ORIGINAL

24-5383

No._____

In the

Supreme Court of the United States

Samuel James Kent,

Petitioner,

v.

Darrly LaCounte, in his official capacity as Director of Bureau of Indian Affairs, et al.,

Respondents.

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

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Pro Se

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July 7, 2024

QUESTIONS PRESENTED

Several provisions of the Indian Self-Determination and Education Assistance Act[1] ("ISDEAA") were amended in 1988 to foreclose the United States Bureau of Indian Affairs ("BIA") from engaging in the practice of the "[i]nappropriate application of federal procurement laws and acquisition regulations to self-determination contracts"[2]. To affect these purposes, Congress added provisions exempting "self-determination contracts" entered into pursuant to the ISDEAA from "the Office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et seq.) and [the] Federal acquisition regulations promulgated thereunder"[3]. Additionally, Congress added a definition of self-determination contracts that was intended to clarify "self-determination contracts are not procurement contracts, as defined by the Federal Grant and Cooperative Agreement Act of 1977[4], and the system of federal acquisition regulations contained in Title 41 of the Code of Federal Regulations should not apply to self-determination contracts."[5]

The fundamental statutory interpretation question underlying this petition involves what effect a subsequent "technical"[6] change to the language of exemption provisions that is intended "to conform the 1975 language with the 1988 Amendments[7]" have on the scope of Federal laws that self-determination contracts are exempted from. Moreover, did Congress intend this technical change to authorize the BIA to exclude the application of any Federal law conceivably related to "contracts" from self-determination contracts, including an entire positive law title of the United States Code, regardless of their subject matter? Is the presence of the term "contract" in both the exemption provision and the name of a Title of the United States Code a sufficient basis to overlook the complete absence of evidence Congress contemplated

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[1] Public Law No. 93-638, 88 Stat. 2203 (January 4, 1975).
[2] *See* Senate Report 100-274, December 15, 1987) Pg. 7.
[3] Public Law No. 100-472, 102 Stat. 2291 (October 5, 1988). §204(c)
[4] Pub. L. No. 95-244, 92 Stat. 3 (Feb. 3, 1978)
[5] Senate Report 100-274, (December 15, 1987) Pg. 18.
[6] Senate Report 103-374 (September 12, 1994) Pg. 6.
[7] *Id.*

this technical change to vastly expand the scope of Federal laws precluded by the exemption provisions? The precedence of this Court and well-established principles of statutory construction would readily lead one to conclude the answer to be no. However, an undivided panel of the United States Court of Appeals for the Ninth Circuit upheld a decision by the BIA Director to deny Mr. Kent's claim for relief under 41 U.S.C. § 4712(c) based upon such an interpretation after applying the arbitrary and capricious standard of review under the Administrative Procedures Act.[8]

The questions presented are:

1. Did the United States Court of Appeals for the Ninth Circuit err in construing 25 U.S.C. § 5324(a)(1) to exempt self-determination contracts from the whistleblower protections of 41 U.S.C. § 4712?
2. Is it permissible for a Federal Court to ignore the plain text of the Federal statute granting it jurisdiction to review a case in favor of electing to apply an interpretive process that both begins and affords primacy to the statutory provisions of a related but ultimately irrelevant and separate statute?
3. Does ambiguity in amendatory statutory language implicitly authorize Federal courts and agencies to broadly expand the scope of an explicitly defined statutory exemption beyond its originally intended purpose where Congress has not expressed any intent to do so.

[8] 5 U.S.C. § 706(2)

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are as follows:

Petitioner is Samuel James Kent

Respondents are Darryl LaCounte in his official capacity as the Director of the United States Bureau of Indian Affairs, the United States Bureau of Indian Affairs, Deb Halaand in her official capacity as the Secretary of the United States Department of the Interior, and the United States Department of the Interior.

STATEMENT OF RELATED PROCEEDINGS

The following proceeding is directly related to this case within the meaning of Rule 14(b)(iii):

- *Samuel Kent v. Darryl LaCounte et al.*, No. 22-70013 (9th Cir.), judgment entered April 8, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Samuel James Kent respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW.

The memorandum opinion of the Court of Appeals was not reported in the Federal Reporter, however, it has been assigned a unique identifier on Westlaw at 2024 WL 1502504 and it is reproduced in the appendix., App. *Infra*,

JURISDICTION.

The U.S. Court of Appeals for the Ninth Circuit issued its opinion on March 8, 2024. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1)

STATEMENT OF THE CASE

I. Legal Background

Congress enacted Public Law No. 114-261 (codified at 41 U.S.C. § 4712) to address "current gaps in whistleblower protections for the individuals that work on projects funded by the over [5.8][1] trillion in contract and grant funding provided by the Federal Government each year"[2] These protections were based upon whistleblower protections provided in Section 1553 of the American Recovery and Reinvestment Act of 2009[3] ("ARRA")[4], with the added caveat that the whistleblower protections under 41 U.S.C. § 4712 would not be limited to grants and contracts funded by stimulus funds. Instead, the scope of individuals was broadly expanded to include employees of a "contractor, subcontractor, grantee, subgrantee or personal service contractor"[5].

The exceptions to these broad protections is "any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))"[6]. Moreover, any disclosure made by an employee of the categories of recipients identified in §4712(a)(1) if such disclosure "relates to an activity of an element of the intelligence community" or "was discovered during contract, subcontract, grantee, subgrantee, or personal services contractor services provided to an element of the intelligence community"[7]. Aside from the individuals expressly excluded from the statute's protections, Congress intended 41 U.S.C. § 4712 to provide across the board protections to any employee of a recipient of Federal funds. The broad expansion of protections was intended to match the exponential increase in the amount of Federal spending attributable to Federal civilian contracts and grants. At the time, there was not comparable whistleblower protections for civilian contractors and grantees to those that currently existed for employees of non-civilian contractors and

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[1] Amount reflects average annual amount of Federal spending on Federal civilian grants for the period covering the enactment of Pub. L. No 114-261 until the end of the most recent Federal Fiscal Year, according to usaspending.gov.

[2] Senate Report 114-270 (June 7, 2016). Pg. 2 §II.

[3] *Id.*

[4] Pub. L. No. 111-5, 123 Stat. 297 (Feb.17, 2009)

[5] 41 U.S.C. § 4712(a)(1)

[6] 41 U.S.C. § 4712(f)(1)

[7] 41 U.S.C. § 4712(f)(2)(A)-(B)

grantees [8]. Thus, Congress enacted 41 U.S.C. § 4712 to "remedy this unbalanced treatment by ensuring that contractors, subcontractors, grantees, and subgrantees of civilian Federal contracts and grants have the same rights as those working on defense contracts and grants."[9]

The Indian Self-Determination and Education Assistance Act[10] ("ISDEAA") was amended in 1988 in response to the United States Bureau of Indian Affairs from ("BIA") efforts to safeguard a greater portion of the funds Congress appropriated for Federal programs intended to serve the Indian people, from being transferred to Indian tribes in "self-determination contracts" authorized by the ISDEAA. The United States Senate Committee on Indian Affairs held extensive hearings on the matter and ultimately identified the BIA's "[i]nappropriate application of federal procurement laws and acquisition regulations to self-determination contracts"[11] as primary the mechanism employed by the BIA to obstruct the transfer of Federal programs to prospective Indian tribes attempting to enter self-determination contracts with the United States Government. To foreclose the BIA's use of these laws to impede the United State's policy of " supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities"[12] , the provisions of the ISDEAA were amended to "make clear that self-determination contracts are not procurement contracts, as defined by the Federal Grant and Cooperative Agreement Act of 1977, and the system of federal acquisition regulations contained in Title 41 of the Code of Federal Regulations should not apply to self-determination contracts."[13]

According to The Federal Grants and Cooperative Agreements Act of 1977[14] ("FGCAA"), A procurement contract (referred to within the FGCAA as "contracts") is to be used when the relationship between the Federal agency and the recipient "whenever the principal purpose of the

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[8] Senate Report 114-270 (June 7, 2016), Pg. 2-3. § II.
[9] *Id.* at Pg. 4.
[10] Public Law No. 93-638, 88 Stat. 2203 (January 4, 1975).
[11] *See* Senate Report 100-274, (December 15, 1987) Pg. 7.
[12] 25 U.S.C. § 5302(b)
[13] Senate Report 100-274, (December 15, 1987) Pg. 18.
[14] Pub. L. 95-244, 99 Stat. 3. (February 3, 1978). Currently codified at 31 U.S.C. § Chpt. 63.

instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government"[15]. Congress specifically chose to exempt self-determination contracts from Federal laws and regulations governing procurement contracts, as defined by the FGCAA because the BIA having perceived the ISDEAA as threatening their prospective share of the funds Congress appropriated to the United States Department of the Interior[16], perniciously began to treat self-determination contracts as if they were procurement contracts defined by the FGCAA. This resulted in the BIA imposing "excessive paperwork and unduly burdensome reporting requirements"[17] and "making the contracting process much more burdensome and time-consuming." Ultimately, these actions culminated in fewer self-determination contracts being entered into by Indian tribes and "[t]he federal service bureaucracy that was supposed to be reduced as tribes assumed control of programs [being] replaced by a contract monitoring bureaucracy."[18]

Congress foreclosed the BIA from continuing to engage in this conduct by amending provisions of the ISDEAA in 1988 by adding to the provisions under Section 105 (currently codified at 25 U.SC. 5324(a)(1)) to state "Provided further. That, except for construction contracts (or sub-contracts in such cases where the tribal contractor has sub-contracted the activity), the Office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et seq.) and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts."[19]. The language of this section was changed again in 1994 to "address both a technical and substantive problem."[20]. The only matter relevant to this case and was explained in the Senate Committee Report for the amendment as "the need to conform the 1975 language with the 1988 Amendments."[21]. As a result, the current language of this provision of the ISDEAA states "Notwithstanding any other provision of law... the

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[15] *Id.* at §4.

