribes,
11 yes. We don't --

12 JUSTICE GINSBURG: You must answer that
13 question --

14 JUSTICE SOTOMAYOR: The system that's in
15 place does not --

16 JUSTICE GINSBURG: You must answer that
17 question "yes" --

18 MR. FREEMAN: Yes.

19 JUSTICE GINSBURG: -- because that's exactly
20 what the Secretary did.

21 MR. FREEMAN: Right.

22 JUSTICE GINSBURG: You -- claimed that it
23 was pro rata.

24 MR. FREEMAN: That's right. And --

25 JUSTICE KAGAN: Well, then this is a

1 very -- this is a very strange kind of contractual
2 right. The -- the contracting tribe has a right to have
3 the Secretary to use discretion to decide how much the
4 contracting tribe gets.

5 What kind of contract is that?

6 (Laughter.)

7 MR. FREEMAN: Respectfully -- respectfully,
8 Your Honor, that is an exaggeration. Congress has
9 appropriated since 1994 more than \$2.3 billion in
10 contract support cost funds. We've distributed all of
11 that money to the tribes. All of the tribes here have
12 gotten substantial sums.

13 JUSTICE KAGAN: No, I'm not contesting -- I
14 mean, clearly you think and the Secretary thinks that
15 there's an obligation to distribute all that money.

16 MR. FREEMAN: Right.

17 JUSTICE KAGAN: And -- and I don't think
18 anybody disagrees with that. The question is what each
19 individual tribe has a contractual right to.

20 MR. FREEMAN: May I answer the question,
21 Your Honor?

22 Your Honor, once it is clear that the caps
23 control the total amount of money that the Secretary may
24 spend, every further question is a question of
25 allocation. We think we have the policy that's right --

1 it was negotiated with the tribes and counsel for
2 Respondents -- but if we're wrong about that, we can
3 have that fight another day. The question here is
4 whether the caps define the maximum amount of money that
5 the Secretary may spend, and we think they do.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Counsel.

8 The case is submitted.

9 (Whereupon, at 11:08 a.m., the case in the
10 above-entitled matter was submitted.)

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A				
ability 20:2,7 28:11	agency's 7:17	analysis 43:24	54:10 59:22	7:7,12,13 21:9
able 58:4	agreement 9:3 14:11,13 37:15	answer 18:4 21:15 28:20	63:9	23:15,20 24:21
above-entitled 1:12 64:10	38:11 42:5,6	36:3 44:19	appropriates 11:8 34:22	27:24 29:12
absolutely 16:8 21:15,23 52:16	45:12,13 46:11	45:9 47:15	59:12 61:5	40:7 45:6,6,8
absolve 55:22	49:13 53:12	53:6 56:7	appropriating 24:13,14	45:10 48:12
accept 3:14 24:2 24:5 42:17,21	agreements 43:8 50:10	57:11,13 62:12	appropriation 5:7 8:16,17	58:21 60:7
acceptance 7:25	agrees 53:19	62:16 63:20	9:15 11:21,22	arguments 7:6
access 54:16 57:7	ahead 38:11,19 38:21 44:25	answering 17:8	17:4,25 25:9	Army 8:20
accomplish 44:6 47:2	aid 14:23	answers 39:13	25:10 28:24	arrangement 58:9
accurate 8:11	airplane 12:4	Antideficiency 13:9 17:19	30:1,2 31:15	arrangements 50:19
achieve 51:9	airplanes 11:3,7	27:15	33:25 34:12,14	article 39:25
Acquisition 28:10	AL 1:4,7	anybody 47:7 63:18	35:6,7,13,15	aside 7:14 25:16
act 3:17 6:18,20 7:1,14 13:9	albeit 7:15	anyway 24:8 30:3 37:15	36:19,23 37:14	46:23
17:19 19:11,11	Alito 49:23,25 50:1	38:20 55:18	37:16,21 38:18	asked 15:23 23:24 53:5
26:7 27:15	allegation 4:8,22 5:1	apologize 33:17	40:15,16,20,24	asking 36:1 48:11
29:8 38:1	allegations 5:2	appear 36:19	41:17,19 42:5	asks 19:22
acting 4:13,14	allocating 50:15	APPEARAN... 1:15	42:10 44:4	Assistant 1:16
activity 34:11	allocation 18:14 63:25	appears 26:18 26:20 45:10	47:4 49:17	assume 19:5 44:24 53:19
add 12:2 16:12	allotment 8:9	appendix 23:10 23:23 61:24	53:13,21 54:8	44:24 53:19
additional 16:6 59:21 61:1	allotted 8:2	applicable 5:16	56:9,22 58:5	57:3
address 4:25 25:17	allow 52:23	applied 8:4	appropriations 6:14,18,20 7:1	assuming 4:16
adequate 8:9	allowed 7:14 23:3 39:22	apply 43:14,15 51:18 52:25	7:6 9:22 10:10	assurances 14:15
administration 40:21 41:3	allowing 47:7	apportion 52:8	10:11,14,16	attention 36:12
administrative 13:25 28:15	alternatively 57:6	apportioned 52:5	11:4,19,20	authorities 32:3
adopt 62:6	amici 15:2	apportionment 59:17	15:5,16 16:6	authority 27:11 33:22 34:8
adopted 14:20 59:9 62:1	amount 3:21 6:1 6:4,5 7:15 8:2	appreciate 32:10	16:10 17:12,15	37:4,7
advance 11:19 17:12	20:16,18 21:22	approach 19:25 51:24	17:17 18:8	authorization 11:3
advancing 18:19	25:10,11,24	appropriate 25:2 36:25	19:12 20:5,12	authorized 47:20
agencies 59:18	26:5,10,14	38:13 41:24	20:16 25:5	authorizes 24:15
agency 9:3 10:7 11:24 21:19 23:8	29:2 33:10	42:2 54:24	28:1 30:15	availability 10:16 14:9,12
	34:2,22 44:5	appropriated 6:8 7:8 14:10	31:13,22 34:17	15:15 17:14
	44:24 48:20	16:20 17:1	37:24 38:6	19:12 20:4
	56:19 59:14	38:1,18 52:3	40:9,11 44:15	38:10 39:14
	60:23 63:23		49:8 53:10	58:7
	64:4		55:6 58:2 62:8	available 7:9,10 7:15,19 8:25 9:10,18 10:7,9

