No. 23-48

IN THE

Supreme Court of the United States

INDIANA MUNICIPAL POWER AGENCY, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN PUBLIC POWER ASSOCIATION AND LARGE PUBLIC POWER COUNCIL IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The **American Public Power Association ("APPA")** is the voice of not-for-profit, community-owned utilities nationwide. Public power utilities provide power to 2,000 towns, and cities nationwide, serving 49 million people.[2] Those community-owned utilities employ 96,000 people. APPA represents the interests of 1,420 active members before Congress, the White House, and federal agencies. APPA advocates on energy, environmental, tax, communications, and other policy issues before Congress and federal agencies that impact the ability of public power utilities to provide reliable, affordable, and sustainable electricity to their customers.

APPA and the not-for-profit, community owned utilities it represents, have an interest in the issues raised in the Petition for a Writ of Certiorari (the "Petition") because APPA's members accepted the offer of the United States to issue taxable Build America Bonds ("BABs"), agreeing to use the proceeds to invest in infrastructure projects for the long term benefit of the country, in return for Congress's promise that the federal government would refund 35% of the interest payments for the life of the

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1. Pursuant to Rule 37.2, notice was given to counsel of record for the Petitioners and counsel of record for the Respondents of the intent of American Public Power Association and Large Public Power Council to file an *amici curiae* brief. Pursuant to Rule 37.6, counsel for *amici* authored this brief in whole; no party's counsel authored this brief in whole or in part; and no person or entity—other than *amici*—contributed monetarily to preparing or submitting this brief.

2. The Petitioners are members of APPA.

BABs. Like the Petitioners, APPA's members have been financially harmed because the United States reneged on its promise to annually make a direct cash payment to the bond issuers of 35% of the interest payments made to bondholders.

Eighty-three public power utilities—all but nine of which are APPA members—issued an estimated $16.7 billion in BABs, approximately 9% of BABs issued nationwide in direct response to the offer made by the Congress in the American Recovery and Reinvestment Act ("ARRA").[3] Of the BABs issued by these public power utilities, $13.2 billion remain outstanding, which represents 12% of BABs that remain outstanding nationwide.[4]

Since 2013, the Office of Management and Budget ("OMB") has published annual reports which estimate, among other things, the amounts by which the promised refunds of new tax revenues to issuers of BABs have been reduced as a result of OMB's decision to apply sequestration.[5] According to OMB's reports, BABs reimbursements were cut by $2.416 billion from 2013 through 2022. Based on that information, APPA estimates that public power issuers were denied $221 million in such promised refunds from 2013 through 2022. APPA also

3. Bloomberg L.P., MSRC Screen, Bloomberg Terminal (retrieved June 2, 2023 using "active municipal" and "ARRA program" criteria).

4. *Id.*

5. *See, e.g.*, OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2021 at p.13 (Feb. 10, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/02/JC-sequestration_report_FY21_2-10-20.pdf.

estimates that payments to public power issuers of BABs will be cut by another $112 million through 2031, the date when the cuts of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, 99 Stat. 1037 ("BBEDCA") are currently set to expire.[6]

The **Large Public Power Council ("LPPC")** is a national organization comprising 28 of the nation's largest public power systems. LPPC's members are locally owned and controlled not-for-profit electric utilities committed to the people and communities which they serve. LPPC's members are also members of APPA. LPPC advocates for policies that allow public power systems to build infrastructure, invest in communities, and provide reliable service at affordable rates. From New York to California and Washington State to Florida, LPPC members provide reliable, low-cost electric service to over 31 million people. LPPC's member utilities represent a cross-section of the nation's utility industry, and own and operate 40,000 circuit miles of high voltage transmission lines and over 71,000 megawatts of electric generation capacity.

LPPC members are owners of capital-intensive electric utility systems. Because they are not-for-profit entities, they do not have the ability to raise capital, other than through the issuance of debt. As a result, LPPC's members are significant issuers of municipal bonds.

