No. 23-_____

IN THE
Supreme Court of the United States

INDIANA MUNICIPAL POWER AGENCY,
MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY
COMMISSION, NORTHERN ILLINOIS MUNICIPAL POWER
AGENCY, AMERICAN MUNICIPAL POWER, INC.,
ILLINOIS MUNICIPAL ELECTRIC AGENCY, AND
KENTUCKY MUNICIPAL POWER AGENCY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a payment obligation imposed by Congress on the federal government under a money-mandating statute and specifically exempted from later reduction can be reduced, without congressional repeal, by agencies based on administrative interpretations of later-enacted statutes that make no reference to the payment obligation contained in the earlier statute.

2. Whether a statutory provision creates a contractual obligation when its language and the parties' course of dealing reflect an intent to contract by the government.

PARTIES TO THE PROCEEDINGS

Petitioners Indiana Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Northern Illinois Municipal Power Agency, American Municipal Power, Inc., Illinois Municipal Electric Agency, and Kentucky Municipal Power Agency were the plaintiffs in the Court of Federal Claims proceedings and the appellants in the court of appeals proceedings.

Respondent United States of America was the defendant in the Court of Federal Claims proceedings and the appellee in the court of appeals proceedings.

RELATED CASES

Indiana Mun. Power Agency, et al. v. United States, No. 2022-1377 (Fed. Cir.) (judgment entered Feb. 17, 2023)

Indiana Mun. Power Agency, et al. v. United States, No. 20-2038C (Fed. Cl.) (judgments entered July 23, 2021 and Nov. 15, 2021)

Salt River Project Agricultural Improvement District v. United States, No. 1:21-cv-01519 RAH (Fed. Cl.), also challenges the sequestration of payments due under the Build America Bonds program. That case has been stayed by the U.S. Court of Federal Claims pending resolution of this appeal.

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Petitioners Indiana Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Northern Illinois Municipal Power Agency, American Municipal Power, Inc., Illinois Municipal Electric Agency, and Kentucky Municipal Power Agency petition for a writ of certiorari to review the Federal Circuit's judgment in this case.

OPINIONS BELOW

The Federal Circuit's opinion (App. 1a-4a) is reported at 59 F.4th 1382. The Court of Federal Claims' opinions (App. 5a-16a, 17a-52a) are reported at 156 Fed. Cl. 744 and 154 Fed. Cl. 752.

JURISDICTION

The Federal Circuit entered judgment on February 17, 2023. On May 10, 2023, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including July 13, 2023. App. 103a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced at App. 53a-102a.

INTRODUCTION

This case arises from a multi-billion-dollar broken promise by the federal government. In 2008, the United States faced its most severe financial crisis since the Great Depression. Hoping to jumpstart the economy, Congress passed the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 ("ARRA"). ARRA introduced the Build America Bonds ("BABs") program, designed to entice state and local governments and their instrumentalities, like petitioners, to invest in infrastructure projects of long-term benefit to the Nation using taxable bonds instead of tax-exempt bonds. In return,

Congress promised to refund enough of those otherwise unexpected tax revenues to cover 35% of interest payments for the life of the long-term BABs. Congress provided that the federal government would make a direct cash payment to issuers to refund 35% of each interest payment made to bondholders in the BABs program. Petitioners, and many other state and local government entities, accepted Congress's offer, issuing more than $181 billion in BABs. Petitioners specifically issued more than $4 billion in BABs and used the proceeds to invest in capital infrastructure projects that created thousands of new jobs, just as Congress intended.

Four years later, after both parties had been holding up their ends of the bargain, the federal government reneged. Even though Congress had not repealed ARRA, federal agencies – specifically, the Office of Management of Budget ("OMB"), the Department of the Treasury ("Treasury"), and the Internal Revenue Service ("IRS") – decided in 2013 to stop providing the promised 35% refund to BABs issuers and instead to keep much of the pledged tax revenue for the government. Given their obligations to the holders of these 30+ year bonds, issuers were left holding the bag. Petitioners could not predict this bait-and-switch, and so they did not budget for it. Nor did Congress explain why it would have intended the government to stop making those refund payments. When petitioners sought to hold the government to its promise and recover their massive unanticipated costs, the Court of Federal Claims and the Federal Circuit dismissed their case.

These decisions threaten "a principle as old as the Nation itself: The Government should honor its obligations." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1331 (2020). The questions

presented by this case are: first, whether the federal government must honor its obligations under money-mandating statutes unless those obligations are lawfully repealed by Congress; and, second, whether a statutory provision creates a contractual obligation when its language and the parties' course of dealing reflect an intent to contract by the government, a question the Court has left open in previous cases. If this Court does not accept review to answer these questions, the ability of the federal government to evade congressional spending directives will be enhanced.

Resolution of these questions holds profound national importance, particularly in light of the stakes of this case. The price to petitioners of the federal government's broken promise is projected to amount to $96 million, and the price to all state and local governments totals more than $2 billion. Even more broadly, the consequences of this case extend to countless other existing and future statutory and contractual promises by the federal government. The Federal Circuit's exclusive jurisdiction over similar claims against the federal government means that all future challenges are funneled into a court that has closed its door on such claims. Unless the Court reverses the Federal Circuit, the government's refusal to honor its obligations under ARRA creates a roadmap for future agency practices that benefit the federal fisc but conflict with congressional commands. Because agencies should not be permitted to exercise such power in the face of congressional direction, this Court should grant certiorari.

STATEMENT

A. Statutory History

1. ARRA

In 2009, Congress enacted ARRA to pull the United States out of severe economic decline. Congress intended ARRA to stimulate the economy by "[m]aking supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization." Preamble, 123 Stat. 115; *see also* §§ 3(a), 1531, 123 Stat. 115-16, 358-60 (ARRA is intended to "preserve and create jobs and promote economic recovery," "invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits," and "stabilize State and local government budgets").