18:8 24:4 25:15,19,24 26:25 27:2,8 27:10 34:14 46:5 47:22 51:16 a.m 1:14 3:2 64:9	bind 25:25 26:1 binding 9:3 10:5 11:25 27:5 bit 51:21 bizarre 46:20 bottoms-up 59:23 bound 12:18 62:2 Bradley 10:1 Brandeis 35:5 breach 9:12,13 27:3,3 41:18 48:13,14 breached 9:14 break 27:20 28:16 breaking 28:23 Breyer 16:16,22 17:3,7,16,20 17:22 31:9,20 31:23 32:8,9 32:10,13,15,18 32:21 33:2,8 33:21 34:15,24 35:2,10,17,19 35:22,24 36:4 36:5,11,16,17 36:21 37:4,10 37:17 38:8 40:17 41:13,22 brief 5:2 15:3 23:15 31:25 32:1,20,25 51:21 52:19 bring 46:21 bringing 46:23 broader 55:20 budget 21:19 26:19,20 30:20 57:17 59:8 budgeting 26:17 building 8:3 built 9:5 burden 43:4 48:7 58:9 burdensome	55:3 Bureau 50:18 business 35:11 buy 11:7 <hr/> C <hr/> c 2:1 3:1 14:10 calendar 50:7 call 59:23 cancellation 42:13 candidly 57:2 cap 3:21 25:5 46:13,14,15,20 46:21 47:15,16 caps 10:23 23:8 23:13,16 24:22 60:4 61:11 63:22 64:4 care 12:12 47:21 careful 39:8 cares 38:20 carries 30:17 carry 39:14 CARTER 1:19 2:6 29:12 case 3:4,11 5:8 5:19 7:22 9:17 10:21 12:11 14:7 21:5 26:18,19 29:18 32:4 39:11 41:5 43:22 45:5 52:25 57:23 61:24 62:1 64:8,9 cases 10:2 category 34:3 cents 54:7 certain 7:15 8:2 20:17 26:14 certainly 37:17 45:5 Chamber 31:25 32:1 39:24 changes 24:14 Chapter 1:7 3:5	characterizati... 8:11 chargeable 40:20,25 chart 23:9 Cherokee 6:12 6:13,17 7:5,5,8 10:4 21:5 28:2 32:5 38:8 39:4 39:5,8,12,13 Chief 3:3,9 22:8 22:13,22 26:16 29:10,14 32:23 33:1 53:3,4,15 53:25 54:19,22 55:7,11 58:18 58:23 62:3 64:6 chooses 24:5 choosing 4:23 chose 19:24 Circuit 8:14 10:15 25:16 Circuit's 8:14 circumstance 7:22 11:24 16:15 24:18 25:19 46:10 circumstances 3:24 12:25 13:5 29:23 51:19 58:13 citations 32:11 cite 31:11 33:16 cited 10:4 32:3 citing 15:13 claimed 62:22 class 6:10 14:7 14:24 61:4 classic 58:14 clause 7:6 38:10 clear 16:14,16 21:15 29:9 36:12 48:9,19 60:16 63:22 clearly 35:23 38:7 42:3	51:16 55:21 63:14 clients 52:13 close 53:14 coincidence 32:16 colleague's 50:20 colloquy 17:10 come 19:20 23:8 23:13 26:14 37:5 comes 12:20 15:20 24:3 35:5 38:16 40:8 53:13 54:8 56:22 59:16 comment 50:13 Commerce 31:25 32:1 39:24 commit 19:8 commitments 12:18,19 compensation 58:15 Comptroller 29:21 44:2 52:25 concept 45:15 conduct 4:16 Congress 3:13 3:20,25 6:2,7 7:8,13 8:2 10:7 10:21 11:8 18:12,13,22 19:4,6,13,15 19:24,25 20:6 20:12 21:16,16 22:4 23:13,18 23:19 24:13,14 24:20,21,23 25:5,24 26:1,9 26:13 27:8,10 28:23 31:14 34:21 35:18
---	--	--	--	--

<p>38:12 39:20,23 41:6 42:10,20 45:11,12 46:18 48:19,24 49:3 51:6,9,22 52:6 52:20,23 54:23 55:8,12,21 57:10,11,14,20 57:23 59:11,21 61:5 63:8 congressional 18:10 21:18 consequence 22:8 consistent 49:1 constitutional 24:21 construe 57:24 consultation 14:22 62:10 contemplated 26:9 contest 57:20 contesting 63:13 context 30:21 39:2 54:14 contingency 9:11 contract 3:15,16 3:22 5:4,5,9 6:14 8:5,20,21 8:23,24 9:14 10:13 12:7 13:1,23 14:6 14:11 15:7,20 16:22 17:3,12 17:16,24 19:18 19:22 21:9 22:13 23:2,6 24:3 26:10 27:3,4,14,20 27:25 30:3 31:12,16 33:24 34:11,16,23 37:11,21 38:5 38:20 40:4,9 40:10,13,15,18</p>	<p>40:24 41:4,18 41:23 42:3,6 42:11 44:4,14 45:1,3,19 46:4 47:1 48:11,13 48:14 49:14,16 49:18,19,20 50:23 51:11 52:1,1,9,9,12 52:13 53:1 54:5,10 55:23 58:4 60:10,10 60:22 61:3 63:5,10 contracted 12:5 12:6 13:15 56:23 contracting 4:15 16:25 17:5 26:4 28:9 60:11 63:2,4 contractor 9:1 9:10 15:5 27:19 31:12 34:13 37:23 39:25 40:19 61:6 contractors 4:9 11:10,13 23:4 29:24,25 30:22 32:2 33:24 41:17 43:5 contractor's 14:8 35:8 contracts 3:17 3:23 5:7 7:11 7:16,18 10:17 11:6,18 12:10 12:11 13:7 15:2,12 16:4 17:13,15 18:7 18:7,15 19:7 19:20 25:14 31:16 34:3 36:18 42:12,17 43:13 48:22 49:7 50:2 51:7</p>	<p>51:14 53:9 54:13,23 56:8 61:22,24 contractual 11:14 12:1,17 12:19 18:4 25:20 27:5 50:19 60:8 61:19,21 63:1 63:19 contract-by-c... 54:2 contrary 42:17 control 63:23 controlled 39:11 controls 16:13 convenience 13:3,6 18:6 42:12 Corps 8:20 correct 4:17 14:5 19:8 40:2 correctly 9:25 10:2 23:10 cost 14:1 22:10 22:14 26:11 54:6 58:5 63:10 costs 3:22 5:4,9 13:25 19:1,8 20:8,18 22:19 23:2 26:13 28:15,15 29:4 48:11 49:14,16 52:4 54:11 57:15 61:2,3 counsel 14:24 29:10,20 60:1 64:1,6,7 couple 5:3 11:16 12:23 43:18 course 19:15 27:3 44:7,8 47:3 48:3 Court 1:1,13 3:10 7:6,17 9:7 13:9 26:2,22</p>	<p>29:15 53:2 court's 5:19 9:25 10:4 38:8 cover 8:9 9:22 37:21 39:9 52:3 56:20 covers 44:4 create 42:24,25 creating 43:10 criminal 45:14 critical 8:22 21:4 cutbacks 23:12 cycle 56:12 59:2</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 dam 8:3,5,16 damages 27:3 48:13,15,15 date 50:3 day 29:23 51:8 58:7 64:3 deal 38:10,14 48:16 56:2 dealing 31:14 39:25 decide 9:11 63:3 decided 9:4 decides 38:13 decisions 10:1 decline 23:3 defend 62:5 defense 9:13 deficiency 42:14 deficit 21:20 define 64:4 Delaware 8:19 department 1:17 26:19 49:15 55:9 56:23 depend 11:16 deprives 30:25 described 5:15 describes 16:15 describing</p>	<p>16:11 51:22 despite 42:16 determine 55:12 developed 10:17 differ 21:10 difference 21:5 22:2,3 24:18 25:8 40:23 different 5:7 7:7 9:17 15:14 19:24 24:12,19 30:14 39:19 40:5 51:1,2 52:20 57:13 differentiate 15:12 difficult 45:15 direct 18:16 directly 18:13 25:17 61:23 disagree 52:18 disagrees 63:18 discover 34:2 discretion 9:4 10:8 51:18 62:6 63:3 dishonor 15:7 dispute 3:11 27:2 50:21 53:1 58:24 distinctive 3:12 distinguish 15:24 35:3 distinguishing 34:24 distribute 63:15 distributed 63:10 distribution 5:21 14:19 59:6,22 61:4 61:10,25 62:7 district 5:19 doctrine 7:25 8:1 29:17,22 39:22 doing 18:13</p>
---	--	--	---	--