Because they rely upon debt offerings to raise capital, the promise contained in ARRA was particularly enticing

6. This conclusion assumes that a) sequestration continues at a rate of 5.7% as required under current law, b) that the overall volume of direct payment bonds continues to decline at historic rates and, c) that the public power utilities continue to hold 11% of such outstanding debt.

to LPPC members, who responded by issuing a substantial amount of BABs[7]—approximately $11.3 billion of which remain outstanding.[8] Moreover, a number of LPPC's members are departments or agencies of cities, including the Los Angeles Department of Water, Seattle City Light, Tacoma Public Utilities, and the City of San Antonio. Those members also issued substantial amounts of BABs.

The 2013 decision of OMB to stop paying the full 35% refund to issuers of BABs was implemented by the Treasury and the Internal Revenue Service ("IRS") and caused a substantial adverse impact on members of LPPC. Since 2013, LPPC's members have not received over $11 million per year that the federal government promised to pay them (assuming an average interest rate of 5%). The total impact on LPPC members to date is approximately $110 million, an impact which will continue to grow for years as a result of the erroneous decisions of the courts below.

SUMMARY OF THE ARGUMENT

The Court should grant the Petition to review the Federal Circuit's holding that federal government agencies do not have to honor the money-mandating obligations imposed by Congress when it enacted the

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7. LPPC members also issued approximately $1.4 billion in other types of tax credit bonds in response to the offer contain in ARRA. Those bonds have higher interest rate reimbursements than BABs and were also adversely affected by sequestration.

8. Bloomberg L.P., MSRC Screen, Bloomberg Terminal (retrieved June 2, 2023 using "active municipal" and "ARRA program" criteria).

American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 ("ARRA"). The Court should also grant the Petition to resolve the question of whether a statutory provision imposes a contractual obligation on the federal government when the statutory language and parties' course of dealing reflect an intent to contract. The Court's review is essential to remedy the profound adverse impact of the Federal Circuit's decision, which will result in further harm to members of APPA and LPPC, among other issuers of BABs, and will impair other existing and future programs through which states and municipalities are encouraged to partner with the federal government to serve the public interest.

BACKGROUND

Congress passed ARRA at a time when a grave financial crisis was affecting the nation. Congress crafted ARRA to include multiple programs designed to spur economic recovery. The BABs program was one of those programs, and it was simple and straightforward. Congress invited state and local governments and their instrumentalities to invest in infrastructure programs using taxable bonds, rather than tax-exempt bonds, as the financing mechanism. If parties like the Petitioners and the *amici* did so, Congress promised that the federal government would refund to the bond issuers, from the tax revenues that were generated, an amount equal to 35% of the annual interest payments made to the bondholders.

Members of APPA and LPPC accepted the offer made by Congress and issued billions of dollars of BABs, using the proceeds to fulfill their part of the bargain by investing in capital intensive investment projects. And, for four

years between 2009 and 2013, the federal government and issuers of BABs performed their respective obligations just as Congress intended.

However, in 2013, that all changed. At the direction of the OMB, Treasury and IRS stopped refunding the full 35% interest subsidy and kept the associated revenue for the federal government. OMB directed that course of conduct even though Congress did not repeal ARRA.

ARGUMENT

A. The Court should grant the Petition to review the Federal Circuit's decision that the federal government does not have to honor its payment obligations.

The Petition, and the interests of members of APPA and LPPC, rest upon a principle that is "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). From 2009 through 2012, the federal government did so, but in 2013, the federal government stopped honoring its obligation to refund 35% of the annual interest payments on BAB's bonds, which directly affected issuers of BABs, including members of APPA and LPPC. Absent Congressional repeal of ARRA, which did not occur, the agencies did not have the authority to exercise that power and abrogate the federal government's obligation.

ARRA is a money-mandating statute, stating explicitly that issuers of BABs "shall be allowed a credit with respect to each interest payment" made to

bondholders, which "shall be payable by" Treasury, who "shall pay … 35 percent of the interest payable under such bond…." ARRA § 1531(b), 123 Stat. 359-60 (adding 26 U.S.C. § 6431 (repealed 2017)). Simply put, after the BABs issuers, including members of APPA and LPPC, made annual interest payments to the purchasers of the BABs they had issued, as they were obligated to do, the federal government was obliged to keep its end of the bargain and pay 35% of that amount, as refundable tax credits, to issuers of BABs. OMB's decision to stop honoring that obligation in 2013 has cost members of APPA and LPPC approximately $221 million to date.