In the wake of the financial crisis, the federal government struggled to finance capital projects. ARRA therefore created two types of subsidized, taxable bonds. Congress intended for those "Build America Bonds" to lower the cost of borrowing for state and local governments, incentivize capital investments, and generate federal tax revenue. The type of BABs at issue here, called "direct payment BABs," offered issuers (here, petitioners) a direct cash payment by Treasury to cover 35% of each interest payment from issuers to BABs holders over the life of the BABs.[1]

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[1] The other type of BABs, called "tax-credit BABs," entitled bondholders to a tax credit of 35% of the interest received on their BABs. Tax-credit BABs proved far less popular than direct-payment BABs, which accounted for more than 88% of BABs issued across 2009 and 2010. *See* IRS, *Municipal Bonds, 2009*, Statistics of Income Bull. (Fall 2011), https://www.irs.gov/pub/irs-soi/11ebfallbulmunbond.pdf; IRS, *Municipal Bonds, 2010*,

ARRA required issuers of direct-payment BABs to meet five requirements: (1) issue a state or local bond that otherwise would be tax-exempt, (2) issue the bond before January 1, 2011, (3) use the proceeds for capital expenditures, (4) make an irrevocable election to designate the bond as a BAB, and (5) make an irrevocable election to accept direct payments in lieu of tax credits to the bondholders. § 1531(a), 123 Stat. 358-59. In exchange, ARRA mandated that issuers "shall be allowed a credit with respect to each interest payment under such bond which shall be payable by the [Treasury] Secretary [who] . . . shall pay (contemporaneously with each interest payment date under such bond) to the issuer of such bond . . . 35 percent of the interest payable under such bond on such date." § 1531(b), 123 Stat. 359-60 (adding 26 U.S.C. § 6431 (repealed 2017)).

In other words, issuers would pay 100% of interest payments directly to BABs holders, but then apply for and receive a cash payment from the federal government equal to 35% of those interest payments as refundable tax credits. The 35% cash payment was key to the success of the BABs program, because it provided issuers with a lower cost of borrowing compared to traditional tax-exempt bonds. Taxable BABs also appealed to a wider range of investors than traditional tax-exempt bonds.

Congress established funding for the BABs program by amending the Internal Revenue Code ("IRC") to treat BABs payments as an "overpayment" of tax, 26 U.S.C. § 6401(a), which the Treasury Secretary "shall . . . refund," *id.* § 6402(a). In ARRA, Congress also amended the permanent appropriation for "[r]efund of

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Statistics of Income Bull. (Spring 2013), https://www.irs.gov/pub/irs-soi/13ebsprbulbonds.pdf.

internal revenue collections" to include BABs payments due under § 6431. *See* 31 U.S.C. § 1324(b)(2).

To ensure the success of the BABs program, Congress needed to reassure potential issuers that the federal government would in fact make the promised cash payments. Congress therefore expressly excluded ARRA's money-mandating obligations from spending limitations by specifying that "[a]ll applicable provisions in [ARRA] are designated as an emergency for purposes of pay-as-you-go principles." § 5(b), 123 Stat. 116. That provision effectively exempted BABs payments by Treasury from any required offset in spending or any prohibition on expanding the federal deficit.

After enacting ARRA in 2009, Congress did not again expressly address BABs payments until 2017, when it repealed § 6431, but made that repeal applicable only "to bonds issued after December 31, 2017." Act of Dec. 22, 2017, Pub. L. No. 115-97, § 13404(d), 131 Stat. 2054, 2138. All of the BABs in this case were issued prior to that date.

2. Sequestration

In 2011, Congress enacted the Budget Control Act ("BCA"), which reinstated and amended the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, 99 Stat. 1037, 1038 ("BBEDCA"). The BCA authorized reduction of certain government spending through sequestration of "discretionary appropriations or direct spending law." 2 U.S.C. § 900(c)(2). "[D]irect spending" refers to "(A) budget authority provided by law *other than appropriation Acts*; (B) entitlement authority; and (C) the Supplemental Nutrition Assistance Program." *Id.* § 900(c)(8) (emphasis added).

In 2013, Congress passed the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313

(2013) ("ATRA"), which further amended BBEDCA to require that sequestration be implemented in 2013. § 901(b), 126 Stat. 2370. Treasury subsequently stopped making direct cash payments to BABs issuers to cover the full 35% of interest payments, maintaining that these payments qualified as direct spending subject to sequestration under BBEDCA, BCA, and ATRA.

None of BBEDCA, BCA, or ATRA expressly addresses whether the BABs program is exempt from or subject to sequestration. Nor did any of those statutes amend the provision of the IRC providing for express tax-refund credits payable to BABs issuers like petitioners. But all three statutes expressly prohibit sequestration of funds from programs funded by "appropriation acts."

B. Factual And Procedural History

Petitioners are public-sector power providers. App. 21a. ARRA's BABs program specifically intended to incentivize state and local governments and their instrumentalities, like petitioners, to partner with the federal government in "investment in infrastructure" of long-term benefit to the Nation. *See* App. 19a; Am. Compl. ¶ 11; § 3(a), 123 Stat. 115-16. Under this money-mandating statute, petitioners agreed to make capital expenditures using taxable BABs instead of tax-exempt bonds. In exchange, Congress mandated that Treasury "shall pay (contemporaneously with each interest payment date under such bond) to the issuer of such bond . . . 35 percent of the interest payable under such bond on such date." § 1531(b), 123 Stat. 359-60; *see* Am. Compl. ¶¶ 19-21. This agreement was intended to "lower the cost of borrowing for state and local governments" while also raising tax revenue for the federal government. App. 19a.

The federal government repeatedly affirmed its commitment to BABs issuers. Am. Compl. ¶ 26. A Treasury press release dated April 3, 2009, which references a 2009 IRS guidance document regarding BABs, declared that "issuers can begin issuing these bonds with confidence about how these federal payments will be made." U.S. Dep't of the Treasury, *Build America Bonds and School Bonds* (Apr. 3, 2009), https://home.treasury.gov/news/press-releases/tg81; *see* Am. Compl. ¶ 27. Again, in March 2010, a report issued by the Treasury Inspector General for Tax Administration ("IG") affirmed that Congress had "not given a limit" to BABs, which were "not limited in the total dollar amount that can be issued." *Id.* ¶ 28. In June 2011, another report issued by the IG confirmed that issuers of BABs, like petitioners, would "receive the credit payment from the Federal Government *over the life of the bond*." *Id.* ¶ 29 (emphasis added in Amended Complaint).