<p>36:15 43:3 61:17 dole 59:18 dollar 6:1 20:18 34:22 61:5 dollars 8:18 11:6,11 36:22 53:18 54:7 door 15:20 24:3 doorstep 55:24 drafted 14:24 dredge 8:21 uplicative 22:20 duty 44:3 Dyk 21:2 40:22 Dyk's 25:15 D.C 1:9,17,19</p> <hr/> <p style="text-align: center;">E</p> <p>E 2:1 3:1,1 earlier 21:15 56:7 59:4 easy 49:5 50:5 51:12 effect 4:13 33:10 60:4 either 9:21 12:3 33:6 44:15 57:3,4 elements 59:10 emphatic 24:23 25:1 emphatically 28:7 enact 19:14 24:21 enacted 3:20 Engineers 8:20 ensure 18:7 ensures 46:1 enter 3:18 13:1 15:20 16:4 17:24 18:15 19:7,16 25:14 27:11 38:11 45:11,13 50:5</p>	<p>50:6 51:14 53:8,12 55:23 entered 5:6 9:3 16:5 27:1 43:7 43:11,14 49:24 50:2 entering 11:18 17:11 23:5 enters 11:6 entire 39:23 51:6 entitled 30:18 31:15 48:13 57:8 equation 44:9 equitable 50:14 50:25 ESQ 1:16,19 2:3 2:6,9 essentially 26:10 31:8 43:2 established 41:11,14 estimate 20:7 24:3,4 estimated 6:5 24:1 et 1:4,7 16:14 everybody 12:6 32:1 38:12 evidence 50:16 exact 59:14 exactly 4:1 6:3 20:19 21:12 35:9,10 36:3 56:18 57:2,12 60:8 62:19 exaggeration 63:8 example 5:3,8 61:23 examples 5:4,5 exceed 6:2 20:20 20:21 21:10,17 21:21 24:12,16 24:22 25:11 26:5,14 30:1,5</p>	<p>30:10,14,17,23 31:2,2,5,15,17 33:12 34:1 37:1 38:19 39:18 40:7 42:10 44:24 45:18,20,25 46:1,14 49:16 excess 20:13,17 Excuse 4:3 excused 44:16 executive 10:8 25:23 exhausted 41:19 expect 34:12 35:21 37:23,25 expectation 43:16 expectations 43:20 expected 48:16 expend 24:15 expenditures 9:23 38:1 explain 5:10 7:4 11:17 12:23 14:5 18:22 19:13 28:8 59:4 explaining 23:23 explicit 3:20 explicitly 27:10 exposed 20:6 express 17:13 expresses 25:5 expressly 26:1 55:15 extent 20:10 27:9 extra 42:7</p> <hr/> <p style="text-align: center;">F</p> <p>fact 4:9 10:13 13:4 22:17 35:7 40:3 55:16 57:5</p>	<p>58:8 61:22 factual 5:2 23:21 failure 27:5 fair 50:14 fairer 55:2 fairest 5:24 fairly 29:9 34:6 faith 39:25 43:8 58:13 fall 48:7 false 5:3 far 39:14 farthest 59:24 fault 26:21 favorable 57:25 features 3:12 16:8 19:15 Federal 7:17 8:13,14 10:14 25:16 28:10 59:18 Ferris 7:25 8:1,4 8:11,12,15,17 9:2,7,21,24 10:2,4,4,12,18 11:1,14 12:15 12:16 16:23 25:8,12,17,18 25:22 28:1 29:16,19,22 32:5 34:25 35:3 37:8,12 37:22 39:4,7 39:19,21 40:5 40:12,13,14,15 40:19,23 41:1 41:8 44:1,2 52:24 Ferris-type 25:9 field 41:11 fight 64:3 figure 6:6 22:10 figures 6:9 21:19 file 23:5 filled 35:3</p>	<p>find 31:20 32:8 40:18 56:15 fine 54:4 first 12:23 14:6 14:21 25:20,24 35:21 59:4 60:15,21 fiscal 3:19 16:13 38:11 50:1,5 59:13 fix 18:12,13 52:20,23 followed 5:20 33:9 following 4:23 follows 52:5 forced 42:17 formal 4:19 forward 15:4 52:21 forward-looki... 53:8 four 36:18,18 37:5 52:20 frankly 30:2 39:19 49:7 50:8 Freeman 1:16 2:3,9 3:6,7,9 4:5,11,18,21 4:25 5:13,18 6:3,16,22 7:2 8:7,10,17 9:24 10:12,24 11:12 11:15,23 12:8 12:15,22 13:13 13:16,19,22 14:4 15:9,13 15:23 16:1,7 16:21 17:2,6,9 17:18,21 18:3 18:17,20 19:4 19:9 20:14,23 20:25 21:3,6 21:12,23 22:3 22:6,12,17,25 23:7,13 24:9</p>
--	---	---	---	--