Through ARRA, Congress structured the BABs program to encourage entities, like APPA and LPPC members, to issue taxable BABs rather than tax-exempt bonds, and Congress recognized that it needed to provide comfort that the promised money would be paid.[9] For that reason, Congress was specific when it crafted the method for funding the BABs program. Congress amended the Internal Revenue Code ("IRC") so that BABs payments were to be treated as an overpayment of tax. *See* 26 U.S.C. § 6401(a). Congress also directed that the Secretary of the Treasury "shall … refund" the specified amounts. *Id.* at § 6402(a). To provide additional comfort to issuers of BABs, Congress exempted BABs from pay-as-you-go principles. ARRA § 5(b), 123 Stat. 116.

Congress did not make any changes to the BABs program until 2017, when it repealed § 6431. That repeal only applied to bonds issued after 2017.

9. Given the state of the economy at the time, the appetite for tax-exempt bonds was diminished.

Nevertheless, in 2013, OMB determined that BABs payments were subject to sequestration, and the IRS stopped paying BABs issuers, including the members of APPA and LPPC, the full 35% of the interest that the issuers were paying to their bondholders. The decision was not based upon Congressional repeal of ARRA, but rather upon the passage of Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 ("BCA"), which authorized a reduction of some spending through sequestration. The American Taxpayer Relief Act of 2012, Pub. L. No. 112-24, 126 Stat. 2313 (2013) ("ATRA") required that sequestration be effective beginning in 2013.

As the Petition makes clear, the Federal Circuit's conclusion that the unambiguous payment obligations of ARRA were impliedly repealed by Congress is error. Likewise incorrect, is the Federal Circuit's decision to disregard the Congressional structure which protected BABs payments from sequestration by explicitly defining them as overpayments of tax, which was to be refunded from the excess tax revenues.

The impact of those erroneous conclusions falls dramatically upon the members of APPA and LPPC, in addition to the Petitioners and countless others who issued BABs. All of those who issued BABs have annual obligations to pay their bondholders the entire amount promised. That obligation exists because Petitioners, the members of APPA and LPPC and others accepted the offer made by the federal government to refund 35% of those payments to bondholders and issued BABs. The obligations the issuers undertook at the behest of the federal government are ongoing, even though the federal government is no longer doing what it promised to do.

The circumstance APPA and LPPC find themselves in—suffering significant financial losses because the federal government is violating the principle that "it should honor its obligations"—is of great significance and warrants review by this Court.

B. The Court should grant the Petition to resolve the question of whether a statutory provision imposes a contractual obligation on the federal government when the statutory language and parties' course of dealing reflect an intent to contract.

As the Petition points out, there is an important unresolved question about whether a contract can be created by a statute when the statute's language and the parties' course of conduct over time establish the intent to contract. The experience of members of APPA and LPPC illustrates the national importance of granting the Petition in this case to resolve that question.

The Congressional purpose of ARRA was to spur economic activity to help the country recover from the so-called Great Recession. *See* ARRA § 3(a), 123 Stat. 115-16. One of the ways Congress sought to achieve that goal was through the BABs program. The BABs program was intentionally designed to entice members of APPA and LPPC, who relied upon the issuance of debt to raise capital to take part in the program. The BABs program enticed members of APPA and LPPC to raise capital by selling taxable bonds to investors as an alternative to tax-exempt bonds. The Congressional goal of spurring economic activity was to be achieved by requiring those who participated in the BABs program to invest the proceeds in infrastructure projects. And the

final enticement was Congress's promise that the federal government would refund 35% of the amounts paid to their respective bondholders annually.

The language of ARRA reinforces the conclusion that Congress intended to bind the federal government should the offer contained in ARRA be accepted. Examples of the intent of Congress abound in ARRA: "the issuer of such bond shall be allowed a credit"; the credit "shall be payable" by Treasury; the Treasury "shall pay" annually when the issuer pays interest to its bondholders; and the amount paid "shall" be "35% of the interest payable under such bond on such date." ARRA § 1531(b), 123 Stat, 359-60.