[16] *See* Testimony of Ross O. Swimmer, Assistant Secretary for Indian Affairs, United States Department of the Interior. Senate Hearing 100-369 Pt. 2, Pg. 31. (October 2, 1987).

[17] Senate Report 100-274 (December 22, 1987), Pg. 7.

[18] *Id.*

[19] Public Law No. 100-472, 102 Stat. 2291 (October 5, 1988). §204(c)

[20] Senate Report 103-374 (September 12, 1994) Pg. 6.

[21] *Id.*

contracts and cooperative agreements entered into with tribal organizations pursuant to section 5321 of this title shall not be subject to Federal contracting or cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes."[22]

II. FACTUAL BACKGROUND

In retaliation for making several protected disclosures regarding the fraud, waste, and abuse of Federal funds, Petitioner Samuel James Kent was terminated from his employment with the Pit River Tribe on July 11, 2019. On July 15, 2019, Mr. Kent then filed a whistleblower retaliation complaint with the Office of the Inspector General for the United States Department of the Interior ("OIG") pursuant to 41 U.S.C. §4712(b)(1). These complaints were met with the OIG's refusal to investigate Mr. Kent's complaint resulting in Mr. Kent seeking review of the grounds cited by the OIG, in a petition for review to the U.S. Court of Appeals for the Ninth Circuit[23]. The Ninth Circuit denied review for want of jurisdiction because 41 U.S.C. § 4712(c)(5) only permitted direct review of a final agency action of the Agency head, not the OIG.

Mr. Kent subsequently filed a complaint under the Administrative Procedures Act in the United States District Court for the District of Oregon[24]. Within this case, the Federal Government moved to stay proceedings in the District Court to allow the OIG to investigate Mr. Kent's whistleblower retaliation complaint on the condition that the OIG did not concede 41 U.S.C. § 4712 applied to Mr. Kent's complaint but the OIG investigation would proceed as though the statute did apply. The subsequent investigation conducted by the OIG concluded on December 6, 2021, having substantiated Mr. Kent's whistleblower retaliation claim. On January 5, 2022, BIA Director Darryl LaCounte issued an order denying Mr. Kent's claim for relief under 41 U.S.C. § 4712 on the grounds that "Upon legal review, it is clear that 41 U.S.C. § 4712 does not apply to Indian Self-Determination and Education Assistance Act agreements made under Public Law 93-638". Director LaCounte determined the Tribal Transportation Program

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[22] 25 U.S.C. 5324(a)(1).

[23] *Kent v. U.S. DOI OIG et al.*, Case No 20-70391 (9th Cir.)

[24] *Kent v. Office of the Inspector General, et al.*, Case No. 3:21-CV-00291-MO (D.Or.) 3:21-CV-00291-MO

and Housing Improvement Plan agreements the OIG chose to include in their investigation were agreements made under Pub. L. No. 93-638, so Mr. Kent was not covered by the whistleblower protection provided under 41 U.S.C. § 4712.

Mr. Kent timely filed for review of this decision in the United States Court of Appeals for the Ninth Circuit on January 24, 2024, pursuant to 41 U.S.C. § 4712(c)(5).

III. PROCEEDINGS BELOW

Petitioner filed the petition for review of the BIA Director's Order in the United States Court of Appeals for the Ninth Circuit alleging, as relevant here, that the BIA Director erred in interpreting 41 U.S.C. § 4712 to exclude assistance agreements under the ISDEAA. Petitioner alleged the interpretation included in the BIA Director's order contradicted the plain and unambiguous text of 41 U.S.C. § 4712(f)(1)-(2), which provided a limited exception to the whistleblower protections when a protected disclosure involved an expressly defined element of the intelligence community. Petitioner contended 41 U.S.C. § 4712's silence on whether ISDEAA assistance agreements were also excluded from its coverage was not a permissible basis for the BIA Director to "disregard clear language simply on the view that...Congress must have intended something broader." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782,794 (2014). Petitioner also challenged the BIA Director for having failed to carry the burden of justifying the assistance agreements under the ISDEAA being exempt from the scope of 41 U.S.C. § 4712's coverage. The order identified no provision of any relevant statute to support their interpretation and, since "a reviewing court...must judge the propriety of [agency action] by the grounds invoked by the agency." *Burlington Truck Lines Inc. v. United States,* 371 U.S. 156, 169 (1962), Respondent was bound by the justification provided in the BIA Director's Order, and the Ninth Circuit "may not accept appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto In. Co.* 463 U.S. 29, 50 (1983).

Petitioner also argued this Court has previously in *Cherokee Nation of Oklahoma v. Leavitt,* 543 U.S. 631 (2005) that the ISDEAA's general purpose did not support a determination that self-determination contracts were

subject to any special treatment that would otherwise support the BIA Director's order. Furthermore, Petitioner contended the BIA Director's interpretation contradicted a prior decision of the U.S. Department of the Interior in a case decided by the Ninth Circuit wherein the whistleblower protections provided under section 1553 of the ARRA were afforded to an individual that made a protected disclosure of an assistance agreement under the ISDEAA.[25]. The whistleblower protections enacted under 41 U.S.C. § 4712 were predicated on those provided under section 1553 of the ARRA, however, the BIA Director failed to explain why its interpretation of the protections under 41 U.S.C. § 4712 departed from its interpretation of what is essentially an identical statute. The Petitioner also challenged the BIA Director's order on the grounds that a federal program known as the Tribal Transportation Program, which was also the subject to Mr. Kent's protected disclosures, was not an assistance agreement under Public Law No. 93-638. The administrative record containing the agreement for this assistance agreement clearly states, "This Tribal Transportation Agreement is entered into under the authority granted by Chapter 2 of Title 23, United States Code". Accordingly, Petitioner alleged the BIA Directors acted arbitrarily and capriciously because the order was not "based on a consideration of the relevant factors and...there has been a clear error of judgement" *Dept. of Homeland Sec. v. Regeants of the Univ. of California,* 140 U.S. 1891,1905 (2020).

Finally, Petitioner contended the BIA Director lacked the authority to deny Mr. Kent's claim for relief. Under 41 U.S.C. § 4712(c)(1), only the head of the executive agency concerned is authorized to issue an order granting or denying relief. However, the BIA Director's order assumed this authority based on his authority as the head of the cognizant agency of the U.S. Department of the Interior. Petitioner challenged that the statute did not authorize the heads of cognizant agencies to grant or deny relief and no delegation of authority from the Secretary of Interior permitted the BIA Director to assume the authority claimed in the order.

The United States Government argued in support of the BIA Director's order by claiming for the first time that the

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[25] See *Chippewa Cree Tribe of Rocky Boy's Rsrv., Montana v. U.S. Dep't of Interior,* 900 F.3d 1152 (9th Cir 2018)

BIA Director's order is based on the provision of the ISDEAA under 25 U.S.C. § 5324(a)(1). Respondents then urged the Ninth Circuit to begin its review of this case by interpreting the newly raised provision of the ISDEAA, instead of the 41 U.S.C. § 4712. Of the arguments relevant here, Respondents alleged 41 U.S.C. § 4712 was a "contracting and procurement law"[26] within the meaning of 25 U.S.C. § 5324(a)(1) of the ISDEAA, which exempts self-determination contracts from those laws. Respondents claimed that 41 U.S.C. § 4712 is on its face a federal contracting and procurement law because Congress codified section 4712 in title 41 of the United States Code, which is titled "Public Contracts". Respondents cited this Court's Decision in *Yates v. United States,* 574 U.S. 528, 540 (2015) to support their proposition that "the heading of a section" is a "tool[] available for the resolution of the doubt about the meaning of a statute". According to Respondents, since 41 U.S.C. § 4712 did not expressly state it applied to Indian tribes, self-determination contracts were excluded from its coverage by operation of 25 U.S.C. § 5324(a)(1).

Respondents also argued the Tribal Transportation Program Agreements were assistance agreements under the ISDEAA because the authorizing statute for the Tribal Transportation Program at 23 U.S.C. § 202(b)(6)(A) requires that all funds are made available to tribes "in accordance with the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 *et seq.)".* The remainder of Petitioner's arguments were claimed to be without merit by Respondent.

After Petitioner was, for the first time, provided notice that Respondent purported to base the BIA Director's order on the exemption under 25 U.S.C. § 5324(a)(1) of the ISDEAA, Petitioner submitted an oversized Reply Brief that extensively discussed the legislative history of the exemption relied upon by Respondents to demonstrate Congress intended the "Federal contracting and cooperative agreement laws" referred to in 25 U.S.C. § 5324(a)(1) to mean federal procurement contracts and cooperative agreements as defined by the FGCAA. Petitioner contended that according to the definitions therein, 25 U.S.C. § 5324(a)(1) did not exclude the application of 41 U.S.C § 4712 to self-determination

[26] See Brief for Respondents [Dkt. Entry 50 Pg. 13].

contracts because the fundamental purpose of the whistleblower protection statute differentiated it from the Federal laws Congress intend the exemption under 25 U.S.C. § 5324(a)(1) apply to. Petitioner further argued Congress extended whistleblower protections for individuals who make protected disclosures related to the gross waste of Federal funds supported a broad interpretation that conceivably included all funds (except for those expressly excluded) appropriated by Congress that were provided to recipients, regardless of the legal instrument in which they are provided. Petitioner also contended Respondent's interpretation conflicted with broader United States Government policy goal under the ISDEAA.