<p>24:17 25:3,12 26:8,23 27:17 27:22 28:3,6 28:19 29:6 58:20,21,23 59:3 60:7,12 60:15,20 61:3 61:9,14,21 62:9,18,21,24 63:7,16,20 front 32:15,24 full 26:10 28:16 50:17 57:4,6 58:8,15 fully 18:15 56:1 fund 7:16 12:21 18:15 26:20,21 26:24,25 47:24 48:2,10,11 57:7,16 58:7 fundamental 29:17 funding 3:11 15:15 19:11 20:4 23:17,19 23:25 26:11 28:12 59:25 funds 7:9,10 8:24 9:9 14:10 22:20,21 25:19 27:21 39:9 52:3 57:14,16 60:24 63:10 further 14:12 58:16 59:1 63:24</p> <hr/> <p style="text-align: center;">G</p> <p>G 1:19 2:6 3:1 29:12 GAO 23:22 32:12 33:6,7 33:19 gather 35:16 general 1:17 6:13,20 16:10 20:15 30:15</p>	<p>41:17 43:19 44:2 45:17,19 52:25 generally 56:8 59:13 General's 29:21 getting 13:18,21 27:14 59:1 Ginsburg 5:12 5:14 20:10,15 22:7 23:7 39:3 39:7,11 44:12 44:18 46:9,12 47:14 62:12,16 62:19,22 Ginsburg's 21:8 give 5:8 19:2,7 19:16,19 20:1 33:15 42:22 46:3 59:24 60:22 61:17,18 given 5:3 9:25 18:19 27:16 gives 37:18,20 giving 26:10 go 9:15 26:5 38:19,21 44:25 46:24 47:23 48:1 51:9,16 53:22 54:23 goes 42:5 going 10:25 11:15 12:4,5,6 12:7 13:24 14:3,14,18,22 15:7 19:1,2,18 22:10,14,15,16 26:5 28:14,16 29:2,5 42:21 48:10,21 50:20 52:21 54:17,24 55:8 56:2,18 59:9 good 35:14 43:7 58:13 gotten 63:12 governed 6:21</p>	<p>government 7:5 8:19 10:17 11:2,5 12:1,18 13:2,6 14:2 15:4,19 16:3,4 18:5 19:2 20:5 23:4,15 27:20 28:11 29:20,24 30:22 35:11 37:13 38:16 39:15 40:1,3 42:10,16 45:1 45:2,2,6 50:9 51:10,14 53:16 54:9 55:22 57:12 government's 15:7 28:9 38:23 57:20 60:7 great 53:23 ground 22:9 guarantees 59:11 guess 29:16 36:2 41:9 60:6</p> <hr/> <p style="text-align: center;">H</p> <p>half 44:8 hand 3:13,19 42:16,19 happen 12:24 57:3 happened 9:2 57:5 happens 13:4 17:24 38:14 53:11 hard 40:6 hate 49:8 hear 3:3 4:5 heartbeat 51:17 held 60:10 help 18:21 helpful 6:23 7:4 holds 42:4 home 39:16</p>	<p>honor 4:6,18 6:4 6:16 8:7 9:24 11:15 12:8,22 13:5 14:3,4 15:9 16:7,15 18:3,20 21:13 21:24 22:18 23:14 24:10 25:12 26:24 27:22 28:20 33:18 58:17 59:3 60:21 63:8,21,22 honored 14:2 honoring 18:25 Honor's 7:3 16:9 hypothesis 11:17 hypothetical 10:25 11:18 15:23,25 16:17 16:18 17:11 36:18</p> <hr/> <p style="text-align: center;">I</p> <p>idea 40:23 45:12 identical 8:1 36:18 ignore 29:1 ignored 29:5,7 iii 14:10 immediately 59:14,16 impaired 50:23 50:23 implicit 37:14 implied 30:3 implies 55:4 importance 46:8 important 5:11 8:12 15:17 16:9 18:21 impose 49:6 54:18 improvements 8:19</p>	<p>inadequate 52:3 inapplicable 25:13 incidentally 10:3 included 40:4 incorporate 55:18 incredibly 54:16 incur 14:1 Indian 3:15 55:24 indicate 23:11 individual 5:22 8:9 39:2 41:2 61:7 63:19 information 54:17 inherent 7:17 47:18 initial 28:7 initiate 23:8 injunction 30:20 injunctive 30:19 30:23 46:4 innocent 43:5 instance 25:20 25:25 41:5 60:21 integrity 58:2 intended 3:25 10:21 45:11 intends 19:6,6 43:20 intent 18:10 43:20 interest 4:15 interesting 29:20 Interior 1:4 3:5 3:14 26:19 46:2 55:9,13 55:16 57:16 internal 25:5 interpretation 18:19 29:22 interpreted 44:2 52:24</p>
--	---	---	---	---

