No. 23-48

In the Supreme Court of the United States

INDIANA MUNICIPAL POWER AGENCY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

When Congress created the Direct Payment Build America Bonds program in 2009, it authorized the issuers of those bonds to receive a tax refund equal to 35 percent of the interest they paid to bondholders, to be funded by a standing appropriation that exists for refunds of internal revenue collections. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1531, 123 Stat. 358-360; see 26 U.S.C. 6431(a) and (b) (2012); 31 U.S.C. 1324(b)(2).

To reduce government spending, Congress enacted sequestration legislation in 2011 and 2013 that cancelled certain "budgetary resources" provided by "direct spending law." 2 U.S.C. 900(c)(2), 901(a). To comply with the prevailing sequestration rate, the U.S. Department of the Treasury reduced the refunds for Direct Payment bond issuers, as it did with other non-exempt tax refunds.

The questions presented are as follows:

1. Whether the court of appeals correctly rejected petitioners' statutory claim for tax refunds at a rate that Congress, through sequestration legislation, mandated that Treasury reduce.

2. Whether the court of appeals correctly rejected petitioners' contractual claim that Congress had guaranteed tax refunds equal to 35 percent of the interest paid on petitioners' Direct Payment bonds.

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2023. On May 10, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 13, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115, "to stabilize the U.S. economy in the wake

of the 2008 financial crisis." Pet. App. 1a. ARRA was designed to "create jobs," "assist those most impacted by the recession," "invest in * * * infrastructure," and "stabilize State and local government budgets." ARRA § 3(a), 123 Stat. 115-116.

ARRA created several new types of bonds eligible for tax advantages under the Internal Revenue Code, including, as relevant here, Build America Bonds. Pet. App. 2a. Section 1531 of ARRA authorized state and local governments to issue those bonds, "which were subsidized to lower the cost of borrowing" for these entities. *Id.* at 19a; see ARRA § 1531, 123 Stat. 358-360. The type of Build America Bonds at issue here, Direct Payment bonds, were designed to subsidize capital expenditures by providing a tax refund equal to 35 percent of the interest paid by the issuer on the bonds. See ARRA § 1531, 123 Stat. 358-360.

Specifically, ARRA amended the Internal Revenue Code to authorize issuers of Direct Payment bonds to receive a refundable tax credit. ARRA § 1531, 123 Stat. 358-360; see 26 U.S.C. 54AA(g), 6431 (2012). As amended, the Code stated, in relevant part:

> In the case of a qualified bond issued before January 1, 2011, the issuer of such bond shall be allowed a credit with respect to each interest payment under such bond which shall be payable by the Secretary * * * .
>
> The Secretary shall pay (contemporaneously with each interest payment date under such bond) to the issuer of such bond (or to any person who makes such interest payments on behalf of the issuer) 35 percent of the interest payable under such bond on such date.

26 U.S.C. 6431(a) and (b) (2012) (heading omitted).

Congress did not appropriate funds for that credit in ARRA itself. Instead, ARRA also amended 31 U.S.C. 1324, the standing appropriation for refunds of internal revenue collections. See ARRA § 1531(c), 123 Stat. 360. Section 1324 appropriates "[n]ecessary amounts * * * for refunding internal revenue collections as provided by law," 31 U.S.C. 1324(a), authorizing the payment of "refunds due from credit provisions of the Internal Revenue Code" and other enumerated provisions, including Section 6431. 31 U.S.C. 1324(b).

Pursuant to Section 1531, petitioners—six public-sector providers of electric power—issued a total of $4,097,680,000 in qualifying Direct Payment bonds. Pet. App. 21a. Between January 2010 and the end of 2012, the Department of the Treasury made payments to petitioners equal to 35 percent of the interest paid on their bonds. *Ibid.*

b. In 2011, Congress enacted the Budget Control Act of 2011 (Budget Control Act), Pub. L. No. 112-25, 125 Stat. 240, to reduce government spending. The Budget Control Act amended and reinstated the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, Tit. II, 99 Stat. 1038, to revive "'sequestration'"—*i.e.*, "the cancellation of budgetary resources provided by discretionary appropriations or direct spending law." 2 U.S.C. 900(c)(2). "'[B]udgetary resources'" are defined as "new budget authority, unobligated balances, direct spending authority, and obligation limitations." 2 U.S.C. 900(c)(6). As relevant here, "'direct spending'" refers to "budget authority provided by law other than appropriation Acts." 2 U.S.C. 900(c)(8)(A). The Act further specifies that "[b]udgetary resources sequestered from any account shall be permanently cancelled." 2 U.S.C. 906(k)(1).

The Budget Control Act required the Executive Branch to reduce non-exempt spending programs by following the process laid out in the Act. See 2 U.S.C. 901a. To achieve that goal, Congress specified formulae for applying sequestration and directed the Office of Management and Budget (OMB) to calculate the necessary reductions, should they be triggered. *Ibid.* Sequestration is triggered for non-exempt direct spending when Congress fails to enact certain budgetary legislation for the fiscal year.