Petitioner also contended the exclusion of whistleblower protections from applying to self-determination contracts was at odds with the purpose of the ISDEAA. Congress intended for the control of Federal programs to be transferred to Indian tribes under the ISDEAA based on the recognition that when Indian tribes been able to develop "sophisticated systems to manage and account for financial, personnel, and physical resources"[27], they are in the best position to serve the needs of their membership. Congress envisioned self-determination contracts as providing the foundation for Indian tribes to develop the necessary infrastructure and governmental services necessary to support the development of these systems with the goal of maximizing their use of natural resources, tribal, federal, and private resources to "create jobs and support business on Indian lands"[28]. In this respect, the appropriate use of funds provided by self-determination contracts is inextricably linked to attaining the broader policy goal of self-determination. Within this context, Respondent's interpretation of 25 U.S.C. § 5324(a)(1) to preclude the application of 41 U.S.C. § 4712 to self-determination contracts would eradicate the benefits afforded by providing whistleblower protections for those who disclose the misuse of Federal funds provided in a self-determination contract. The negative impact this would have on the accountability of Tribal governments to the Indian people clearly contradicts the important purpose Congress recognized the appropriate management of the

[27] Senate Report 100-274 (December 15, 1987) Pg. 4.
[28] *Id.*

resources provided under the ISDEAA has in supporting tribal governments' development of their institutional capacity and, ultimately, the attainment of greater autonomy and self-determination of the people they serve.

The Ninth Circuit held an oral argument hearing on March 11, 2024, where the panel primarily directed its questioning at Respondents regarding the statutory basis for the BIA Director's order concluding the Tribal Transportation Program Agreement in this case was an assistance agreement made under Public Law No. 93-638. Respondents filed a letter to the court following oral argument to further support their arguments related to Tribal Transportation Program and Petitioner filed a response as required by an order of the Ninth Circuit.

On March 8, 2024, the Ninth Circuit entered a memorandum disposition granting the petition related to the Tribal Transportation Program and remanding for a reviewable explanation as to why the BIA concluded that the Tribal Transportation Program Agreement is exempt from 41 U.S.C. § 4712. The Ninth Circuit denied the portions of the petition related to the Housing Improvement Program based on the determination that 41 U.S.C. § 4712 is a Federal contracting and cooperative agreement law within the meaning of 25 U.S.C. § 5324(a)(1). The Ninth Circuit explained that it reached this conclusion because "The laws that govern federal contracting and procurement are found in Title 41 of the U.S. Code (titled "Public Contracts)"[29] and the whistleblower protection statute at issue is codified at "Section 4712 of that title"[30] Based on this characterization, the Ninth Circuit concluded "Because section 4712 does not expressly apply to Indian tribes, ISDEAA self-determination contracts are exempt from its protection."[31]

REASONS FOR GRANTING THE PETITION

In interpreting the exemption under 25 U.S.C. § 5324(a)(1) to preclude the application of any federal law codified under Title 41 of the United States Code that does not expressly apply to Indian tribes, the Ninth Circuit decision establishes a novel rule that splits with the

[29] See *Infra* App. Pg. 3.
[30] *Id.*
[31] *Id.*

precedence of at least three circuits and two extraordinarily important decisions of this Court. The significance of the consequences of these split warrants plenary review. Sup. Ct. R. 10(a).

The Ninth Circuit's decision has also "decided an important question of federal law in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Finally, the Ninth Circuit's decision results from an egregious deviation from this Court's precedent for engaging in the process of statutory construction to determine Congress's intent in addressing cases presented to them. Petitioner respectfully submits the Ninth Circuit's decision cannot stand and review by this Court is necessary to preserve the integrity of the law.

I. The Ninth Circuit's opinion creates a novel rule resulting in a split with the precedence of this Court and at least three circuits.

The Ninth Circuit based its decision to deny the petition for review of Mr. Kent's claim for relief related to the protected disclosure made regarding self-determination contracts based on the conclusion that 41 U.S.C. § 4712's being codified in Title 41 of the United States Code automatically resulted in it being a Federal contracting law within the meaning of the exemption under 25 U.S.C. § 5324(a)(1). From this, it further extrapolated that since 41 U.S.C. § 4712 did not state it expressly applied to Indian tribes, the ISDEAA precludes its application to self-determination contracts. The totality of the Ninth Circuit's explanation for this conclusion is stated as "The laws that govern federal contracting and procurement are found in Title 41 of the U.S. Code (titled "Public Contracts")"[32]. The Ninth Circuit did not explain what it understood the meaning of the phrase "Federal contracting and cooperative agreement law" un 25 U.S.C. § 5324(a)(1) to be or why §4712's codification in Title 41 of the U.S. Code automatically resulted in it being a "Federal contracting and cooperative agreement law" within the meaning of 25 U.S.C. § 5324(a)(1) or

According to the logic of the Ninth Circuit's decision and interpretation of 25 U.S.C. § 5324(a)(1), self-determination contract are exempt from any Federal law codified in Title 41 of the United States Code unless they expressly apply

[32] *Id.*

to Indian tribes. This interpretation would preclude the application of Chapter 71 of Title 41 of the United States Code, the Contract Disputes Act[33], to self-determination contracts. In addition to contradicting 25 U.S.C. § 5331 of the ISDEAA, the Ninth Circuit's decision squarely conflicts with the cause of action permitting Indian tribes to seek this Court's review for claims under the ISDEAA and resulted in this Court's landmark decision that in Cherokee Nation of Okla. V. Leavitt, 543 U.S. 631 (2005), which held the Government is legally bound to pay "contract support costs", and the subsequent decision in Salazar v. Ramah Navajo Chapter, 567 U.S. 182, (2012) which held the Government must pay each Indian tribe's contract support costs in full.

Both cases began with Indian tribes suing the Federal Government for claims brought under the Contract Disputes Act which, by its terms, does not expressly apply to Indian tribes. Based on the Ninth Circuit's decision in this case, 25 U.S.C. § 5324(a)(1) would preclude the application of the the Contract Disputes Act to self-determination contracts because it is also codified in Title 41 of the United States Code. For similar reasons, the Ninth Circuit's decision in this case also splits with decisions in the Tenth Circuit[34], D.C. Circuit[35], and Federal Circuit[36] that also recognized the ISDEAA provides Indian tribes a cause of action to bring claims under the Contract Disputes Act.

The Ninth Circuit's decision in this case provides no basis to explain away the split resulting from the rationale it relied on in pronouncing its sweeping interpretation of the exemption under 25 U.S.C. § 5324(a)(1). Similarly, no justification exists to support the novel interpretive rule applied in this case that would suggest the superiority of the Ninth Circuit's decision to the prior decision of this Court and other circuits that recognize the applicability of the Contract Disputes Act for claims brought by self-

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[33] Public Law No. 95-563, 92 Stat. 2383 (November 1, 1978). Currently codified at 41 U.S.C. § 7101-7109.

[34] *Northern Arapaho Tribe v. Becerra,* 61 F.4th, 810, 813 (10th Cir. 2023); *Southern Ute Indian Tribe v. Sebelius,* 657 F.3d 1071, 1075 (10th Cir. 2011); *Ramah Navajo v. Salazar,* 644 F.3d 1054 (10th Cir. 2011).

[35] *Navajo Nation v. U.S. Department of Interior,* 57 F.4th 285, 291 (D.C. Cir. 2023); *Swinomish Indian Tribal Community v. Becerra,* 993 F.3d 917, 919 (D.C. Cir. 2021); *Menominee Indian Tribe of Wisconsin v. U.S.,* 764 F.3d. 51, 55 (D.C. Cir. 2014).

[36] *Kaw Nation v. Norton,* 405 F.3d 1317 (Fed. Cir. 2005).

determination contractors under the ISDEAA despite its codification under Title 41 of the United States Code or language providing for its express application to Indian Tribes. To prevent the Ninth Circuit's decision from creating a split with other circuit and depriving tribal self-determination contractors of an invaluable tool for ensuring the continued viability of the programs administered under the ISDEAA, the decision in this case cannot stand. Plenary review by this Court is merited to prevent these consequences from becoming further entrenched.

II. The Ninth Circuit's decision conflicts with this Court's precedence related to the interpretation of statutory provisions to determine their meaning.

The fundamental error in the Ninth Circuit's decision emanates from their application of an interpretive methodology that is the antithesis of this Court's well-established precedence for interpreting the meaning of Federal statutes. In affirming the permissibility of the BIA Director's order to deny relief for Mr. Kent's whistleblower retaliation claim, the Ninth Circuit accepted the *post hoc* argument Respondents advanced for the first time in their answering brief, premised on a novel interpretation of isolated terms within an isolated provision of the ISDEAA. To obtain this result, the Ninth Circuit concluded the term "contract" in the name of Title of the United States Code Title where §4712 is codified was dispositive evidence of its subject matter and was therefore controlling of the scope of its application.

This laid the groundwork for the Ninth Circuit to decide 41 U.S.C. § 4712 is a "law[] that govern[s] federal contracting and procurement"[37], because it is codified under Title 41 of the United States Code. Without explaining what the Ninth Circuit meant by a "law that governs federal contracting and procurement", the Ninth Circuit then identified 25 U.S.C. § 5324(a)(1) of the ISDEAA as establishing a "presumption that a federal contracting law does not apply to self-determination contracts unless that law expressly applies to Indian tribes. 25 U.S.C. § 5324(a)(1)."[38]. Since 41 U.S.C. § 4712

[37] *Infra* App. 3.
[38] *Id.*

was codified under Title 41 of the United States Code and it did not expressly state it applied to Indian tribes, the Ninth Circuit held employees of self-determination contractors were excluded from the whistleblower protections by operation of the exemption under 25 U.S.C. § 5324(a)(1). The Ninth Circuit disposed of the fact that self-determination contracts were not amongst the exempting provisions of 41 U.S.C. § 4712(f)(1)-(2) by declaring "That section 4712—the enactment of which postdates the current version of section 5324(a)(1)—does not specifically except employees of an Indian tribe is thus immaterial."[39]

1. *The Ninth Circuit's Decision contradicts this Court's precedent regarding the nature of self-determination contracts.*

This Court has repeatedly upheld the longstanding principle that the "starting point" of statutory interpretation is "the language of the statute itself." *Randall v. Loftsgaarden,* 478 U.S. 647, 656 (1986). Moreover, a fundamental doctrine of statutory interpretation requires courts to employ the tools of statutory construction to ascertain Congress's intent on the question before it. *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013). These tools include examination of the "text, structure, history, and so forth," *Kisor v. Wilkie,* 139 S.Ct. 2400, 2416 (2019). These principles suggest the Ninth Circuit's review should have started with the text of 41 U.S.C. § 4712 in reviewing this case.