<p>involved 54:13 involves 7:22 irrelevant 30:9 ISDA 3:22 14:11 28:14,17,22 60:22 ISDA's 3:12 issue 7:4,11 14:9 29:18 issued 8:23 item 18:14 26:18</p> <hr/> <p style="text-align: center;">J</p> <p>job 61:17 joint 23:10,23 61:24 Judge 21:2 25:15 judgment 12:20 26:6,7,20,21 26:24,25 43:22 47:24 48:2,10 48:11 57:7,16 58:7 judgments 26:25 Justice 1:17 3:3 3:9 4:3,7,12,20 4:22 5:12,14 5:25 6:11,19 6:24 7:24 8:8 8:13 9:20 10:9 10:24 11:13,21 12:3,14 13:11 13:14,17,20,23 15:1,11,22 16:2,16,18,22 17:3,7,10,16 17:20,22 18:11 18:18,24 19:5 20:10,15,19 21:1,4,7,8,18 21:25 22:4,7,8 22:13,22 23:7 24:7,11,25 25:7 26:3,16 27:13,18,23</p>	<p>28:4,13 29:1 29:10,14 30:4 30:8,11,13,24 31:1,3,4,9,20 31:23 32:8,9 32:10,13,15,18 32:21,23 33:1 33:2,8,15,21 34:15,24 35:2 35:10,17,19,21 35:24 36:3,5,8 36:11,16,17,21 37:4,10,17,22 38:4,8,15,24 39:2,3,7,10 40:2,12,17 41:13,22 42:4 42:8,19,24 43:6,9 44:10 44:12,18,22 45:8,16,23,24 46:9,12 47:5 47:10,14,23 48:1,4,18 49:1 49:10,23,25 50:1 51:5,25 52:7,12,16,22 53:3,4,15 54:1 54:19,22 55:7 55:11,21 56:6 56:11,21,25 57:9,19 58:18 58:23,24 60:6 60:13,17,25 61:7,12,15 62:3,5,12,14 62:16,19,22,25 63:13,17 64:6</p> <hr/> <p style="text-align: center;">K</p> <p>Kagan 10:24 11:13,21 12:3 12:14 15:22 16:2 17:10 25:7 48:18 49:1,10 57:9 57:19 60:6,13</p>	<p>60:17,25 61:7 61:12,15 62:5 62:25 63:13,17 Kagan's 16:18 keep 28:12 56:6 keeping 28:24 KEN 1:3 Kennedy 5:25 20:19 21:1,4,7 21:18,25 22:4 26:3 30:4,8,11 30:13,24 31:1 31:3,4 38:15 38:24 39:2 44:22 45:8,16 45:23,24 47:23 48:4 kind 12:11 24:22 25:10 34:3 50:25 63:1,5 knew 44:23 know 8:13 10:20 10:21 13:17,18 13:20,22 14:17 14:18,21 22:15 24:22 27:19 31:24 32:21 34:4,9,13 35:18 41:10 44:18,22 45:12 47:6 49:3,20 50:13,20 52:17 53:21 54:5,9 54:15 55:13,22 56:22 58:12,25 61:16 Knowing 51:7 knowledge 40:21,25 known 50:21 knows 32:1 38:12</p> <hr/> <p style="text-align: center;">L</p> <p>L 1:3 lack 44:14</p>	<p>language 6:2,12 6:13,17 10:16 11:3,5 15:6 20:20 24:12,23 29:2 30:2,23 31:2,5 39:15 39:18 40:7,18 45:17,17,18,20 45:25 46:1,7 larger 34:11 Laughter 20:24 32:17 36:10,14 60:19 63:6 law 29:3 31:14 33:25 36:6 52:2 lawful 9:3 lawfully 7:10,15 7:19 8:25 9:9 9:18 10:6 27:8 lawsuit 23:5 46:21,24 lawyer 35:13,14 37:18 40:25 leaving 58:6 left 9:15 19:21 Leiter 10:1 let's 21:11 28:1 28:1 44:23 48:9 53:17 60:15,16 liability 20:6 liable 23:16 life 12:9 light 61:11 limit 28:10,24 40:16 48:20 limitation 37:13 40:4 41:21 58:5 limitations 47:19 49:6,11 limited 22:18 25:15 37:24 limiting 46:8 line 18:14 26:18 35:6,7</p>	<p>literally 44:21 litigate 23:6 litigation 26:12 little 33:4 live 12:19 logic 27:19,24 long 57:10 59:11 look 14:21 19:4 21:21 33:5 35:14 36:17 37:21 38:16 43:19 48:18 49:11,12,18 52:19 53:18 59:7 looked 32:2 looking 25:23 26:17 38:17 lost 36:9 43:23 lot 34:8 53:17 luck 42:7 49:21</p> <hr/> <p style="text-align: center;">M</p> <p>making 7:6,7 manufacturers 12:4 mark 1:16 2:3,9 3:7 41:9 58:21 matter 1:12 5:3 12:24 16:3 19:25 23:21 25:4 28:7 35:17,19 41:25 64:10 maximum 64:4 mean 6:15,17,19 6:20,20,24,25 9:21 10:10 15:4 21:14 24:13 33:13 35:15 37:8,12 38:7,22 39:4 43:18,23 44:13 45:4 46:22,23 46:24 47:19 48:8 50:11 51:20 52:10</p>
--	--	---	--	---

<p>53:16 55:16,19 57:5,19 58:11 60:9 63:14 meaning 13:20 19:19 45:25 46:13 meaningless 45:20,21,23 46:16,21 47:15 47:16 48:5 means 11:1 28:4 41:22 48:6 58:1 meets 3:16 member 6:9 14:7 members 13:25 mention 16:23 30:5 mentioned 20:11,21 59:4 message 52:22 methodology 5:21 59:6 middle 15:6 military 42:12 million 11:6,8,8 11:10,22,25 21:11 31:15,17 34:2,4,5 36:21 36:25 37:1,6,6 38:18,19 44:23 53:18 54:10 mind 45:15 minus 26:12 minute 18:22 minutes 58:20 misgivings 51:22 missed 31:10 mistakes 50:18 50:22 model 14:11,13 moment 25:17 money 3:21 7:9 7:15,18 9:5,15 9:18 10:6 13:7</p>	<p>14:15,18 16:19 19:21,23 22:10 23:2,24 25:10 25:11 26:14 30:19 37:20 38:13 41:3,6 41:24 42:2 44:6 46:3,25 47:1,20 48:21 51:2 56:19 59:12,15,16,21 59:23 60:23 63:11,15,23 64:4 moneys 50:15 months 44:20 morning 3:4 movie 8:23 moving 15:4</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 name 19:17 Nation 6:12,13 28:2 nationwide 4:19 Navajo 1:7 3:5 49:13 near 39:16 necessarily 35:13 need 6:4 22:16 33:4 53:18,22 61:18 needs 5:21 negotiated 6:5 59:25 64:1 negotiations 51:9 never 6:8 29:20 new 5:6 26:24 43:10 normal 34:7 42:9 noted 52:15 notice 17:5 35:8 37:18,19,24,25</p>	<p>38:2 49:22 54:3 57:1 notices 56:16 notwithstandi... 19:10 23:16 29:8 number 3:17 15:14 23:21 49:19,20 54:6</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 obligate 9:10 19:6 obligated 8:25 15:19 16:4 44:25 obligation 10:5 11:25 12:1 14:8 15:8 18:14,25 44:7 44:13 45:19 63:15 obligations 18:8 25:21 obviously 43:19 50:5 51:20 53:2 58:6 occasionally 49:9 odd 56:4 offer 23:3 offered 23:1 Office 21:19 officer 25:23 26:4 official 45:13 officials 9:4 10:8 oh 21:23,23 30:7 33:8 37:17 48:25 52:16 61:16 okay 17:22 32:3 32:7,13 37:2 41:7,15 54:4 56:2 OMB 24:4</p>	<p>once 9:14 29:21 63:22 ones 46:16 ongoing 53:7 open 58:6 operates 39:21 58:1 operating 51:1,2 53:17 operational 60:24 operations 7:17 opinion 30:6 38:8 40:22 opportunity 19:16 20:3 43:24 50:17 opposed 58:9,10 opposite 35:5 options 46:8 oral 1:12 2:2,5 3:7 29:12 order 46:3,14 47:2,21 52:25 57:7 Ordinarily 30:22 ordinary 12:10 12:11 13:2 18:4 25:4 30:18 47:3 ought 43:15 54:8 57:24 outside 57:16 58:4 overhead 20:8 61:1</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 5:1 23:10 31:24 32:20,23,25 61:23 paid 5:5,7,9 11:19 31:16 32:2 34:1,5</p>	<p>40:20 41:3,4,6 41:7,17 46:11 48:12 57:4,6 61:25 part 10:17 14:2 21:9 31:10 50:8,12 59:3 particular 5:6 8:3 30:17 34:22 40:4 47:21,22 49:15 49:23 50:1,3 58:3 particularly 9:25 28:12 parties 43:20,21 60:11 partly 15:22 party 4:15 17:5 44:15 path 51:16 pay 3:22 4:23 6:8,15 7:10,16 7:19,21 8:24 9:16,18 10:6 10:22 11:24 12:1 13:7,24 15:8 17:1 18:1 18:1 20:7,17 25:20,25 26:25 27:3,7,9,21 28:5,15,22,23 29:2 42:20 46:4 56:3 paying 7:20 8:6 19:1,8 payment 42:21 payments 36:25 pays 4:9,10 36:12 peculiarity 43:13 people 4:24 17:24 19:17 36:18 37:5 50:22 51:2,3,3 55:12</p>
---	---	---	---	--