Petitioners and other state and local governments responded how Congress designed and intended in ARRA. In reliance on the federal government's promises, petitioners issued more than $4 billion in qualifying direct-payment BABs prior to January 1, 2011 and used the proceeds to invest in critical infrastructure projects of long-term benefit to the public. *See* App. 21a; Am. Compl. ¶ 30. Petitioners complied with all five requirements for direct-payment BABs. They irrevocably elected to accept direct payments from the federal government as issuers of the BABs, in lieu of tax-exempt bonds or tax credits being claimed by those who had invested in the BABs; and

committed all the funds to capital investment projects. Am. Compl. ¶¶ 12-14, 30, 32-34.[2]

Along with stimulating the economy and providing thousands of much-needed jobs, petitioners' BABs funded capital investments in important projects that provide safe and reliable electric power to more than 300 municipalities serving nearly 1.8 million customers in nine States. *See* App. 21a; Am. Compl. ¶ 31. Notably, petitioners' BABs funded construction of several coal-energy facilities and run-of-the-river hydropower projects, which created thousands of jobs and produced cleaner electricity for petitioners' States. *Id.* ¶¶ 42-44, 58, 60, 74-76. Petitioners' investments therefore fulfilled the purpose of ARRA by preserving and creating jobs, promoting economic recovery, and making technological advances in critical infrastructure that will provide economic benefits to the public for years to come. *See* § 3(a), 123 Stat. 115-16; Am. Compl. ¶ 31. In exchange for using BABs to fund these important projects and accomplish Congress's goals in enacting the BABs program, petitioners are "entitled to a refund from the [IRS] of 35 percent of the interest payable under the BABs." App. 17a.

At first, the federal government held up its end of the bargain. Between January 2010 and the end

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[2] This irrevocable election forced issuers to make tradeoffs that directly impacted their financial liabilities. The government's promise to refund to issuers 35% of each interest payment made by issuers to bondholders incentivized issuers to elect direct-payment BABs in lieu of either tax-exempt bonds or tax-credit BABs, and therefore locked issuers in to making full interest payments to bondholders for the entire life of the long-term BABs. Even though the government eventually reneged on its promise to refund 35% of those interest payments, issuers cannot elect to re-designate the bonds and must continue making full interest payments to bondholders.

of 2012, the government made direct payments to petitioners equal to 35% of the interest payments due on petitioners' BABs. *See* App. 21a; Am. Compl. ¶ 36.

But, beginning in January 2013, "the United States acting through the Treasury Department and the IRS, stopped making payments to [petitioners] based on the ARRA's 35-percent rate." App. 17a; *see* Am. Compl. ¶¶ 37-39. The federal government admits that the BABs program "remains in effect for these bonds" and petitioners' "bonds continue to qualify for the Direct Payment BAB program." U.S. C.A. Br. 38. The government also does "not dispute at this juncture that [ARRA] creates an obligation on the [federal] government to pay." *Id.* at 26-27. Nevertheless, since January 2013, the government "has been paying issuers of BABs [including petitioners] at rates reduced by the amount of funds determined by OMB to be covered by sequestration," which has been extended through 2030.[3] App. 23a.

The federal government's refusal to honor its obligations does not erase petitioners' continuing obligations to BABs holders, so petitioners must cover the shortfall. By the end of sequestration in, at the earliest, 2031, petitioners will have suffered more than $96 million in damages. Am. Compl. ¶ 40, Prayer for Relief. Seeking to recover these damages, petitioners filed suit against the government in the Court of Federal Claims in December 2020. App. 23a-24a.

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[3] After petitioners filed their Amended Complaint, sequestration was extended through fiscal year 2031. *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 90001, 135 Stat. 429, 1341 (2021). This necessarily will add to petitioners' estimated damages, which were calculated based on an end to sequestration in 2030.

The trial court granted the federal government's motion to dismiss petitioners' case, finding that the BABs payment obligation constituted direct spending subject to sequestration, rather than appropriation under an "appropriation Act" exempt from sequestration. App. 29a-30a. The court relied primarily on "[l]egislation enacted by Congress after the issuance of the Direct Payment BABs under the ARRA," which requires sequestration of direct spending. App. 18a. The court also relied *sua sponte* on a report from the Congressional Research Service ("CRS") and a letter from the Congressional Budget Office ("CBO") Director, which described the government's BABs payment obligation as both "revenues" and "direct spending," rendering the factual characterization of the government's payment obligation subject to reasonable dispute. App. 13a-15a, 35a.[4] The court also dismissed petitioners' contract claim, finding that petitioners had "not pleaded facts sufficient to establish the [government's] intent to contract and the statute itself provides no basis on which to demonstrate congressional intent to create a contract by law." App. 51a.

Petitioners appealed to the Federal Circuit, which "affirm[ed] and adopt[ed] the trial court's reasoning." App. 1a.

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[4] *See* CBO, https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/hr1conference0.pdf ("CBO Letter"); CRS, *American Recovery and Reinvestment Act of 2009* (P.L 111-5): *Summary and Legislative History*, R40537, at 6 (Apr. 20, 2009) ("CRS Report"), https://crsreports.congress.gov/product/pdf/R/R40537.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT REQUIRING THE FEDERAL GOVERNMENT TO HONOR ITS PAYMENT OBLIGATION UNDER MONEY-MANDATING STATUTES

The courts below erred by allowing the federal government to evade its BABs payment obligation under ARRA. First, the courts erroneously held that subsequent statutes impliedly repealed the government's payment obligation under ARRA, even though this Court's precedent rejects such an implied-repeal theory. Second, despite Congress's mandate to protect BABs payments from sequestration by defining them as overpayments of tax to be refunded from over-collected revenues that the government was required to return to the rightful owners, the courts disregarded that clear congressional choice. Finally, the courts also mischaracterized the BABs payment obligation as direct spending subject to sequestration, disregarding the applicable exemptions for non-defense balances and appropriations.

A. The Courts Below Erred In Holding That Congress Repealed The Government's BABs Payment Obligation Through The Enactment Of Subsequent Statutes

This Court recently affirmed "a principle as old as the Nation itself: The Government should honor its obligations." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1331 (2020). Citing the fiscal policy championed by Alexander Hamilton early in our country's formation – that "States . . . who observe their engagements ... are respected and trusted: while the reverse is the fate of those . . . who pursue

an opposite conduct" – this Court declared that, "[c]enturies later, this Court's case law still concurs." *Id.* (citation omitted; first ellipsis added).