As relevant here, the text states the individuals covered by the whistleblower protections under 41 U.S.C. § 4712(a)(1) include "An employee of a contractor...may not be discharged, demotes or otherwise discriminated against as a reprisal for disclosing...evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds...or a violation of law, rule, or regulation related to a Federal contract". In *Leavitt*, this Court's held the ISDEAA's "language strongly suggests that Congress, *in respect to the binding nature of a promise,* meant to treat alike promises made under the Act and ordinary contractual promises." *Leavitt,* 543 U.S. at 639 (2005) (alteration in original). As such, this Court

[39] *Id.*

concluded that the ISDEAA's use of the term "contract" in describing the "nature of the Government's promise" is not intended to mean something greater than the ordinary or plain meaning of the use of the word "contract" to refer to "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty, Restatement (Second) of Contracts § 1 (1979)." *Id.* Accordingly, this Court also concluded the ISDEAA's general purpose did not support self-determination contracts being afforded "special treatment" and rejected arguments advocating for their special treatment under the law. *Id.* Under the ISDEAA, when an Indian tribe and the United States Government enter into a self-determination contract, it establishes "a promise or set of promises for the breach of which the law gives a remedy". *Id* It follows that a self-determination contractor is a "contractor" according to the ordinary and plain meaning of the term.

When the precedential holding of this Court's decision in *Leavitt* is considered in light of the text of 41 U.S.C. § 4712(a)(1) it is clear that the whistleblower protections afforded to the employees of a contractor include employees of a self-determination contractors entered into under the ISDEAA. The application of the "fundamental canon of statutory construction that words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute." *New Prime Inc. v. Oliveira,* 586 U.S. 105, 113 (2019),) requires the interpretation of the term "contractor" under 41 U.S.C. §4712(a)(1) to be afforded the same ordinary and plain meaning of the term "contractor" this Court applied to self-determination contractors in *Leavitt.* Stated simply, this Court's decision in *Leavitt* unambiguously demonstrates and requires the construction of 41 U.S.C. § 4712(a)(1)'s whistleblower protections for employees of "contractors" to include employees of self-determination contractors under the ISDEAA. There exists no basis in the text, context, structure, or legislative history that supports the employees of self-determination contractors being afforded the "special treatment" this Court denied in *Leavitt* thereby permitting their exclusion from the scope of protections established by 41 U.S.C. § 4712(a)(1). Moreover, the "preeminent canon of statutory interpretation requires [courts] to "presume that [the]

legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–254 (1992)). Nothing in the Ninth Circuit decision explains why Congress did not intend the term "contractor" in 41 U.S.C. § 4712(a)(1) to mean a contractor under the ISDEAA.

If the question of whether the employees of self-determination contractors is not definitively answered by the provision of 41 U.S.C. § 4712(a)(1), the necessary clarification is provided by subsequent provisions that answer the question of which individuals are explicitly excluded from the statute's protections. Congress explicitly identified the class of employees it declined to include in the scope of the 41 U.S.C § 4712's protections in the exemption provisions under 41 U.S.C. § 4712(f)(1)-(2). Those employees include "any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))."[40] These provisions clarify any disclosure made by an employee of the same recipient classes identified in 41 U.S.C. § 4712(a)(1), if the disclosure "(A) relates to an activity of an element of the intelligence community" or "(B) was discovered during contract, subcontract, grantee, subgrantee, or personal services contractor services provided to an element of the intelligence community."[41]

This Court's precedence makes clear that there is a strong presumption against courts interpreting statutes recognizing tacit exemption from a statutory rule. "Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include [an] exception to a broad rule, courts apply the broad rule." *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 669 (2020). In the instant case, the Ninth Circuit's decision directly conflicts with this requirement by ignoring Congress's intent to provide whistleblower protections to a broad category of individuals that covers virtually all employees of recipients of federal funds with the limited exemption prescribed in 41 U.S.C. § 4712(f)(1)-(2).

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[40] 41 U.S.C. § 4712(f)(1).

[41] 41 U.S.C. § 4712(f)(2)(A)-(B).

This conclusion is further reinforced by this Court's longstanding recognition that this Court "do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigr. & Customs Enf't,* 543 U.S. 335, 341 (2005). As relevant here, Congress has clearly shown it considered which class of employees it did not wish to provide whistleblower protections under 41 U.S.C. § 4712 by including the exemption provisions under 41 U.S.C. § 4712(f)(1)-(2). Congress unambiguously did not include the employees of self-determination contractors within the exemption provisions. Therefore, all that remains is to give effect to the text of the statute prescribing a broad scope of the individuals Congress intended to protect from retaliation. When these matters are weighed against the rationale articulated for the outcome below, it is clear the Ninth Circuit's decision results from a "disregard of the rules of statutory interpretation." *Food Mktg. Inst. v. Argus Leader Media,* 588 U.S. 427, 436 (2019) and Petitioner respectfully submits this Court should not allow it to stand.

Contrary to the established principle that Federal Court's "When confronted with two Acts of Congress allegedly touching on the same topic" they must "strive to give effect to both." *Epic Sys. Corp. Jacob Lewis Ernst & Young Stephen Morris Nat'l Lab. Rels. Bd. v. Murphy Oil USA,* 584 U.S. 497, 510 (2018) (quoting *Morton v. Mancari,* 417 U.S. 535, 551 (1974) (internal quotations omitted), the Ninth Circuit's decision accomplishes precisely what the precedent of this Court prohibits by resolving the interpretive question presented as if it were at "liberty to pick and choose among congressional enactments" *id.* The precedent of this Court requires Federal Courts to "approach federal statutes touching on the same topic with a strong presumption they can coexist harmoniously. *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz,* 601 U.S. 42, 63 (2024) (internal quotations omitted). The construction of statutes in a manner that achieves this harmony is not a matter of discretion, as this Court has explained "[W]hen two statutes are capable of co-existence, however, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."

Vimar Seguros y Reaseguros, *S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (internal quotations omitted). As this Court has explained, fidelity to the separation of power established by the Constitution obligates the pursuit of such harmony by the Federal Courts and "[r]espect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work." *Epic Sys. Corp. Jacob Lewis Ernst & Young Stephen Morris Nat'l Lab. Rels. Bd. v. Murphy Oil USA*, 584 U.S. 497, 511 (2018).

By choosing to ignore this obligation and dismissing Petitioner's arguments about the relevance of these principles based on the reasoning "This argument is without merit"[42], the Ninth Circuit "transform[ed] them[selves] from expounders of what the law *is* into policymakers choosing what the law *should be*." *Id.* Petitioner respectfully submits that in light of the consequences, this explanation fails to "bear[] the heavy burden of showing a clearly expressed congressional intention' "*Epic Sys. Corp.* 584 U.S. at 510 (quoting *Vimar Seguros y Reaseguros, S.A,* 515 U.S. at 533), that the "two statutes cannot be harmonized, and that one displaces the other," *Id.* This Court has recently affirmed the relevance of the foundational doctrine that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244, 2257 (2024) (quoting *Marbury v. Madison,* 1 Cranch 137, 177 (1803).

The consequences of the Ninth Circuit conceding to Respondent's interpretation are exacerbated by the fact the decision, in this case, upheld the contested agency action based on a different rationale than the BIA Director's contemporaneous reason for denying Mr. Kent's relief pursuant to 41 U.S.C. § 4712(c). The final agency action contested in this case denied Mr. Kent's claim for relief based on the rationale that "Upon legal review, it is clear that 41 U.S.C. § 4712 does not apply to Indian Self-Determination and Education Assistance Act agreements made under Public Law 93-638, including the HIP and TTP administered by PRTC in this case."[43]

In litigating this case before the Ninth Circuit, Respondent's argument in support of affirming the BIA Director's decision is based on the previously unarticulated

[42] *Infra* App. 3.

[43] See *infra* App. Pg. 6.

rationale that includes the BIA Director's interpreting 41 U.S.C. § 4712 to be a "Federal contracting law" within the meaning of "Federal contracting and cooperative agreement laws" that are exempted by 25 U.S.C. § 5324(a)(1). Nowhere in the BIA Director's order[44] is this reasoning articulated. This Court's precedent unflinchingly holds "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). The arguments submitted by Respondent before the Ninth Circuit are therefore impermissible *post-hoc* rationalization, and the Ninth Circuit's decision upholding the BIA Director's decision on the same basis is equally impermissible. *Id.* Therefore, Petitioner respectfully submits review by this Court is warranted to condemn the Ninth Circuit's indifference to the violence done to the law by affording unbridled deference to Respondent's unprecedented statutory interpretation that lacks any basis in the law or the precedent of this Court.

2. *The Ninth Circuit's impermissibly expands the exemption under 41 U.S.C. § 4712(f)(1)-(2) to include employees of self-determination contractors.*

A well-established principle of statutory interpretation prohibits a Federal Court from "disregard[ing] clear language simply on the view that...Congress must have intended something broader." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). The broader "something" invented by the Ninth Circuit was the inclusion of self-determination contractors within the exemption provisions of 41 U.S.C. § 4712(f)(1)-(2) despite the absence of a textual basis for doing so. By defying the well-established principle that statutory construction "begin[s] where all such inquiries must begin: with the

[44] There in fact exists evidence that during Petitioner's previous efforts to pursue a claim under 41 U.S.C. § 4712, the BIA Director response to the Office of the Inspector General for the U.S. Dept. of the Interior perceived the retaliation faced by Mr. Kent to be an "internal matter between [Mr. Kent] and the tribe" and based on the BIA's policy of "not to interfere with the governance of tribes, allowing them to utilize their own process, including staffing decisions" the BIA recommended the OIG take no further action on Mr. Kent's allegation. Based on this response by the BIA Director, it would take an additional two years and the initiation of a lawsuit against the OIG in the United States District Courts for Mr. Kent have his claims of retaliation investigated and substantiated by the OIG. See *infra* App. Pg. 7-10.

language of the statute itself." *Republic of Sudan v. Harrison*, 587 U.S. 1, 8, 139 S. Ct. 1048, 1056, 203 L. Ed. 2d 433 (2019), the substantive effect of the Ninth Circuit's decision is the circumvention of Congress's intent for the broad scope of the whistleblower protection provided under 41 U.S.C. § 4712 to only be withheld from a limited class of employees that are explicitly identified in the text of the statute.