percent 5:4,9 6:9 8:6 50:19 51:3,4 56:17 59:25	50:4 51:5,12 52:6,10,14,17 53:11,25 54:21 55:1,10,14 56:10,14,24 57:2,9,18,22 58:19,25	prevent 16:14 prevents 58:3 previous 59:12 59:15	25:23 33:23 43:11	62:17 63:18,20 63:24,24 64:3
perfect 32:6 58:6	phrases 31:7	primary 38:9	prospective 24:1	questions 36:13 58:16
perform 14:8 27:5 44:8,13	place 30:16 39:23 50:14 62:15	principal 12:13 21:8 22:20 59:10 60:21	protect 42:13 58:1	quickly 33:3
performance 44:15,19,20 56:12,13,15 59:2	places 47:18	principle 8:4 9:9 29:19	protects 4:15 47:5	quite 8:10 33:21
performed 27:6 44:21 56:1 58:12	plain 29:23	principles 16:10 52:24	protestations 42:16	quote 33:10,11
performing 56:25	play 30:11	pro 4:10 5:20 14:20,22 59:5 61:13,19 62:7 62:23	provide 15:15 19:17 41:7 58:12	<hr/> R <hr/>
period 35:12 49:17	please 3:10 29:15	problem 9:21,23 12:9 18:5,13 38:23 43:3,4 44:18 47:21 50:8 51:24 52:21,23 54:3 59:7	provided 3:16 60:23	R 1:16 2:3,9 3:1 3:7 58:21
persons 40:19	plus 9:22	process 26:17 58:2,3	provides 59:22	Ramah 1:7 3:5 49:13
perspective 43:25	point 14:14,19 15:6,18 39:8 53:2 56:17 59:1	processes 28:9	providing 13:12	range 62:9
Petitioners 1:5 1:18 2:4,10 3:8 58:22	pointed 10:15	procurement 12:10 13:2	provision 19:10 29:8 40:9 52:2 54:6	rata 4:10 5:21 14:20,22 59:5 61:13,19 62:7 62:23
Phillips 1:19 2:6 29:11,12,14 30:7,10,16,25 31:3,6,19,21 32:7,9,12,14 32:19,25 33:5 33:9,17 34:10 34:21 35:1,9 35:17,23 36:2 36:15,20 37:3 37:8,12,19 38:3,7,22 39:1 39:6,10 40:6 40:14 41:12,15 42:1,8,18,23 43:2,7,17 44:17 45:4,10 45:22,24 46:9 46:10,22 47:8 47:12,17,25 48:1,3,6,18,25 49:5,12,25	points 15:3	program 6:21 11:2,6 22:20 22:21 60:24	provisions 4:1 7:14 12:10 13:3	reaction 35:21
	police 49:15	promise 27:5,6 27:7,11 28:17 28:22,23,25 60:21	purchase 11:2	read 8:15 14:11 31:9,23,24,25 32:4,4,5,5 33:3 33:24,25 34:9 35:25 36:23 37:8 49:7
	policies 61:23	promised 10:6 27:9	purpose 33:10 38:9 44:5 46:6	reading 32:6
	policy 4:19,20 14:19,25 35:18 35:20 59:9,10 59:22 61:10,25 63:25	procurement 12:10 13:2	put 23:1 25:16 39:1 48:17 49:21 54:14 55:5	real 12:9 16:24 27:24 54:18
	position 22:1 26:4 38:25 46:13 48:17	program 6:21 11:2,6 22:20 22:21 60:24	putting 17:4 35:20 37:16,18 43:3,4	reality 26:17 43:24 50:15
	posits 13:5	promise 27:5,6 27:7,11 28:17 28:22,23,25 60:21	<hr/> Q <hr/>	realized 43:12
	potentially 54:13	promises 28:11 28:14	quarrel 9:8	really 10:25 16:3 19:1 22:7 24:7 28:17 57:23
	power 42:11	promulgated 4:19	question 5:17 7:3 11:1,9 16:9 17:23 18:10 20:20 21:7,15 24:20 33:22,22 35:20 36:3,6,9 39:10,13,17 41:9 43:10,15 47:14 54:18 55:4,7 57:10 57:22 59:20 60:18 62:5,13	reason 12:8 24:19 26:8 38:13 50:12
	practical 12:24	properly 53:1		reasonable 22:19,23 34:12 43:19 62:10
	practice 34:7 35:25 36:1	proportionate 61:9		reasonably 55:12
	prefer 9:4 52:12	proposed 3:15 23:12		reasoning 25:15
	preferable 55:25	proposition 10:3		reasons 23:21
	President 23:18 24:5			REBUTTAL 2:8 58:21
	pretty 25:1 33:3 48:19 53:13			