By its terms, ARRA is a money-mandating statute. App. 25a. When Congress enacted ARRA, it mandated that "the issuer of such [BABs] bond shall be allowed a credit with respect to each interest payment under such bond which shall be payable by the [Treasury] Secretary [who] . . . shall pay (contemporaneously with each interest payment date under such bond) to the issuer of such bond . . . 35 percent of the interest payable under such bond on such date." § 1531(b), 123 Stat. 359-60. Repeated use of "shall" by Congress did not leave discretion in the federal government to disregard Congress's intent.

Congress could have repealed the statutory obligation it imposed in ARRA on the government by enacting a subsequent statute that uses "'words that expressly or by clear implication modified or repealed the previous law.'" *Maine*, 140 S. Ct. at 1324 (quoting *United States v. Langston*, 118 U.S. 389, 394 (1886)). Any such subsequent statute must use "'the most clear and positive terms'" to repeal the government's obligation. *Id.* (quoting *United States v. Vulte*, 233 U.S. 509, 514-15 (1914)). Contrary to the lower courts' judgments, Congress did not do so here.

Since enacting ARRA in 2009, Congress has spoken only once on the BABs program, and that action affirmed the government's payment obligation to petitioners. In 2017, Congress repealed the sections of the IRC that incorporated ARRA but expressly limited the effect of that amendment "to bonds issued after December 31, 2017." § 13404(d), 131 Stat. 2138. This repeal did not affect petitioners' BABs, which were all issued before January 1, 2011, the original

statutory deadline, "and before the 2017 cutoff created by Congress." App. 21a. By choosing to repeal only BABs issued after 2017, Congress expressly exempted petitioners' BABs from that repeal and thus affirmed the government's continued payment obligation to petitioners. Neither the government nor the courts below cited any express congressional repeal of the government's BABs payment obligation to petitioners.

Absent express repeal, the only possibility of relieving the government of its BABs payment obligation is through implied repeal, which this Court has emphasized is "not favored" and a "rarity." *Maine*, 140 S. Ct. at 1323. This "Court's aversion to implied repeals is 'especially' strong 'in the appropriations context.'" *Id.* (quoting *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992)). When considering whether subsequent legislation operates to repeal an existing statutory obligation, this Court "will 'regard each [statute] as effective' – unless Congress' intention to repeal is 'clear and manifest,' or the . . . laws are 'irreconcilable.'" *Id. (*quoting *Morton v. Mancari,* 417 U.S. 535, 549 (1974)). This Court recognizes implied repeal of a statutory obligation under only two limited scenarios: where a subsequent statute either (1) completely revokes "the underlying obligation before the Government began incurring it," or (2) reforms the "statutory payment formulas in ways 'irreconcilable' with the original methods." *Id.* at 1325.

Neither scenario applies here. First, no one disputes the government fully honored its BABs payment obligation to petitioners from 2009 through 2012. App. 21a. The government therefore cannot argue that the 2011 BCA or the 2013 ATRA impliedly repealed the government's BABs payment obligation by revoking it "before the Government began incurring it." *Maine*, 140 S. Ct. at 1325.

Second, no subsequent statute irreconcilably has reformed the original statutory payment formula for BABs payments. As the government admits, "the program remains in effect for these bonds and the Government is still paying bond interest, albeit at a reduced rate," because petitioners' "bonds continue to qualify for the Direct Payment BAB program." U.S. C.A. Br. 38. The government's BABs payment obligation in this respect is like the one this Court considered in *Maine*, where Congress did not "limit the amounts that the Government might pay" under the Affordable Care Act's Risk Corridors program. 140 S. Ct. at 1316. Here, Congress exempted the government's BABs payment obligation from any required offset in spending. *See* § 5(b), 123 Stat. 116 (declaring that "[a]ll applicable provisions in [ARRA] are designated as an emergency for purposes of pay-as-you-go principles").

The trial court appeared to acknowledge that this Court's precedent precludes a finding of implied repeal. It stated that the government "does not (and does not need to) rely on an implied repeal of section 1531 of the ARRA." App. 46a. The court's reasoning, however, relies on a theory of implied repeal in disguise. The court invoked the second scenario in this Court's standard for implied repeal, holding that Congress's enactment of ATRA "expressly modifies the government's existing payment obligations, and it does so in a way that directly conflicts with the earlier payment program created by section 1531 of the ARRA." *Id.*

Because any alleged "conflict[]" is not express, it can only be implied, which the law disfavors. ATRA "did not reference [ARRA or the BABs program] at all, let alone 'irreconcilably' change [them]." *Maine*, 140 S.

Ct. at 1326 (quoting *United States v. Mitchell*, 109 U.S. 146, 150 (1883)) (cleaned up). Without that subsequent statutory reference, the trial court rested on a general, non-specific clause in ATRA § 901(b), which vaguely mandated that "sequestration be implemented '[n]otwithstanding any other provision of law.'" App. 44a (quoting 126 Stat. 2370). Such reasoning cannot be squared with *Maine*'s express-language requirement.

The trial court further erred by disregarding the rest of ATRA § 901(b), which requires sequestration to be consistent with the terms of BBEDCA. *See* 126 Stat. 2370 ("Notwithstanding any other provision of law, the fiscal year 2013 *spending reductions required by section 251(a)(1) of [BBEDCA]* shall be evaluated and implemented on March 27, 2013.") (emphasis added). BBEDCA authorized sequestration only of "direct spending," which does not include programs funded by an appropriation act. 2 U.S.C. § 900(c)(8).[5] Because ARRA's BABs program is funded by an appropriation act, the BABs payment obligation remains exempt from sequestration even after the enactment of ATRA. *See infra* Part I.B.2. The courts therefore erroneously relied on ATRA § 901(b).

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[5] Unlike "direct spending," programs funded through appropriation acts are considered "discretionary spending" because Congress must authorize their funding each year through the appropriation process. "Direct spending," or "mandatory spending," is not subject to the annual appropriation process.

B. The Courts Below Erred In Accepting The Government's Characterization Of Its BABs Payment Obligation As "Direct Spending"

1. "Overpayments" of tax that must be "refunded" from "internal revenue collections" are not "direct spending" subject to sequestration

Congress's choice to designate the BABs payment obligation as an "overpayment" of tax demonstrates its intent to exclude this obligation from sequestration. ARRA amended the IRC to define BABs payments as an "overpayment" of tax and to mandate that Treasury "shall . . . refund" that overpayment of tax through the permanent appropriation for "refunding internal revenue collections" under 31 U.S.C. § 1324(a). § 1531(c)(5), 123 Stat. 360 (amending 26 U.S.C. § 6401).

