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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9                             Washington, D.C.

10                            Wednesday, April 18, 2012

11

12              The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 10:11 a.m.

15   APPEARANCES:

16   MARK R. FREEMAN, ESQ., Assistant to the Solicitor

17      General, Department of Justice, Washington, D.C.;

18      on behalf of the Petitioners.

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

20      the Respondents.

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1              P R O C E E D I N G S

2                                        (10:11 a.m.)

3              CHIEF JUSTICE ROBERTS:  We'll hear argument

4    this morning in Case 11-551, Salazar, Secretary of the

5    Interior v. Ramah Navajo Chapter.

6              Mr. Freeman.

7              ORAL ARGUMENT OF MARK R. FREEMAN

8               ON BEHALF OF THE PETITIONERS

9              MR. FREEMAN:  Mr. Chief Justice, and may it

10   please the Court:

11             The funding dispute in the -- in this case

12   is the result of two distinctive features of the ISDA's

13   statutory scheme.  On the one hand, Congress has

14   required the Secretary of the Interior to accept every

15   self-determination contract proposed by an Indian tribe,

16   provided that the contract meets the requirements of the

17   Act, without regard to the total number of contracts

18   into which the Secretary must enter.

19             On the other hand, in every fiscal year

20   since 1994, Congress has enacted an explicit statutory

21   cap on the amount of money that the Secretary may use to

22   pay contract support costs under the ISDA and under

23   those contracts.

24             Now, we think under the circumstances,

25   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, 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  in 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 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:  Lawfully available subject

10   to 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 contracts 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:  Because, 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?  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:  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:  So 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:  No, 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 cutback.

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    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

24

 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

26

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 could 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 Regulation, that limit

11   the ability of the government to make 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

29

 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 that 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.  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 one.

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.  And 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.  Ferris -- 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 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 was very careful to point out that there

9    were funds to cover the cost --

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 what 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 is 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?

41

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, is 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.  So the reality

25   is, is that from the tribe's perspective, they

43

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 their 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

44

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 set up 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    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:  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 receive 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

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 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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