<p>recall 37:23 receive 58:15 received 56:16 59:15 recognize 44:1 record 50:16,17 recovering 41:18,24 recovery 57:8 Redbook 29:23 30:13,24 31:1 31:4,6,7,10,12 31:18,19,21 32:4,12,22 33:7,19 34:4 41:16 refer 31:1,5 reference 7:25 29:21 55:15 61:22 referring 32:11 refers 35:6 refresher 33:4 refuse 6:15 regard 3:17 28:12 regions 50:11 51:1,8 regular 19:18 Regulations 28:10 reimbursed 29:3,4 relationship 4:1 relevant 24:7,10 reliance 48:14 relief 30:19,23 46:5 58:4 rely 20:11 relying 39:7 remaining 58:20 remains 34:14 remote 54:16 repeat 36:6 reports 23:22 request 51:15 requested 23:17</p>	<p>23:18 require 20:1 45:11 required 3:14 13:1 24:2,2 25:14 38:2 41:6 requirement 51:13 requirements 3:16 28:9 44:5 requires 27:4 requiring 45:13 reserve 28:21 resolution 59:25 resolve 3:25 53:1 resources 26:12 respect 17:9 61:1 respectfully 63:7,7 Respondent 6:10 9:19 14:7 14:24 Respondents 1:20 2:7 5:2 22:1 23:14 26:3 27:9 29:13 60:2 64:2 response 12:2 responsibility 55:22 responsive 62:4 restitutionary 48:15 restriction 7:20 result 3:12 16:11 20:5 retain 28:16 re-jigger 47:4 right 4:11,25 5:18 6:3,22 7:13 8:15 11:12,19,23 13:12 16:1,12</p>	<p>16:21 17:2,6 20:23 21:6,12 22:16,25 24:10 25:3,7 26:8 28:16,19 34:19 35:9 36:20 37:3 38:3,21 39:1,6 41:25 42:18,23 44:13 51:12 52:9,10 55:14 56:10,24 57:18 59:19 60:13,20 61:1 61:4,8,13,19 61:22 62:21,24 63:2,2,16,19 63:25 rightly 42:11 rights 11:14 50:23 60:8,11 risk 15:6 river 8:19,21 ROBERTS 3:3 22:8,13,22 26:16 29:10 32:23 33:1 53:4,15 54:19 54:22 55:7,11 58:18 62:3 64:6 role 30:11 rule 39:24 42:25 43:1,10,14 ruling 5:19 run 22:21 runs 25:7</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1 Salazar 1:3 3:4 satisfied 44:5 satisfy 46:25 saw 31:9 saying 10:3,5 22:4 25:8 28:13,17 33:2 33:13 40:24</p>	<p>42:20 56:1,7 says 4:20 11:3 13:24 14:2,7 16:19,25 17:4 19:6,10,23 26:4,13 27:15 27:25 28:18,22 29:2,3,7,23 31:12,13,14 32:1,14 33:24 34:1,5,10,16 34:21 35:12 36:6,7,24 37:5 37:7 38:19 40:10,16,22 41:23 42:6,11 47:19 49:20 52:2 53:18 54:9 57:12 61:24 Scalia 6:11,19 6:24 9:20 10:9 24:7,11,25 36:8 37:22 38:4 40:2,12 42:4 43:6,9 47:5,10 51:25 52:7,12,16 scheme 3:13 12:25 13:2 16:8 18:5,23 25:13 26:9 46:20 49:2 50:14,25 51:7 51:10 57:24 58:1 59:5 schemes 15:19 schizophrenia 51:21,23 second 41:1 50:12 Secretary 1:3 3:4,14,18,21 3:25 4:2,4,7,9 4:19 5:20 6:6 6:15 7:10 10:22 14:15,19</p>	<p>16:19 19:19,20 19:22 20:1,17 24:15 27:11 46:24 47:20 52:7 53:19 60:23 61:16 62:1,4,6,20 63:3,14,23 64:5 Secretary's 61:10 section 14:10,13 29:7 see 15:24 35:14 53:9 59:8 seek 14:15 30:19 30:22 58:4 self-determin... 3:15 20:1 send 56:18 sending 56:17 sense 26:13,16 53:17 58:6 separate 23:5 sequitur 16:14 seriously 21:22 services 13:12 13:24 14:8 19:17 58:12 set 7:14 33:23 49:2 55:16 settled 41:16 share 4:10 61:9 61:13,20 shift 47:20 57:15 shortfall 11:10 12:17,20 show 35:25 showing 36:5 shows 55:24 side 45:7 56:2 sign 22:13 27:20 38:4 signed 13:23 14:7 51:7 56:8 significance 30:17</p>
--	---	---	---	---

<p>significant 30:11 46:7 signing 50:9 signs 19:20 similar 6:11,17 15:3 simple 34:6 55:19 simply 40:10 48:10 55:21 single 27:18 sit 55:5 situation 8:2 10:18 12:16 16:18 30:18 32:2 38:10 39:20 42:9,15 43:1 47:11,13 48:19 58:14 situations 54:16 56:18 sliced 12:7 Slope 15:2 small 18:1 Solicitor 1:16 solution 60:3 solutions 62:10 solve 51:25 solves 18:5 sophisticated 46:17 sophistication 26:12 sorry 4:5 16:16 31:3 33:6,17 35:1 47:25 53:3 56:2,6 62:3 sort 15:23 38:23 45:15 sorts 42:13 Sotomayor 4:3,7 4:12,20,22 7:24 8:8,13 13:11,14,17,20 13:23 15:1,11 18:11,18,24</p>	<p>19:5 27:13,18 27:23 28:4,13 29:1 33:15 42:8,19,24 44:10 51:5 52:22 55:21 56:6,11,21,25 58:24 62:14 source 46:3 47:1 sources 30:19 Southern 45:5 special 37:15 42:25 43:1 specific 20:16 21:17 34:22 42:2 45:16,18 49:6,10,19,21 54:6 specifically 34:16 47:19 specified 6:1 spend 9:5,11 16:19 27:15 50:12 63:24 64:5 spending 58:2 spent 38:2 staff 55:4,8,9 stand 25:22 standard 25:9 start 29:16 started 15:18 stated 26:1 statement 58:25 States 1:1,13 27:1 40:1 49:13 statute 6:14,21 16:19,25 19:14 22:19 36:24 45:14 49:2 52:4 55:18 statutes 15:14 15:14 statutory 3:13 3:20 7:20 10:23 15:19</p>	<p>16:8 18:23 25:13 stay 39:22 stop 8:22 13:12 14:13 straight 41:16 straightforward 18:6 60:18 strange 63:1 strict 16:13 28:8 stuck 27:14 46:17 studies 23:22 subject 10:9,10 10:13,15 11:4 14:9 15:5,15 17:4,14,17 19:11 20:4,16 27:25 30:1 31:13,22 33:25 34:17 35:12 36:19 37:14,16 38:9 39:14 40:10,15,24 59:17 submitted 64:8 64:10 subsequent 10:1 substantial 50:16 63:12 suddenly 41:14 sue 26:6,6,12 46:14,17 47:7 47:7 sues 46:15,15 47:16 sufficient 8:24 23:6,17,19 36:12 44:15 62:8 suggest 39:18 43:18 suggesting 54:20,22 sum 21:17 25:15 summary 43:22 sums 21:10 27:7</p>	<p>63:12 supersede 45:18 support 3:22 5:4 5:9 23:2 26:10 28:15 48:11 49:14,16 54:6 54:10 58:5 61:3 63:10 suppose 11:1 44:22,23 55:11 supposed 48:16 60:9 Supreme 1:1,13 sure 7:12 10:18 13:7 35:4 38:5 44:3 47:12 48:25 53:5 60:16 Sutton 10:1 32:5 34:25 35:3,4 42:3 system 5:15 14:20 15:1 53:16 62:14</p> <hr/> <p style="text-align: center;">T</p> <p>T 2:1,1 take 12:12 18:14 21:21 24:2 26:3 30:19 41:15 47:1,21 51:13 52:8 takes 15:6 39:25 talk 30:13 41:9 talking 34:15 50:13 54:15 talks 31:21,22 33:7,9 tell 18:25 31:11 34:19 telling 42:21 tells 39:24 term 44:14 terminate 18:6 terminates 13:6 termination 13:3</p>	<p>terms 23:6 thank 29:10,14 33:1 58:17,18 58:23 64:6 theirs 51:3,4 theory 27:15 they'd 9:4 thing 6:25 10:21 26:24 38:2 41:1 56:4 things 10:14 11:16 12:23 42:13 43:18 57:3 think 3:24 5:1 5:10 7:3 8:10 8:14,18 9:24 11:17 15:13 16:12 18:20 20:20 23:20 24:17,25 25:12 26:9,23 27:6,8 27:9 29:9 30:2 30:4,17 33:6 33:19 34:17 38:4 39:11,13 39:15 42:3 43:18 47:5,15 47:18 48:23 52:10,14 53:4 53:4 55:1,2,3 57:10,22 60:2 60:3 61:12,14 61:19,21 62:4 62:9 63:14,17 63:25 64:5 thinks 22:25 63:14 third 36:7 thought 5:23,23 7:12,16 16:17 16:24 21:1 35:6 52:22 56:7 thousand 8:18 three 52:20 time 5:19 8:23</p>
---	---	--	---	--