Congress carefully and specifically devised this statutory scheme to define the BABs payment obligation as an "overpayment" of tax and to ensure that the payment obligation remained mandatory and funded. Significantly, years prior to the 2009 enactment of ARRA, the Government Accountability Office ("GAO") already had determined that the government's obligation to pay interest on refunds of "overpayment" of tax (26 U.S.C. § 6611(a)) would not be subject to sequestration.[6] Further, Congress used the term "refunds," defined as "the return of money that the government improperly collected or collected in excess of the amount owed." GAO *Glossary*[7] 84. The government's

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[6] *See* GAO, *Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations*, GAO/AIMD-96-79, at 106 (May 1996) ("GAO, *Budget Issues*"), https://www.gao.gov/assets/aimd-96-79.pdf.

[7] *See* GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Sept. 2005) ("GAO *Glossary*") (describing

"collections" are the "amounts received by the federal government during the fiscal year." *Id.* at 28.

Congress intentionally defined the government's BABs payment obligation as an overpayment of tax that must be refunded to petitioners from revenues collected by the government in excess of the amount owed to the government. In that way, Congress ensured that the government had no right to "spend" this money but instead must transfer it to the rightful owner. Nothing in Congress's express language justifies the trial court's unsupported declaration that these statutes are ineffective to "defeat[] sequestration" of the government's BABs payment obligation. App. 37a. The courts below erred by overriding Congress's efforts to exclude the government's BABs payment obligation from sequestration. App. 4a, 16a, 44a.

2. Programs created and funded under "appropriation Acts" are not the "direct spending" for which Congress authorized sequestration

Because Congress defined the BABs payment obligation as overpayments of tax funded through appropriation authority, the obligation falls within an exemption from sequestration for appropriation acts. The courts below, however, accepted the government's mischaracterizations to hold that BABs payments are subject to sequestration as "direct spending." That was error.

a. The trial court acknowledged that "sequestration of direct spending . . . does not include budget authority provided by 'appropriation Acts.'" App. 18a. But in concluding that ARRA does not constitute such

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"national defense" functional classification), https://www.gao.gov/assets/gao-05-734sp.pdf.

an act, the court misread "[t]wo sources [that] provide relevant definitions of 'appropriation Act': another statute in Title 2 and the GAO Glossary." App. 30a. Both of these sources, properly read, confirm that ARRA is an appropriation act.

The trial court recognized that "Congress has defined the term 'appropriation Act' to mean 'an Act referred to in section 105 of Title 1,'" which provides that "[t]he style and title of all Acts making appropriations for the support of Government shall be as follows: 'An Act making appropriations (here insert the object) for the year ending September 30 (here insert the calendar year).'" App. 30a-31a (quoting 2 U.S.C. § 622(5); 1 U.S.C. § 105). The court further acknowledged that "the title of the ARRA conforms with 1 U.S.C. § 105." App. 13a.

The trial court's own findings, therefore, demonstrate that ARRA is an appropriation act. But the court reached the opposite conclusion. The court narrowed the definition provided by Congress, stating that "whether a bill enacts an 'appropriation Act' . . . must be derived by reviewing not simply the style and title of the legislation, but also its structure." App. 13a. This finding cannot be squared with the plain text of § 105, which establishes only a required "style and title" for appropriation acts and makes no reference to structure whatsoever.

The trial court similarly misread the GAO *Glossary* definition of an "Appropriation Act," defined as a "'statute, under the jurisdiction of the House and Senate Committees on Appropriations, that generally provides legal authority for federal agencies to incur obligations and to make payments out of the Treasury for specified purposes.'" App. 31a (quoting GAO *Glossary* 13). Yet the court found that ARRA did

not comply with the GAO *Glossary* definition of an "Appropriation Act" because "[m]ultiple congressional committees, not only the committees with jurisdiction over appropriations, reviewed the ARRA." App. 15a. This finding cannot be squared with the GAO definition, which requires only that the statute in question be, at some point, "under the jurisdiction of the House and Senate Committees on Appropriations." GAO *Glossary* 13. Because ARRA's legislative history includes the jurisdiction of both the House and Senate Committees on Appropriations, it satisfies this definition. *See* S. Rep. No. 111-3 (2009); H.R. Conf. Rep. No. 111-16 (2009). The court's finding effectively adds a new requirement to the GAO definition not found in its text: *exclusivity* of jurisdiction of the House and Senate Committees on Appropriations.

b. The trial court also erroneously relied on two extraneous sources to resolve whether the government's BABs payment obligation qualifies as "direct spending" subject to sequestration or "revenues" not subject to sequestration. The court *sua sponte* introduced a letter from the CBO Director and a CRS statement to resolve that question of statutory interpretation. But this Court has rejected reliance on these types of documents to support a finding of congressional repeal of a statutory payment obligation. In *Maine*, this Court found "an unpublished GAO letter" and a "floor statement" to be "unpersuasive" in determining "the kind of clear congressional intent required to repeal a statutory obligation." 140 S. Ct. at 1326.

In any event, those sources (properly understood) support petitioners' understanding of the BABs payment obligation. The court relied on the CBO Letter to find that the BABs payment obligation is "direct spending," because that letter "lists all of [ARRA]

Division B as direct spending, explicitly listing refundable tax credits in that category." App. 35a n.10. But the court flatly misinterpreted that letter. It actually describes ARRA's Division B as "*[r]evenues*," which, unlike direct spending, are not subject to sequestration. *See* CBO Letter tbl. 2 (p. 5) (emphasis added). Like the CBO Letter, the CRS Report affirms that ARRA's "Division B includes the mandatory spending *and revenue* provisions." CRS Report 9 (emphasis added).

The trial court also erred in finding that 31 U.S.C. § 1324 – the permanent appropriation for the "[r]efund of internal revenue collections" amended by ARRA to include BABs payments – is not an "appropriation Act" exempt from sequestration. App. 30a-32a. To the contrary, statutes such as § 1324 "that are not regular annual or supplemental appropriations acts may also explicitly state that they make an appropriation."[8] "A permanent appropriation is an appropriation that is available as the result of previously enacted legislation, remains so until repealed, and does not require current appropriations action by the Congress." GAO, *Budget Issues* 2. Further, the trial court failed to recognize that § 1324 "provides legal authority for federal agencies to incur obligations and to make payments out of the Treasury for specified purposes" as required by the GAO definition, GAO *Glossary* 13, by providing that "[n]ecessary amounts are appropriated to the Secretary of the Treasury for refunding internal revenue collections as provided by law, including payment of . . . [r]efunds," 31 U.S.C. § 1324(a)(2)(E).