Instead, the Ninth Circuit applied a novel interpretive approach that utilized the provisions of a different statute to establish a basis for justifying the existence of a tacit exemption for self-determination contractors that appears nowhere in the text of 41 U.S.C. § 4712. In electing to simply overlook the statutory text that answers the questions before it, the Ninth Circuit's decision violates the "fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 677 (2020) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012). In so doing, the Ninth Circuit's construction offends this Court's precedent that "[Federal Courts] cannot properly expand [statutory exemptions] beyond what its terms permit." *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 439 (2019) (citing *Milner v. Dep't of Navy*, 562 U.S. 562,571-571 (2011)). This principle equally applies to the interpretation of statutory exemptions as this Court recognized in holding "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980) (alterations in original).

More importantly, the Ninth Circuit's use of statutory interpretation to create from whole cloth an exemption for a class of individuals not identified in the statutory text is the functional equivalent of creating a law that has the effect of abrogating an individual right established by Congress's in its exercise of its enumerated "legislative Powers" U.S. Const. art. I, § 1. The integrity of the tripartite governmental structure established by the Constitution is dependent on the Federal Judiciary's exercise of its enumerated power not intruding upon the

powers of the other branches of government. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016), as revised (May 24, 2016). By sanctioning the exclusion of a class of individuals from the whistleblower protections provided by 41 U.S.C. § 4712 through the creation of an exemption that does not exist in the legislation enacted by Congress, the Ninth Circuit's decision, in this case, constitutes such an intrusion. Petitioner respectfully submits the insubstantiality of reasoning for issuing a decision to this effect demonstrates the Ninth Circuit's perception of its duty to exercise its enumerated powers in accordance with this foundational doctrine has run far afoul of what the Constitution permits. As such, review by this Court is warranted to prevent this perception from becoming further ingrained in the lower courts and to obviate the expansion of Ninth Circuit's error in this case to other circuits.

III. The Ninth Circuit's interpretation of 25 U.S.C. § 5324(a)(1) to displace the application of 41 U.S.C. § 4712 conflicts with the intent of Congress recognized by this Court's precedent.

To achieve the result of precluding the application of 41 U.S.C. § 4712 in this case, the Ninth Circuit utilized the phrase "Federal contracting law" in 25 U.S.C. § 5324(a)(1) to create a bright-line rule that presumptively exempts self-determination contracts entered under the authority of the ISDEAA from every statute codified in Title 41 of the United States Code that does not expressly apply to Indian tribes. The astonishing breadth of the Ninth Circuit's interpretation substantially deviates from the well-established interpretive doctrines pronounced in this Court's precedent and obstructs the express will of Congress by stripping the protections 41 U.S.C. § 4712 provided for individuals the employees of self-determination contractors. Therefore, the decision in this case unnecessarily subjects the funds Congress appropriates for the ISDEAA to the risk of fraud, waste, and abuse. When the traditional tools of statutory construction are applied, it is clear the Ninth Circuit's interpretation of 25 U.S.C. § 5324(a)(1)'s meaning is irredeemably flawed and the resulting displacement of 41 U.S.C. § 4712's application to the employees of self-determination contractors is not supported by the ISDEAA.

The Ninth Circuit's interpretation of the phrase "Federal contracting law" in isolation is instrumental to the decision in this case being completely unmoored from any intent expressed by Congress. In discerning the meaning of a statute, Federal Court's "interpretation of [a statutory] phrase 'depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis'" *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011) (quoting *Dolan v. Postal Service,* 546 U.S. 481, 486 (2006)". The decision in this case violates the "whole-text" canon, which prohibits Federal Courts from separating words from the statutory context that is the "primary determinant of their meaning." A. Scalia and B. Garner, *Reading Law; The Interpretation of Legal Texts* 167 (2012). In this case, that context includes related statutory provisions from which the purpose and meaning of the exemption from "Federal contracting and cooperative agreement laws"[45] must be discerned. Were it the case that the Ninth Circuit sought to determine whether the meaning of the term "contracting" under 25 U.S.C. § 5324(a)(1) was the plain and ordinary meaning this Court applied in *Leavitt* or a more specific meaning, this Court has instructed "When words have several plausible definitions, context differentiates among them." *United States v. Hansen*, 599 U.S. 762, 775 (2023).

The context for consideration begins with the definition of "self-determination contracts" under 25 U.S.C. § 5304(j), which expressly provides "except as provided in section 5324(a)(3) of this title, no contract entered into under subchapter I (or grant or cooperative agreement used under section 5308 of this title) shall be"[46]... "construed to be a *procurement contract*"[47] (emphasis added) or "except as provided in section 5328(a)(1) of this title, subject to any *Federal procurement law (including regulations)*"[48] (emphasis added). The direct reference to 25 U.S.C. § 5324 implies a shared purpose between these two provisions and the identification of "Federal procurement law" further aids in refining the context from which the meaning of "Federal contracting and cooperative agreement law" in 25

[45] 25 U.S.C. § 5328(a)(1)
[46] 25 U.S.C. § 5304
[47] 25 U.S.C.§ 5304(j)(1).
[48] 25 U.S.C. § 5304(j)(2).

U.S.C. §5324(a)(1) must be given effect. In addition to these initial contextual tools, the answer to the question of what is meant by the exemption under 25 U.S.C. § 5324(a)(1) and whether it affirmatively displaces the application of 41 U.S.C. § 4712 required the Ninth Circuit to "interpret the relevant words not in a vacuum, but with reference to the statutory context, "structure, *history*, and purpose." *Abramski v. United States*, 573 U.S. 169, 179 (2014) (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (2013)) (emphasis added). In this case, the ISDEAA's unique history and the purpose Congress intended the statutory provisions at issue to serve, in light of the larger statutory regime, is essential for interpreting 25 U.S.C. § 5324(a)(1) in a manner that gives effect to the will of Congress.

Congress amended the ISDEAA in 1988 to prevent the BIA from continuing the practice of inappropriately applying federal procurement laws and acquisition regulations to self-determination contractors. To affect these purposes, Congress expressly defined self-determination contracts to include the declaration "That no contract entered into pursuant to this Act shall be construed to be a procurement contract"[49]. The Senate Committee Report accompanying the bill explains the meaning of a "procurement contract" as "self-determination contracts are not procurement contracts, as defined by the Federal Grant and Cooperative Agreement Act of 1977 ("FGCAA")[50], and that the system of federal acquisition regulations contained in Title 41 of the Code of Federal Regulations should not apply to self-determination contracts.[51]

The meaning and purpose of the 1988 amendment to the definition of self-determination contract is further confirmed by the changes Congress made to the "Administrative Provisions" expressly exempting self-determination contracts from the application of "Office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et seq.) and Federal acquisition regulations promulgated thereunder".[52] The Senate Committee Report defines the body of law that is being referred to in stating "the federal procurement laws and the system of federal

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[49] Public Law No. 100-472, 102 Stat. 2291, §103(j)
[50] Pub. L. No. 95-244, 92 Stat. 3 (Feb. 3, 1978)
[51] Senate Report 100-274 (December 22, 1987), Pg. 18.
[52] Public Law No. 100-472, 102 Stat. 2291, §204(c)

acquisition regulations contained in Title 41 and Title 48 of the Code of Federal Regulations shall not apply to Indian self-determination contracts."[53] This statutory history unequivocally demonstrates Congress had a clear vision in mind of which Federal laws self-determination contracts were exempt from and what purpose those exemptions were intended to serve.

The subsequent 1994 amendment to 25 U.S.C. § 5324(a)(1), which resulted in the change to the language used to identify which laws self-determination contracts were exempted from was "technical" and not intended to change the substantive purpose of the provision[54]. This Court's precedent is clear that "Congress does not make radical—but entirely implicit—change[s] through technical and conforming amendments." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 431, 138 S. Ct. 1061, 1071, 200 L. Ed. 2d 332 (2018) (quoting *Director of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 324, 121 S.Ct. 941, 148 L.Ed.2d 830 (2001) (internal quotation marks omitted).

The application of these interpretive principles to the exemption in 25 U.S.C. § 5324(a)(1) illustrates the meaning of which Federal laws Congress intended to exclude from applying to self-determination has remained substantively unchanged since the enactment of the 1988 amendment. Thus, the only plausible meaning of the specific laws referred to by the phrase "Federal contracting and cooperative agreement laws" are the federal procurement laws and regulations established pursuant to the "Office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et seq.) and Federal acquisition regulations promulgated thereunder"[55]. Any uncertainty as to the precise nature of these laws is capable of clarification by recognizing Congress explicitly identified the definition of procurement contracts in the Federal Grants and Cooperative Agreement Act of 1977 ("FGCAA") as the basis against which a procurement contract was to be distinguished from self-determination contracts.[56] According to that definition, 25 U.S.C. § 5324(a)(1) exempts Federal laws that govern legal instruments "reflecting a

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[53] Senate Report 100-274 (December 22, 1987), Pg. 28.
[54] See *Infra* n. 4.
[55] See *infra* n.50.
[56] See *infra* n.49.

relationship between the Federal Government and... a State or local government or other recipient" when "the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government"[57].