When members of APPA and LPPC accepted the BABs program offer, they took on a series of obligations, just as any party to a contract would. *See* ARRA § 1531(a), 123 Stat. 358-59. Specifically, when issuing BABs, members of APPA and LPPC had to meet five requirements. They were required to (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 from the federal government in lieu of tax credits. *See* ARRA § 1531(b), 123 Stat. 359-60. The bilateral nature of the arrangement could not be clearer: ARRA promised something to members of APPA and LPPC, among others—the refund of 35% of the interest payments made to bondholders—in return for certain performance by the issuers of BABs.

Two other points are worth noting about the parties' course of conduct. First, the parties performed the

obligations imposed upon them by ARRA from 2009 through 2012. Second, even though the federal government reneged on its promise to pay the full 35% of the amounts that the members of APPA and LPPC paid to their bondholders, the obligation of the issuers of the BABs made to those bondholders continues to this day; they must pay 100% of what they promised the bondholders they would pay.

C. The Court should grant the Petition to address the uncertainty caused by the Federal Circuit's decision, which will have long-term and widespread repercussions.

In the absence of this Court's intervention, the impact of the Federal Circuit's decision, upholding the agency decision to impose sequestration, will be extraordinary. APPA estimates that payments to public power issuers of BABs will be cut by approximately $112 million more from the beginning of 2023 through 2031—on top of the $221 million that APPA estimates public power issuers were denied from 2013 through 2022. LPPC estimates the losses of its members to date at $110 million. Other issuers of BABs will also continue to be significantly impacted.

Indeed, under the Statutory Pay-as-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8 ("PAYGO"), any increase in the deficit caused by new tax or entitlement spending laws also triggers sequestration cuts to eliminate those deficits. These cuts are automatic unless PAYGO is waived, either as part of the new law or in subsequent legislation. Congress has twice postponed sequestration cuts that would have begun in January 2022, but absent further action, PAYGO sequestration will take effect in

January 2025 and last through September 2031. Under the Federal Circuit's erroneous decision that ARRA did not create a contractual obligation, PAYGO sequestration will eliminate billions of dollars in payments to state and local issuers of BABs, including public power utilities.

Furthermore, BABs are generally not structured so that the issuers can easily refinance the bonds, meaning that issuers cannot eliminate the sequestration-related reduction in the 35% federal subsidy. As a result, most BABs will remain outstanding until their maturity, which can be decades from now, with the bond issuers continuing to be impacted by the OMB decision to apply sequestration to BABs. The results could be financially devastating to public power utilities that issued BABs.

More broadly, this case has significant ramifications for other existing and future government programs. The unexpected application of sequestration diminished many issuers' faith that the agencies of the federal government will fairly administer these kinds of direct subsidy programs, even though evidence shows that BABs were an effective and efficient way for the federal government to subsidize state and local borrowing costs and spur economic activity. This will have adverse implications for future programs through which states and municipalities are encouraged to partner with the federal government to serve the public interest.

For example, Congress incentivized energy investments for years by providing tax credits for certain investments and for energy production. That approach did not apply to entities with little to no tax liability, including public power utilities and rural electric cooperatives,

which are exempt from federal tax. To level this playing field, in the Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818, Congress allowed certain energy tax credits to be claimed as refundable elective payment tax credits, making them directly available to public power utilities and rural electric cooperatives. However, the Federal Circuit's decision, combined with the ongoing threat of sequestration, clouds investment decisions for public power utilities and rural electric cooperatives, which collectively serve nearly 30% of the nation's retail customers. If public power utilities and rural electric cooperatives cannot trust that the federal government will honor its statutory obligations, future energy and infrastructure investments may be imperiled, as will the ability of public power utilities and rural electric cooperatives to effectively provide safe and reliable power to municipalities throughout the nation.

In other words, the consequences of the Federal Circuit's decision, if allowed to stand, will extend far beyond the Petitioners in this case. That is reason enough to grant the Petition and review both questions presented by Petitioners.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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