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[8] GAO, *Principles of Federal Appropriations Law: Chapter 2, The Legal Framework*, GAO-16-464SP, at 2-23 (4th ed. 2016 Revision), https://www.gao.gov/assets/gao-16-464sp.pdf.

C. The Courts Below Erred In Holding That Congress Failed To Exempt The Government's BABs Payment Obligation From Sequestration

This Court requires the federal government to show "something more than the mere omission" of a program from later congressional action to prove that Congress has repealed that program. *Maine*, 140 S. Ct. at 1323. The courts below ignored that precedent. Instead, they theorized that Congress repealed the government's BABs payment obligation through ATRA because 2 U.S.C. § 905 lists "[t]he only programs exempt from sequestration" and "[t]he lists of programs that are exempted . . . do not include the Direct Payment BABs payment program." App. 22a.

That analysis, however, misinterprets the sequestration statute. Congress *did* exempt certain defined payment programs from sequestration, which include the BABs program. Both BBEDCA and ATRA expressly exempted from sequestration the government's "non-defense" balances. *See* 2 U.S.C. § 905(e) (exempting non-defense unobligated balances); BBEDCA § 256(*l*), 99 Stat. 1091 (exempting non-defense obligated balances).[9]

The government's BABs payment obligation is a "non-defense" balance. Congress enacted the BABs

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[9] Nothing at this stage turns on whether the government's promised BABs payments are "obligated" or "unobligated" balances. Because petitioners did not plead facts concerning the exemption of BABs payments from sequestration, and this case was decided below on a motion to dismiss, the record does not contain sufficient facts to permit a finding that BABs payments qualify as "obligated" or "unobligated" balances. In any event, this issue is neither material nor an impediment to the Court's resolution of this case.

program to fund job creation and infrastructure investment, not national defense efforts.[10] Petitioners' BABs did just that, funding capital projects to develop electric-power infrastructure and create jobs. *See* App. 21a-22a. The government's obligation to refund interest on petitioners' BABs is, therefore, a "non-defense" balance exempt from sequestration.

II. THE FEDERAL CIRCUIT'S DECISION THAT MONEY-MANDATING STATUTES AND THE GOVERNMENT'S COURSE OF DEALING WITH ITS PARTNERS DO NOT CREATE A CONTRACT IS AN IMPORTANT AND RECURRING QUESTION

This Court has left open in prior cases the important question whether a statutory provision creates a contractual obligation when its language and the parties' course of dealing reflect an intent to contract by the government.[11] However, the way this Court has analyzed similar matters confirms the Federal Circuit's error in concluding that ARRA did not create a contractual obligation.

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[10] *Compare* Preamble, 123 Stat. 115 (purpose of ARRA), with GAO *Glossary* 124-25.

[11] *See*, *e.g.*, *United States Tr. Co. v. New Jersey*, 431 U.S. 1, 17 (1977) (finding it "unnecessary . . . to dwell on the criteria for determining whether state legislation gives rise to a contractual obligation" because no party denied that the statute at issue constituted a contract); *United States v. Winstar Corp.*, 518 U.S. 839, 860 (1996) (plurality) (hearing a case about "enforcement of the governmental contracts at issue" but noting that "[t]he anterior question whether there were contracts at all between the Government and respondents . . . is not strictly before us"); *see also Maine*, 140 S. Ct. at 1331 n.15 (declining to address question whether statute created implied-in-fact contract).

A. The Courts Below Misinterpreted ARRA's Text, Which Indicates The Existence Of A Contract

1. This Court's precedent affirms that, when Congress has "clear[ly] indicat[ed] that the legislature intends to bind itself contractually," the government has a duty to honor its contractual obligations and a long-run interest in being reliable in its binding agreements. *National R.R. Passenger Corp. v. Atchison T. & S.F. Ry. Co.*, 470 U.S. 451, 465-66 (1985). In determining whether a statute creates a contractual obligation upon the state, examining the statutory language is "of first importance." *Dodge v. Board of Educ.*, 302 U.S. 74, 78 (1937).

2. ARRA's language indicates Congress's intent to enter into a binding contract. Section 3(a) commits the government "[t]o provide investments" and "[t]o invest in" necessary infrastructure. 123 Stat. 115-16. Courts interpret statutory "language according to its ordinary, contemporary, common meaning." *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022) (cleaned up). To "invest" is "to commit (money) in order to earn a financial return." *Merriam-Webster*, https://www.merriam-webster.com/dictionary/invest; *see also Merriam-Webster*, https://www.merriam-webster.com/dictionary/commit (defining "commit" as "obligate, bind" and "to pledge . . . to some particular course or use"). Thus, the common meaning of ARRA's language contemplates a binding obligation.

ARRA's language also supports a finding of consideration received and offered, indicating the creation of a contract. In *Dodge*, this Court held that "[i]f, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right."

302 U.S. at 79. In *Dodge*, the statute at issue did not create a contract because it used the words "pension" and "annuity," implying "a choice of terminology based on [gift] rather than on [contract]" and not "implying a consideration received as well as offered." *Id.* at 81. By contrast, the construction of ARRA clearly imposes conditions on BABs issuers in exchange for a direct cash payment. *See* § 1531(a), 123 Stat. 358-59. ARRA also uses the word "investment," a term based on contract that implies consideration received in exchange for a commitment of performance. *See Merriam-Webster*, https://www.merriam-webster.com/dictionary/invest ("invest" means "to commit (money) *in order to earn* a financial return") (emphasis added); *cf. International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 560 (1979) (explaining that a pension does not qualify as an "investment contract" under the Securities Act of 1933 and the Securities Exchange Act of 1934 because an investment contract involves "some tangible and definable consideration in return for an interest" and a pension plan involves merely the contribution of "a relatively insignificant part of an employee's . . . compensation package").