This Court's precedent makes clear that"[w]hen interpreting Congress's work... our charge is usually to ascertain and follow the original meaning of the law before us." *McGirt v. Oklahoma*, 591 U.S. 894, 913–14, 140 S. Ct. 2452, 2468, 207 L. Ed. 2d 985 (2020) (citing *New Prime Inc. v. Oliveira*, 586 U. S. 105, 113, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019)). The application of this principle is particularly relevant to this case to determine the meaning of the phrase "Federal contracting and cooperative agreement law" within 25 U.S.C. § 5324(a)(1). This Court "will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment." *Id.* The specific purpose Congress intended the exemption to serve compels the construction of its meaning to afford considerable deference to its original meaning. The novel interpretation applied by the decision, in this case, represents the Ninth Circuit impermissibly "[favoring a] contemporaneous or later practices *instead of* the laws Congress passed." *Id.*

It is indisputable that the whistleblower protections provided by 41 U.S.C. § 4712 are entirely distinct from the type of laws Congress originally intended to exempt self-determination contractors from having to comply with. This intent has remained unchanged since the enactment of the 1988 amendment to the ISDEAA and the Ninth Circuit's deviation from the definitions above impermissibly applies a meaning to the exemption in 25 U.S.C. § 5324(a)(1) that "turn[s]... on the broadest imaginable definitions of its component words." *Epic Systems* 584 U.S. at 523 (internal quotation omitted). The ISDEAA's legislative history conclusively demonstrates that 25 U.S.C. § 5324(a)(1) is the product of Congress acting in response to the detrimental effect of self-determination contractors being inappropriately subjected to federal procurement laws.

It stands to reason that the solution Congress fashioned was the correspondingly specific remedy of precluding the

[57] Pub. L. No 95-244, 92 Stat. 4, (Feb. 3, 1978), §4(1). (Criteria for use of procurement contracts)

application of those same laws to self-determination contractors. In the absence of evidence that Congress intended something greater, there is no reason for the Ninth Circuit's interpretation of 25 U.S.C. § 5324(a)(1) to require an exemption of all "Federal contracting law" to include the entirety of Title 41 of the United States Code. Thus, the decision in this case can only be the result of the Ninth Circuit having afforded an unreasonable degree of deference to Respondent's *post hoc* litigating position. This Court's precedent has never upheld a Federal Court affording such a degree of unbridled deference to the statutory interpretation of an administrative agency, particularly when there exists compelling evidence demonstrating the unreasonableness of said agency interpretation. "In the business of statutory interpretation, if [a federal agency's interpretation of a statute] is not the best, it is not permissible." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). This conclusion is further bolstered by the fact that the Ninth Circuit's interpretation fails to account for the fundamental inconsistency of their interpretation with the fact that that the federal procurement laws Congress prohibited from applying to self-determination contractors are intended to apply to the Executive Agencies of the United States Government whereas the subject of 41 U.S.C. § 4712 are the non-federal employees of various recipients of Federal funds. This is facially evident by the purpose of the Office of Federal Procurement Policy Act's being "to establish an Office of Federal Procurement Policy in the Office of Management and Budget to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies"[58].

The interpretation of 25 U.S.C. § 5324(a)(1) to mean the federal laws that apply to procurement contracts and cooperative agreements according to the definitions established by the FGCAA is further supported by the provision surrounding 25 U.S.C. § 5324(a)(1), which clarifies the context necessary to discern purpose served by the provision. Within the ISDEAA's statutory scheme, subsection 5324 primarily operates to either establish constraints on the discretion afforded to the Secretary of the Interior and Secretary of Health and Human Services to impose provisions or administrative requirements in

[58] Pub. L. No. 93-400, 88 Stat. 796 (Aug. 30. 1974) §3(b), 41 U.S.C. § 402.

self-determination contracts with Indian tribes[59] or, to establish statutory rights that aid an Indian tribe in the performance of a self-determination contract[60]. These provisions collectively operate to better facilitate the transfer of control of applicable Federal programs to Indian tribes and preclude Federal Agencies from impeding Indian tribes from entering self-determination contracts by imposing requirements Congress did not authorize or limiting access to appropriated funds. Within this context, the logically consistent interpretation of §5324(a)(1)'s meaning would also operate to achieve the limited purpose of preventing Federal Agencies from acting in a manner that impedes the progress of Indian tribe's attaining self-determination under the ISDEAA by inappropriately applying the federal procurement contract and cooperative agreement laws to self-determination contractors.

The Ninth Circuit's decision also renders superfluous other parts of the statutory scheme of both the ISDEAA and 41 U.S.C. § 4712. The terms of 41 U.S.C. § 4712(a)(1) expressly state it applies to the employees of a "grant" or "subgrantee". According to the definition of "self-determination contract" under the ISDEAA "means a contract entered into under subchapter I (or a *grant* or cooperative agreement used under section 5308 of this title)"[61](emphasis added). A self-determination contract, by its very definition, includes grants that an Indian tribe and the Secretary of the Interior mutually agree to enter in place of a contract. The Ninth Circuit's interpretation, however, renders these statutory provisions superfluous by displacing the applicability of the explicit protections 41 U.S.C. § 4712(a)(1) provides for the employees of grantees from applying to the individuals employed by a self-determination contractor administering a grant under 25 U.S.C. § 5308. This conflicts with this Court's precedence

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[59] See §5324(i); prohibiting the Secretary from limiting or reducing services made previously available as a result of receiving a proposal to contract that divides the administration of a program that previously served a greater number of tribes; §5324(j) Requiring Secretary to apply §5321 upon the receipt of a proposal to redesign a non-construction self-determination program to best meet the needs of the Indian people.

[60] See §5324(k)- Requires Secretary to provide Indian tribe's access to Federal sources of supply and upon request of the tribe, enter into acquisition agreements to obtain good, services, or supplies on behalf of the Indian tribe; §5324(p) Requires secretary to interpret all Federal laws in a manner that facilitates the inclusion of programs, services, functions, and funds within a self-determination contract and the actual implementation of self-determination contracts.

[61] 25 U.S.C. § 5304(j).

that the cannon against surplusage is strongest where "an interpretation would render superfluous another part of the statutory scheme." *Marx v. Gen Revenue Corp.,* 568 U.S. 371, 386 (2013). By ignoring portions of the definition of a self-determination contract, the Ninth Circuit also ignores this Court precedent related to the presence of a defined term when interpreting a statute and recognizing that when "Congress takes the trouble to define the terms it uses, a court must respect its definitions as "virtually conclusive." *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 59, 144 S. Ct. 457, 472, 217 L. Ed. 2d 361 (2024).

The Ninth Circuit further erred in its use of the phrase "Public contracts" in the name of Title 41 of the United States Code as a tool to determine the meaning of the same term in 25 U.S.C. § 5324(a)(1). This Court recognizes that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Dubin v. United States,* 599 U.S. 110, 120–21, 143 S. Ct. 1557, 1567, 216 L. Ed. 2d 136 (2023) *(quoting Almendarez-Torres v. United States*, 523 U.S. 224, 234, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (internal quotations omitted). That said, "A title will not, of course, "override the plain words" of a statute. *Dubin*, 599 U.S. 143 (quoting *Fulton* v. *Philadelphia,* 593 U. S. 522, 536 (2021). The cornerstone of the Ninth Circuit's decision in this case is the significance it attributed to the categorical limitation it imposed on scope of individuals covered by 41 U.S.C. § 4712, based on the name of the Title of the United States Code where it is codified. As Justice Alito recognized in Yates, "Titles, of course, are also not dispositive". 574 U.S. at 552. The fact that the Ninth Circuit's decision, in this case, rests entirely upon the dispositive effect it attributed to the title at issue here further demonstrates how far removed the Ninth Circuit's methodology for constructing and giving effect to the will of Congress is from the principles established by this Court's precedent.This Court recently held "a title is "especially valuable [where] it reinforces what the text's nouns and verbs independently suggest." *Id. (*quoting *Yates v. United States,* 574 U.S. at 552) (ALITO, J., concurring in judgment). Therefore, the use of the title of a statute as an interpretive tool applies to circumstances where its use aids in discerning the meaning of ambiguous statutory provisions and it is

strongest when it reinforces a meaning that is also supported by the operative terms that appear within the provision in question.

The Ninth Circuit decision is principally based upon applying an impermissible variation of this interpretive tool at such a high level of generality that it cannot feasibly support the decision in this case. As relevant here, the comparable title that would be considered for the purposes of determining the meaning of the statutory provision relevant to this case would be the title of §4712 which states "Enhancement of contractor protection from reprisal for disclosure of certain information". However, the Ninth Circuit incorrectly applied this interpretive tool four orders of magnitude higher up in the hierarchical structure of the United States Code by utilizing the name of the Title of the United States Code, "Public Contracts", where §4712 is codified. Moreover, the Ninth Circuit utilized the name for Title 41 of the United States Code to make a categorical determination of 41 U.S.C. § 4712's subject matter which was, in turn, relied upon as the grounds for constraining the scope of its application to exclude the employees of self-determination contractors.

This is clearly inconsistent with the manner this Court has utilized the title of a statute or heading of a section has been utilized by this Court as "useful devices to resolve 'doubt about the meaning of a statute.' " *Yates* 574 U.S. at 552)(ALITO, J., concurring in judgment) (quoting *Porter v. Nussle,* 534 U.S. 516, 527–528 (2002)) based on the statute's title or heading "reinforc[ing] what the text's nouns and verbs independently suggest." *Id.* The basis for the decision in this case results from the Ninth Circuit having simply matched the word "contracts" in the name of Title 41 of the United States Code and with the term "contracting" within the phrase "federal *contracting* and cooperative agreement law" in 25 U.S.C. 5324(a)(1) to conclude every statute under Title 41 of the United States Code that does not expressly apply to Indian tribes presumptively excepted from applying to agreements under the ISDEAA.