<p>20:22 28:21 36:7 39:23 44:5 49:24 51:9 56:8 times 13:10 26:2 told 37:13 45:24 total 3:17 49:17 63:23 totaling 37:6 totality 52:4 transparency 59:8 Treasury 25:25 26:15 tremendously 20:8 tribe 3:15 5:8 6:4,6 19:16,21 20:2,9 22:9,25 38:16 39:2 43:16 44:23,25 46:14,15,15 51:15 53:18 55:24 59:13 61:8 63:2,4,19 tribes 5:22,23 13:11 14:21,23 18:25 20:7 26:11 29:4 38:17 42:9 43:11 47:6 48:7,21 54:12 54:15,21 56:1 56:21,23 57:15 57:25 58:8,25 59:6,24 60:1,4 60:8 61:16,18 62:10 63:11,11 64:1 tribe's 43:25 tribe-by-tribe 54:1 tried 21:14 28:8 true 27:13 28:7 40:21 truth 50:21 try 10:24 53:20</p>	<p>trying 18:4,23 18:24,25 21:16 24:20 35:2 turn 24:6,6 46:2 turned 23:24 turns 11:7 12:16 17:25 two 3:12 28:14 53:19 57:3 type 8:5 25:13 typically 16:25 53:11</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ubiquitous 10:17 ultimately 18:10 24:19 48:6 57:4 unclear 57:23 uncommon 47:4 underscore 10:20 15:17 understand 5:11 8:12 18:21 23:9 24:11 36:3 46:12 53:21 60:7 understanding 5:14 7:3 12:14 understood 9:25 10:2,5 53:6 undisputed 6:7 7:8 uniform 5:20 59:5 unique 16:8 30:21 42:15 43:1 United 1:1,13 27:1 40:1 49:13 unlimited 57:14 unobligated 7:9 unsophisticated 47:6 unusual 19:14</p>	<p>42:9 unusually 23:4 upsets 41:14 upsetting 51:6 use 3:21 4:13 7:16 33:6 35:2 46:4 59:16 63:3 usually 53:13 60:11 Ute 45:5 U.S.C 16:14</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:6 3:5 14:13 validly 26:25 varies 20:8 view 38:15 45:3 57:20 60:14 violates 45:14 violation 13:8 17:19 27:4,4</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 53:9 want 4:13 10:20 16:9 19:15 22:9 30:5 31:24 34:4,9 36:6 37:4,6 41:13 48:20 51:16,18,18 57:11 59:17 60:4 wanted 5:23 15:24 19:14,25 41:10 57:11,12 57:14,15,20,23 wants 20:2 51:10 Washington 1:9 1:17,19 wasn't 9:20 20:15 way 4:1 5:24 11:4 18:6 22:18,23 25:4 35:5 44:1</p>	<p>48:23 49:4,5 51:12,23 55:2 55:17 57:25 ways 18:12 51:2 52:20 55:19,20 Wednesday 1:10 weeks 59:14 went 41:2 43:22 we'll 3:3 19:19 53:20,22 61:17 61:18 we're 9:8 11:18 13:1 14:3 18:25 19:1,2 19:18 24:2 25:14 27:25 28:14,16 29:2 35:4 42:20,21 48:13,16 49:20 50:14 54:24 56:2,17,18 59:9 60:16 64:2 we've 27:6 38:16 44:21 49:21 50:21 58:12 60:10 63:10 wharf 9:6 wish 36:8 word 4:13 20:21 words 17:16 33:11 36:19 37:16,18 53:8 61:15 work 14:22 22:17 world 16:24 17:22,23 24:13 worried 14:14 worry 26:6 wouldn't 41:25 44:11 52:8 54:2 wrap 45:15 write 41:13 51:11</p>	<p>wrong 34:20 35:24 60:2 64:2 wrote 40:23</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,8 29:2 31:15,17 40:16</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year 3:19 5:6 14:1 21:10,10 21:17,17 23:24 38:11 44:19 47:22 49:23 50:2,6,7 56:19 57:5 58:3 59:13,15 years 5:16 14:21 35:12 50:22 59:5</p> <hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$1 37:6 \$10 11:8 \$100 42:5 54:10 \$100,000 17:25 22:14,15 \$150,000 49:16 \$174,000 49:20 \$2.3 63:9 \$24,000 49:21 \$3 36:25 37:1 \$37,000 8:21 \$4 34:2,4,5 37:6 \$400 42:7 \$500 42:6 \$80,000 22:11 22:16 \$9 11:8,22,25 \$900,000 24:13 24:15,16 25:1 \$95 21:11 38:18 38:19</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>0 5:4 51:4</p>
---	--	--	--	---

1	6			
18:6 14:10,13	6-28 33:7,19			
1.3.78 54:7	6-44 32:12,22			
10 5:1 11:6,7,9	6-45 34:10			
10:11 1:14 3:2	63 54:7			
100 6:8 22:24				
59:25	7			
11-551 1:5 3:4	75 56:17			
11:08 64:9				
12 50:11 51:1,2	8			
51:8	80,000 22:23			
120-plus-year...				
39:22	9			
123 61:23	9 5:1			
15 17:24	95 44:23			
1501 16:14				
18 1:10				
1994 3:20 5:20				
63:9				
2				
2 32:12 33:6,7				
33:19 59:14				
2006 5:20 14:19				
59:9				
2012 1:10				
210 23:10				
29 2:7 33:7,19				
3				
3 2:4				
300 51:3				
31 16:13 32:25				
330 54:12				
352 5:9				
4				
4 58:20				
40 50:19				
40-some 8:18				
450j-1(b) 19:10				
29:7				
5				
50 15:12				
50-odd 15:2				
58 2:10				