3. Congress's repeated use of the term "shall" further emphasizes Congress's intent to commit the government to a binding agreement. ARRA identifies the government's investment to require that "the issuer of such bond *shall* be allowed a credit with respect to each interest payment under such bond which *shall* be payable by the [Treasury] Secretary [who] . . . *shall* pay (contemporaneously with each interest payment date under such bond) to the issuer of such bond . . . 35 percent of the interest payable under such bond on such date." § 1531(b), 123 Stat. 359-60 (emphases added). As this Court held in *Maine*, "[t]he first sign

that the statute imposed an obligation is its mandatory language: 'shall.'" 140 S. Ct. at 1320. The word "shall" "normally creates an obligation impervious to . . . discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)*; see also Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement.").

ARRA uses this command six times in the pertinent section: The issuer of the bond "shall" be allowed a credit, the bond "shall" be payable by the Secretary, the Secretary "shall" pay 35% of the interest payable, the yield on the bond "shall" be reduced by the credit allowed under the section, the credit "shall" be treated as exempt from federal income tax, and the amendments of the section "shall" apply to obligations issued after the date of enactment. § 1531(b), (d)-(e), 123 Stat. 359-60. *Cf. Maine*, 140 S. Ct. at 1320 (concluding that the statute imposed a legal duty on the United States because the statute "uses the command [shall] three times"). This language underscores the mandatory nature of the government's obligation under ARRA.

4. This Court's precedent indicates that the absence of express-reservation language in ARRA affirms that Congress intended to enter a binding contract. When assessing Congress's will in *National Railroad Passenger*, this Court found it significant that "Congress 'expressly reserved' its rights to 'repeal, alter, or amend' the Act at any time." 470 U.S. at 467 (quoting 45 U.S.C. § 451 (repealed 1994)).

In other decisions, this Court has "recognized the effect of these few simple words" reserving Congress's right to repeal. *Id.* at 467 n.22 (citing *Sinking-Fund Cases*, 99 U.S. 700, 720 (1879) (holding that, through

the language of reservation, "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power")). In an opinion concurring in part in *National Federation of Independent Business v. Sebelius*, Justice Ginsburg held that "[t]he 'effect of these few simple words' has long been settled," and Congress "put States on notice that the [Medicaid] program could be changed" by including language reserving the right "'to alter, amend, or repeal any provision of [Medicaid].'" 567 U.S. 519, 639 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *National R.R. Passenger*, 470 U.S. at 467 n.22; 42 U.S.C. § 1304) (last alteration in *Sebelius*). Thus, the absence of any such reservation language in ARRA strengthens the conclusion that Congress intended to bind the government contractually.

B. The Decisions Below Contradicted This Court's Precedent By Ignoring Other Evidence Of Congress's Intent To Contract

1. This Court repeatedly has found it necessary to look beyond specific statutory provisions to determine the existence of a contractual obligation. *See*, *e.g.*, *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104 (1938) (finding that "[t]he policy which induced the legislation" indicated that "the state's policy embodied in [the] statute [wa]s to bind its instrumentalities by contract").

In *United States Trust Co. v. New Jersey*, this Court explained that, in general, "a statute is itself treated as a contract when the language *and circumstances* evince a legislative intent to create private rights of a contractual nature enforceable against the State."

431 U.S. at 17 n.14 (emphasis added). This Court had "no doubt" that the covenant at issue in that case was "properly characterized as a contractual obligation" given the legislative history indicating that "the purpose of the covenant was to invoke the constitutional protection of the Contract Clause as security against repeal." *Id.* at 18. Likewise, in *National Railroad Passenger*, this Court looked beyond just the language of the statute to discern that Congress did not intend to enter a binding contract, explaining that "the circumstances surrounding its passage [did not] manifest any intent on the part of Congress to bind itself contractually." 470 U.S. at 470.

2. The courts below diverged from that precedent by dismissing petitioners' claim based on a limited examination of the statutory text and by failing to consider other relevant evidence that clearly indicated Congress's intent to contract – namely, the circumstances indicating that the parties expected ARRA to create binding obligations.

The trial court reasoned that, "[f]or a statute to obligate the government contractually, the statute must speak in contractual terms," App. 18a, and Congress's failure to "frame the payments . . . as a contractual obligation" demonstrated that no contractual obligation existed, App. 48a. This holding, affirmed and adopted by the Federal Circuit, is at odds with this Court's precedent rejecting the notion that the bare use of "contract language" settles the question whether Congress intended to create a binding contract. This Court long has emphasized the importance of looking at other indicia of statutory intent to establish that the government is bound to perform its statutory duties. *See National R.R. Passenger*, 470 U.S. at 467.

C. The Analysis Below Erred By Ignoring The Parties' Course Of Dealing And The Realities Of The Transaction, Which Plainly Indicate The Existence Of A Contract

1. Under the misguided view of the courts below, petitioners made long-term commitments through issuances of BABs without any expectation the federal government would continue to meet an obligation to make the payments ARRA imposed. The parties' course of dealing informs whether the parties reasonably would have entered into such a bargain.

The "realities of the transaction" may reflect the existence of "contractual commitments" upon the government. *Winstar*, 518 U.S. at 863 (plurality). In *Winstar*, this Court affirmed that a statute imposed contractual obligations upon the government due to the "realities of the transaction," including "the dollar amounts at stake" and the history of regulators modifying relevant federal requirements. *Id.* at 863, 867-68. In light of these realities, this Court concluded that the plaintiffs' actions "would have been irrational . . . without seeking . . . some sort of contractual commitment" from the government. *Id.* at 863; *cf. In re Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78 (1866) (refusing to construe a charter so that it would have been "madness" for private party to enter into it).

In *National Railroad Passenger*, by contrast, the railroads asserted a purported contractual right to be free from passenger-service obligations. *See* 470 U.S. at 468. This Court rejected that theory, holding that an "atmosphere of pervasive prior regulation" and "heavy and longstanding regulation of this area strongly cuts against any argument that the statute created binding contractual rights." *Id.* at 468-69. Against the backdrop of Congress's heavy history of railroad regulation, this Court reasoned that

"Congress would have struck a profoundly inequitable bargain if, in exchange for the equivalent of a half year's losses, it had entered into a binding contract never to impose on the railroads . . . any rail passenger service obligations at all." *Id.* at 468.