This result directly conflicts with Congress's intent when Title 41 of the United States Code was enacted as a positive law title pursuant to Public Law No. 111-350. The Report of the House of Representatives Committee on the Judiciary accompanying H.R. 1107, which was signed into

law as Pub. L. No. 111-350[62] expressly provides their intent in enacting Title 41 was limited to "the restatement of existing law to conform to 'the understood policy, intent, and purpose of the Congress in the original enactments'"[63]. In doing so, Congress stated "These changes are not intended to have substantive effect, or to impair in any way the precedential value of earlier judicial decisions of other interpretations. This bill is intended to restate existing law without substantive change"[64] Congress recognized this Court precedent that confirms that absent "an unequivocal expression of Congressional intent to make such a change"[65] the enactment of bills that restate existing law, like H.R. 1107, do not make a substantive change in the law.[66] The resounding clarity of Congress's intent that the restatement of existing Federal law in Title 41 of the United States Code does not substantively affect its original purpose renders the Ninth Circuit's decision interpreting 41 U.S.C. § 4712 based on its presence in Title 41 of the United States Code entirely without any foundation in the express will of Congress. This conclusion is further solidified in consideration of the fact that §4712's codification did occur until five years after Pub. L. No. 111-350 was signed into law and did not coincide with an unequivocal expression by Congress that the location of 41 U.S.C. § 4712's codification was intended to have such an effect.

IV. The Ninth Circuit's Decision Imperils the Integrity Of The Indian Self-Determination And Education Assistance Act.

The Ninth Circuit's decision in this case warrants review by this Court to enforce the vital safeguard Congress afforded to the employees of recipients of Federal financial assistance that disclose the fraud, waste, and abuse of public resources. The United States Government's tradition of protecting whistleblowers from facing reprisal for addressing public misconduct extends as far back as

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[62] 124 Stat. 3677 (January 4, 2011).

[63] House Report 111-42, March 3, 2009, Pg. 2 (quoting 2 U.S.C. § 285b(1).

[64] *Id.* at Pg. 3.

[65] *Id.*

[66] Report cites this Court's decision in *Finley v. United States,* 490 U.S. 545, 553-555 (1989); *Cass v. United States,* 417 U.S. 72, 81-82 (1974), *Tidewater Oil Co. v. U.S., 409 U.S. 151, 161-162 (1972); United States v. Cook,* 384 U.S. 257, 260 (1966). *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 226–227 (1957).

1778[67], just two years after our Nation's founding. The principles that motivated the Continental Congress to pass a resolution establishing a duty for all persons in service of the United States to report the "misconduct, fraud, and misdemeanor" committed by any person or officer in service of the United States; and to pay the attorney fees of two Revolutionary Sailors who were arrested after reporting the torture of captured British Sailors by a Commander of the Continental Navy British, similarly animated Congress decision to extend the availability of Federal whistleblower protections under 41 U.S.C. § 4712.

Employees of self-determination contractors are indistinguishable from the employees of any other recipients of Federal funds, with the exception that the fulfillment of the United States Government's policy objectives established by the Indian Self-Determination and Education Assistance Act[68] is inextricably connected to the integrity of the employees of self-determination contractors assuring the appropriate use of the public resources transferred to Indian tribes through self-determination contracts and other agreements authorized pursuant to the law. The Congress' policy declaration under the ISDEAA is articulated in 25 U.S.C. § 5302. Subsection "a" establishes the "obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in... Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities."[69].

Congress enacted the ISDEAA to fulfill this obligation through "the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for,

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[67] Papers of Continental Congress No. 136, II, folio 427 (July 30, 1778). The resolution was passed in response to a petition submitted to the Continental Congress by two Revolutionary Sailors that were arrested for reporting a commander of the Continental Navy who participated in the torture of captured British Sailors. The resolution held that "it is the duty of all persons in the service of the United States, as well as all other the inhabitants thereof, to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge". The Continental Congress also authorized payment for legal counsel to ensure the two revolutionary sailors could adequately defend themselves. Later, on May 22, 1779, the Continental Congress provided $1,418 to cover the cost of the whistleblowers defense and directed a "Sam. Adams" to ensure their lawyer, William Channing, was paid.

[68] Pub. L. No. 93-638, 88 Stat. 2203. (January 4, 1975).

[69] 25 U.S.C. § 5302(a)

and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."[70]. However, Congress recognized the commitment to "effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services" would ring hollow if the pursuit of these goals was not supported by political institutions "capable of administering quality programs and developing the economies of their respective communities."[71]. Accordingly, Congress acknowledged the United States' additional commitment to "supporting and assisting Indian tribes in the development of strong and stable tribal governments".[72] Congress recognized the initial success realized by Indian tribes following the passage of the ISDEAA by expressly acknowledging the assumption of federal programs by Indian tribal governments to include "operating health services, human services, and basic governmental services such as law enforcement, water systems and community fire protection... the expertise to manage natural resources and to engage in sophisticated economic and community development."[73].

Importantly, these achievements took place "during a time when tribes have also developed sophisticated systems to manage and account for financial, personnel and physical resources" and the resulting "[i]mprovements in tribal financial, personnel, property, and procurement systems [enabling] tribes to manage increasingly complex matters."[74] The advancement of Indian tribal governments' capacity to provide essential infrastructure and basic human services is regarded as having paved the way for improving the economic circumstances for the Indian people by putting Indian tribes in the best position to "implement economic development plans, taking into account the available natural resources, labor force, financial resources, and markets". In this respect, Congress attributed many cases of these successes to a general pattern of "Indian tribes us[ing] self-determination

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[70] 25 U.S.C. § 5302(b)
[71] *Id.*
[72] *Id.*
[73] Senate Report 100-274, December 15, 1987. Pg. 4.
[74] *Id.*

contracts to meet basic human needs in Indian communities. The tribes then use tribal, federal, and private resources to create jobs and support businesses on Indian lands".[75] To Congress, the obvious conclusion was the combination of the development of Indian tribal governments, the provision of supportive human services, and local planning are essential to economic development, and the "Indian Self-Determination Act [made] these conditions possible on many Indian reservations." [76]

Congress explicitly recognizes the direct correlation between the transfer of control of Federal programs to Indian tribes and the development of effective tribal governments capable of sustaining the economic and community development necessary to attain the legislative objective under the ISDEAA. It is not, therefore, a profound leap in logic that Congress would similarly recognize the necessity to safeguard the resources essential to an Indian tribal government providing the services to the Indian people, that are contemplated by the ISDEAA. Not only is this conclusion a logical outgrowth of the express commitment Congress articulated in 25 U.S.C. § 5302(b), but it is also reflected by provisions of the ISDEAA intended to ensure accountability in the use of Federal funds and penalties for individual and official misappropriation of financial resources awarded under ISDEAA agreements.

In 1988, Congress responded to "both federal and tribal demands for accountability"[77] by steadily expanding the reporting requirements for self-determination contractors from initially being required to maintain "such other records as will facilitate an effective audit"[78] to every "tribal organization [that] receives or expends funds pursuant to a contract entered into, or grant"[79] under the ISDEAA being required to submit a single-agency audit report if said tribal organization "expends $500,000 or more in Federal awards during such fiscal year the tribal organization that requested such contract or grant"[80]. The ISDEAA also includes provisions providing penalties for

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[75] *Id.*
[76] *Id.* at Pg. 9.
[77] *Id.* at Pg. 4.
[78] Pub. L. No. 93-638, 88 Stat. 2205 §5(a). (January 4, 1975).
[79] 25 U.S.C. § 5305(f)(1).
[80] *Id.*

any "officer, director, agent, or employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or subgrant" ...[that] embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract, or subcontract"[81]. Moreover, 25 U.S.C. § 5330 authorizes the Secretary, after providing notice and a hearing on the record, to rescind a contract or grant upon a determination by the Secretary that a tribal organization performance under such contract or grant involves the "violation of the rights or endangerment of the health, safety, or welfare of any persons...[the] gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement".

The significant interest Congress has in preventing the misuse of Federal funds was sufficient to overcome the prevailing concerns about the imposition of burdensome compliance requirements that permeated atmosphere preceding the 1988 amendment to the ISDEAA. Instead, Congress considered any alleged burden to be "consistent with the philosophy that the Federal government should not intervene in the affairs of State, local, or tribal governments except in instances where civil rights have been violated, or gross negligence or mismanagement of federal funds is indicated"[82]. Congress reconciled concerns about the burden of compliance requirements with the necessity to safeguard public funds by limiting the requirement to submit the more onerous single-agency audit report to those the Indian tribes that have successfully operated self-determination contracts for three or more years, defined as "mature contracts"[83]. Notably, Congress did not remove the obligation for all self-determination contractors to maintain the financial records capable of facilitating an audit, should the need arise[84]. Clearly, Congress prioritized assurances the resources transferred to the control of Indian tribes under the ISDEAA would not be misused over alleviating the burden of additional compliance requirements.

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[81] 25 U.S.C. § 5306.
[82] Senate Report 100-274 (December 15, 1987). Pg. 21.
[83] *Id.*
[84] 25 U.S.C. § 5305(a)(1)(D).

The obvious conclusion compelled by the consideration of these matters is Congress has explicitly recognized and expressed its intention for the Federal funds awarded pursuant to the ISDEAA to be safeguarded against fraud, waste, and abuse. Whether it be a consequence of Congress's recognition that a tribal government's capacity to manage the resources transferred to their control under an ISDEAA is a prerequisite condition for the attainment of self-determination by the Indian people or the pervading understanding that Federal intervention in the affairs of recipients of Federal funds is warranted if they are misused, the proposition that Congress would purposefully deprive the Indian people of the means to root out fraud, waste, and abuse that is more effective than external auditors, government regulators, self-regulatory organizations, or the media is incomprehensible[85]. Aside from lacking a foundation in common sense, the preclusion of whistleblower protections for self-determination contractors would conflict with Congress's express commitment to "assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities."[86]. The inevitable sentiment such a decision would communicate to the Indian people is best articulated by former the statements of Senator Claire McCaskill in the Senate Report accompanying the bill that would become 41 U.S.C. § 4712, who stated "If the whistleblowers that work for contractors do not have the same protections as Federal employees, we are saying to contractors we do not think wrongdoing by you is that important."[87].