2. That precedent confirms that the context and nature of the promise and ensuing type of government performance matter to determining the creation of a contractual commitment on behalf of the government. Here, Congress intended to induce action by petitioners based on an expectation the government would fulfill its end of the bargain – that is the only way to interpret petitioners' willingness to issue the types of BABs when they did. Unlike in *National Railroad Passenger*, there is no pervasive atmosphere of regulation undermining expectations that the government would be bound by a contractual agreement. Instead, the circumstances of the 2008 financial crisis reveal that the expectation of a binding obligation by the federal government was critical to making the bargain worthwhile to petitioners. ARRA was a new program; it incentivized petitioners to issue taxable BABs in order to invest in infrastructure projects that would pull the Nation out of a significant economic recession. Petitioners "would have struck a profoundly inequitable bargain," *National R.R. Passenger*, 470 U.S. at 468, if the government could renege on its promise to refund 35% of federal tax revenues on such bonds, given that the 35% refund was the motivating factor for entities like petitioners to enter into the deal at all.

It is absurd to imagine that petitioners would issue more than $4 billion of direct-payment BABs while leaving the federal government the absolute right to nullify its contractual promise to provide the specified refund. *Cf. Appleby v. Delaney*, 271 U.S. 403, 413 (1926) ("It is not reasonable to suppose that the grant-

ees would pay $12,000 . . . and leave to the city authorities the absolute right completely to nullify the chief consideration for seeking this property . . . or that the parties then took that view of the transaction."). All of the foregoing factors support the conclusion that Congress intended ARRA to create a binding contractual commitment.

3. This Court repeatedly has emphasized that federal and state governments are bound by contractual obligations just like individuals. *See*, *e.g.*, *Murray v. City of Charleston*, 96 U.S. 432, 445 (1878) ("States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons."); *Sinking-Fund Cases*, 99 U.S. at 719 ("The United States are as much bound by their contracts as are individuals."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."). If the United States "repudiate[s] [its] obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." *Sinking-Fund Cases*, 99 U.S. at 719. Thus, when the federal government – without action by Congress – breached its promise to refund petitioners according to the terms set out in ARRA, the government repudiated its obligation to petitioners. As this Court held more than a century ago, "[a] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *Murray*, 96 U.S. at 445. According to these longstanding principles, Congress clearly indicated that it intended to bind

itself contractually. Thus, the Federal Circuit erred in declining to hold the government responsible for its contractual obligation to petitioners.

III. THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE WARRANTING THIS COURT'S REVIEW

The questions presented by this case hold profound legal and practical importance. At its core, this case threatens the longstanding principle that the federal government must honor its obligations. The Framers "stressed this insight as a cornerstone of fiscal policy" when the Constitution was ratified. *Maine*, 140 S. Ct. at 1331 (citing Report Relative to a Provision for the Support of Public Credit (Jan. 9, 1790), *in* 6 Papers of Alexander Hamilton 68 (Harold C. Syrett & Jacob E. Cooke eds., 1962)). The decision below plainly contravenes this history and threatens to destroy the integrity of the federal government as a business partner. Absent the Court's review, the federal government may be permitted to renege on its statutory promises without any political accountability, leaving state and local governments to foot the bill.

This case also cleanly presents the question when a statutory promise by the government qualifies as a contract. The Court long has recognized the consequentiality of this issue. *See Sinking-Fund Cases*, 99 U.S. at 719; *Lynch*, 292 U.S. at 580 ("Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors."); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 191-92 (2012) (if the government cannot "be trusted to fulfill its promise to pay[,] . . . contracting would become more cumbersome and expensive for the Government, and willing partners more scarce"). Yet the Court has not squarely addressed whether a

statutory provision creates a contractual obligation when its language and the parties' course of dealing reflect an intent to contract by the government. This case presents a straightforward, and exceptionally important, application of that question. Given the significance of this issue and the magnitude of this case, the Court must weigh in.

The stakes of this case alone merit plenary review. The price of the federal government's retreat from its promises has been massive. Petitioners issued more than $4 billion in BABs in reliance on the government's promised cash payments. Petitioners already had suffered $49 million in damages by the time this case was filed, and they expect to sustain more than $96 million in damages by 2031 when sequestration is currently scheduled to end. This already substantial loss stands to grow if Treasury chooses to extend sequestration beyond 2031 and the decision below holds. Such major costs impair petitioners' ability to effectively provide safe and reliable power to municipalities in nine States.

Petitioners are not the only ones suffering the consequences of the federal government's bait-and-switch. In total, state and local governments issued more than $181 billion of BABs to fund capital investment projects for schools, infrastructure, transit, and other public improvements.[12] And, like petitioners, these entities now face massive amounts of unanticipated costs to cover the federal government's shortfall,

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[12] *See* IRS, *Lesson 10: Build America Bonds*, https://www.irs.gov/pub/irs-tege/teb1_lesson10.pdf; *see also* U.S. Dep't of the Treasury, *Build America Bonds* (last updated Dec. 7, 2010), https://web.archive.org/web/20101218032613/http:/www.treasury.gov/initiatives/recovery/Pages/babs.aspx.

totaling an estimated $2 billion for all BABs issuers by 2020 alone.[13]

More broadly, this case has far-reaching implications for all other existing and future statutory promises made by the federal government. The federal government's refusal to honor its obligations under ARRA sets a dangerous precedent that threatens every statutory promise to state and local governments. Even worse, the decision below allows these promises to be undone by unnamed officials at federal agencies, rather than elected representatives in Congress who must answer to the public. Given the extent to which States and municipalities rely on and partner with the federal government to serve the public interest, this result could lead to devastating consequences.

Because lawsuits against the federal government for damages all funnel into the Federal Circuit, *see* 28 U.S.C. §§ 1295(a)(3), 1491(a)(1), there is no prospect of a circuit split. All similar future disputes concerning the government's payment obligation will arise in the Federal Circuit. If this Court does not correct the Federal Circuit's error, the federal government always can argue, and under the decision below always will win, the same point in future litigation.

Finally, this case presents an excellent vehicle for the Court to resolve these important questions. Because this case arises on a motion to dismiss, it presents purely legal questions, which were fully briefed below by both parties. And because the Federal Circuit affirmed in full and adopted the district court's dismissal, no concern exists over the Court taking a case in an interlocutory posture.

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[13] *See* Nasiha Salwati & David Wessel, *What are Build America Bonds or direct-pay municipal bonds?*, Brookings (Aug. 4, 2021), https://www.brookings.edu/articles/what-are-build-america-bonds-or-direct-pay-municipal-bonds/.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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