The Ninth Circuit's decision in this case accomplishes the same result by depriving individuals employed by tribal organizations that is administering a self-determination contract from a vital mechanism for ensuring accountability within the government institutions that represent the Indian people. In this

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[85] Testimony of Angela Canterbury, Director of Public Policy, before the subcommittee on Contracting Oversight, Senate Committee on Homeland Security and Governmental Affairs, on "Whistleblower Protections for Government Contractors". December 6, 2011. Pg. 2. (Citing Alexander Dyck, Adair Morse, and Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?". http://www.affajof.org/afa/forthcoming/4820.pdf.

[86] 25 U.S.C. § 5302(b).

[87] Senate Report 114-270 "To Enhance Whistleblower Protection For Contractor And Grantee Employees" (to accompany S.795). January 7, 2016. Pg. 3.

regard, the Ninth Circuit's decision in this case imperils Congress's intent in enacting the ISDEAA by eroding the capacity of Indian tribes and their people to develop the political and social institutions necessary for the attainment of self-determination. Moreover, the Ninth Circuit's interpretation of the exemption in 25 U.S.C. § 5324(a)(1) conflicts with Congress's intent and this Court's precedent addressing the purpose and meaning of this provision; and this error is directly attributable to the prodigious departure from the manner in which the principles of statutory construction, firmly established in this Court's precedents, are applied by every other United States Court of Appeals. Therefore, Petitioner respectfully submits this Court should grant review in this case to ensure the Ninth Circuit's decisions do not continue to jeopardize the integrity of the ISDEAA.

V. This Case Is Ideally Situated For Review By This Court.

Petitioner respectfully submits this Court is ideally situated for review by this Court given the favorable balance of costs in judicial resources to the overwhelming benefit of maintaining harmony in the state of the laws of the United States, safeguarding the integrity of the Federal Government's obligation to assisting the Indian people in developing and maintaining strong and stable tribal governments and ensuring accountability in the use of the taxpayer's financial resources expended by federal executive agencies.

The questions presented in this case are purely questions of law that will not require the intensive considerations of factual matters or mixed questions of law and fact. Moreover, the statutory scheme relevant to the circumstances giving rise to the controversy in this case provides for the administrative investigation conducted by the DOI OIG, followed by direct review in the United States Court of Appeals in the relevant jurisdiction. Accordingly, this Court's review of this case would not require the consideration of an extensive trial record. Moreover, Respondent does not challenge the validity of the underlying determination of the DOI OIG that substantiated Petitioner's whistleblower retaliation claim. Therefore, this Court need only concern itself with the Ninth Circuit's construction of the provision it relied on to

exclude the application of 41 U.S.C. § 4712 to Petitioner's claim, which presents a pure question of law.

The benefit resulting from this Court granting review in this case is considerable and Petitioner respectfully contends they are a worthwhile consideration of this Court. The most substantively important benefit resulting from this Court grant review is the immediate and direct impact it will provide to the Indian people employed by 574 Federally recognized Indian entities recognized by and eligible to receive services from the United States Bureau of Indian Affairs.[88] The Ninth Circuit's decision deprives these individuals from being protected against retaliation for making a good-faith disclosure about the misuse of resources under the predominant federal program the United States Government honors its obligation to Indian tribes and the Indian people.

By removing the whistleblower protections Congress provided under 41 U.S.C. § 4712, The Ninth Circuit's decision insulates Tribal organizations from accountability by creating a consequence-free environment to retaliate against individuals who disclose the misuse of Federal funds provided under a self-determination contract. Whether a whistleblower is a tribal member or a non-Indian, the combination of common law immunity from suit enjoyed by Indian tribes[89] and the longstanding doctrine that "Native American Tribes possess "inherent sovereign authority over their members and territories." *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 689 (2022) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)), the deterrents typically encountered by recipients of Federal financial assistance are virtually non-existent for tribal organizations administering self-determination contracts.

An employee of a self-determination contractor considering blowing the whistle on fraud, waste, and abuse need only to conduct a perfunctory amount of research to

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[88] U.S. Bureau of Indian Affairs Notice Published January 8, 2024, "Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs". 89 FR 944.

[89] "Thus, we have time and again treated the "doctrine of tribal immunity [as] settled law" and dismissed any suit against a tribe absent congressional authorization (or a waiver). *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (quoting *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998) (alterations in original).

realize the absence of available protections against, or remedies for, the retaliation they are potentially subjecting themselves would imposes far too high a cost on their personal life and, potentially, their professional reputation. While some may nevertheless choose to come forward, the grievous injustice these individuals will face in calling upon the BIA and the Federal Courts to either enforce, or merely recognize the Congressionally afforded right not to face retaliation for making a protected disclosure will unquestionably result in their silence if they encounter the fraud, waste, and abuse of Federal funds in the future. Importantly, the inevitable chilling effect resulting from this being witnessed by the colleagues of these individuals virtually guarantees the self-determination contractor responsible for the unlawful retaliation will misappropriate any Federal funds transferred to their control in the future. In light of the problems the BIA faces in its own management of funds appropriated by Congress[90], it defies logic the BIA would go to such considerable lengths to defy the will of Congress that provides them with an important tool to aid in their detection of fraud, waste, and abuse by self-determination contractors. Nevertheless, Petitioner respectfully submits review by this Court will afford the greatest benefit to the Indian people reliant on tribal organizations to provide them with vital human services. In the absence of this Court review, the Indian people will be deprived the strongest tool available to them for guaranteeing the kind of accountability in their governmental institutions that is fundamental to attaining the ISDEAA's goal of true self-determination for the Indian people.

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[90] See Office of the Inspector General for the U.S. Department of the Interior: "General's Statement Summarizing The Major Management And Performance Challenges Facing The U.S. Department Of The Interior, Fiscal Year 2023" Pg. 17 (Discussing the BIA) "Our work has identified an array of challenges in [the area of the Department of Interior's Responsibility to Native Americans] specifically in the matters of financial oversight and health and safety. November 2023. Available at https://www.doioig.gov/reports/top-management-challenges/inspector-generals-statement-summarizing-major-management-and-7; See also U.S. Department of the Interior OIG Report. "The Bureau of Indian Affairs Can Improve the Closeout Process for Public Law 93–638 Agreements, Report Number 2020-CGD-060" available at https://www.doioig.gov/reports/inspection-evaluation/bureau-indian-affairs-can-improve-closeout-process-public-law-93-638; See also U.S. Department of the Interior OIG Report "The Bureaus of Indian Affairs and Indian Education Have the Opportunity To Implement Additional Controls To Prevent or Detect Multi-dipping of Pandemic Response Funds Report No. 2021-ER-015. November 2022. Available at: https://www.doioig.gov/reports/inspection/bureaus-indian-affairs-and-indian-education-have-opportunity-implement.

By definition, Indian tribal governments are the only non-federal entity eligible to be administer Federal programs for the benefit of the Indian people in the form of self-determination contracts from the Federal Government[91]. Both common sense and historical evidence make clear it is highly unlikely organizations engaged in the misuse of Federal funds will report their own misconduct, nor are they likely to look favorably upon individuals that bring attention to their transgressions. In the context of Indian tribes, this means the direct governmental authority they would otherwise appeal to for relief from retaliation is part of the same entity engaged in wrongdoing. Thus, for the Indian people, the whistleblower protections provided by 41 U.S.C. § 4712 represented an vital jurisdictional avenue to secure the external assistance of the Federal government after they have attempted to internally address the wrongdoing that stands to directly jeopardize the capability of their people to develop the strong and stable Tribal governments contemplated by the ISDEAA. According to the 2018 report by the United States Commission on Civil Rights[92] "The Native American people...face...challenges due to disproportionately high rates of violence and crime victimization; poor physical, mental, and behavioral health conditions; high rates of suicide low educational achievement...; poor housing conditions; high rates of poverty and unemployment; and other challenges, which are exacerbated by the shortfall of federal assistance." It is for this reason that Petitioner submits as strongly as it may be expressed in words that review by this Court is warranted. Every Federal dollar lost to fraud, waste and abuse has a direct consequence on the quality of life of the Indian people. The BIA's refusal enforces the whistleblower protections under 41 U.S.C. § 4712 and the Ninth Circuit's validation of their action clearly demonstrates they are content to turn a deaf ear to these consequences, even if doing so requires interpreting the law in a manner that directly conflicts with the precedent of this Court and the express will of Congress.

Petitioner submits that granting review of this case will have the effect of not only addressing the multitude of legal

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[91] See 25 U.S.C. § 5304(l) for definition of "tribal organization" and 25 U.S.C. § 5304(j) for definition of self-determination contract.

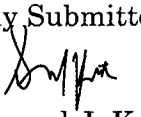
[92] United States Commission on Civil Rights, "Broken Promises: Continuing Federal Funding Shortfall for Native Americans."" (December 20, 2018). Pg. 15-17.

errors resulting from the decision below, but it will also greatly benefit the Indian people by providing the means to ensure accountability within their government's use of the resources the United States Government provides for the purpose of facilitating the self-determination of their people. Importantly, Congress has already passed the legislation definitely speaking to this manner, and by rendering an authoritative and correct interpretation of the statutes relevant in this case, this Court can do a great deal to see that the United States' promise to the Indian people under the ISDEAA may be realized in a substantive and meaningful sense.

CONCLUSION

For these reasons, Petitioner Samuel James Kent respectfully submits this Court should grant this petition for a writ of certiorari.

Respectfully Submitted,



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