On March 1, 2013, OMB issued a report to Congress stating that the absence of legislation reducing the deficit by $1.2 trillion had triggered sequestration for fiscal year 2013. See *OMB Report to the Congress on the Joint Committee Sequestration for Fiscal Year 2013*, at 1 (2013). President Obama then issued an order directing "that budgetary resources in each non-exempt budget account be reduced by the amount calculated by [OMB] in its report to the Congress of March 1, 2013." Order of Mar. 1, 2013, 78 Fed. Reg. 14,633 (Mar. 6, 2013).

On January 2, 2013, Congress enacted the American Taxpayer Relief Act of 2012 (Taxpayer Relief Act), Pub. L. No. 112-240, § 901(b), 126 Stat. 2370. Among other things, the Taxpayer Relief Act put those sequestration measures into effect, providing that "[n]otwithstanding any other provision of law, the fiscal year 2013 spending reductions" required by the Budget Control Act "shall be evaluated and implemented on March 27, 2013." Taxpayer Relief Act § 901(b), 126 Stat. 2370.

Congress exempted dozens of programs from the effects of sequestration. See 2 U.S.C. 905. Although Congress exempted certain tax refunds—including income tax credits under Section 1324, see 2 U.S.C. 905(d)(1)—

Congress did not exempt the Direct Payment program. Accordingly, Treasury reduced Direct Payment tax refunds to 8.7 percent of the bonds' interest, in accordance with the prevailing sequestration rate. Pet. App. 23a.

Since 2013, Congress has consistently extended the sequestration provisions applicable to direct spending. See Pet. App. 23a & n.5. Those provisions are currently in effect through fiscal year 2031. See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 90001, 135 Stat. 1341 (2021).

2. a. In 2020, petitioners filed suit in the Court of Federal Claims, alleging that the government violated Section 1531 of ARRA by not providing tax refunds equal to 35 percent of their bonds' interest since 2013. Pet. App. 17a, 23a-24a. Petitioners also alleged that Section 1531 created contractual obligations that the government breached when it reduced the refund rate. *Id.* at 24a.

b. The Court of Federal Claims dismissed petitioners' complaint for failure to state a claim. Pet. App. 17a-51a. The court explained that because sequestration applies to "'budget authority provided by law other than appropriation Acts,'" the "crucial issue" is whether Section 1324—"the funding mechanism for paying issuers of Direct Payment" bonds—is "'direct spending'" (and therefore subject to sequestration) or is an "'appropriation Act'" (and therefore unaffected). *Id.* at 28a (citation and emphasis omitted). Emphasizing that "Congress uses the term 'appropriation Act' in a specific, technical sense," the court explained that Section 1324 does not satisfy the definition of "'appropriation Act'" in 2 U.S.C. 622(5) and 1 U.S.C. 105, or any other relevant definition. Pet. App. 29a, 31a (citation omitted). Rather, "section 1324 is most naturally seen as provid-

ing for direct spending." *Id.* at 33a. The court also emphasized that Congress had specifically exempted from sequestration "[r]efundable income tax credits paid to individuals under 31 U.S.C. § 1324." Pet. App. 36a. (discussing 2 U.S.C. 905(d)). The court explained that, "[i]f section 1324 were not subject to sequestration as an appropriation act, Congress would have had no need to exempt from sequestration payments of refundable tax credits to individuals." *Id.* at 36a.

Having found that Section 1324 is subject to sequestration, the Court of Federal Claims concluded that the government was "required by law to pay issuers of [Direct Payment bonds] a reduced rate." Pet. App. 43a, 46a. The Taxpayer Relief Act provided that sequestration must be implemented "notwithstanding any other provision of law" and also that sequestered budgetary resources "'shall be permanently cancelled.'" *Id.* at 42a (citation omitted). Those provisions "expressly modifie[d] the government's existing payment obligations." *Id.* at 46a. Accordingly, the court dismissed petitioners' statutory claim. *Ibid.*

The Court of Federal Claims likewise dismissed petitioners' contract claim. Pet. App. 46a-51a. The court explained that petitioners must "overcome the presumption that statutes do not create contractual rights." *Id.* at 46a-48a. The court held that ARRA "neither provides for the execution of a written contract on behalf of the United States nor reflects any language that could be interpreted to establish a contract between issuers of [Direct Payment bonds] and the United States." *Id.* at 48a. The court thus concluded that "plaintiffs have not provided a basis for finding that the defendant intended to contract under the terms of section 1531." *Id.* at 50a-51a.

c. Petitioners sought reconsideration, arguing for the first time that the relevant question is whether ARRA itself—rather than Section 1324—is an "appropriation Act" and therefore exempt from sequestration. Pet. App. 7a, 9a-10a. Although that argument was "untimely," the Court of Federal Claims "consider[ed] it," *id.* at 10a, and rejected it, *id.* at 10a-16a. The court explained that "[petitioners] ignore the fact that the ARRA did not appropriate money for the Direct Payment [bonds] program." *Id.* at 11a. Instead, ARRA amended the "permanent appropriation" in Section 1324 to fund tax refunds for issuers of Direct Payment bonds. *Ibid.* Accordingly, the court had "correctly focused its analysis * * * on that provision," finding "that § 1324 is not an 'appropriation Act' but, instead, authorizes direct spending," and petitioners "have no argument that the prior ruling was in error." *Id.* at 11a-12a (citation omitted).

But "[e]ven if [petitioners' ARRA] argument were determinative," the Court of Federal Claims continued, petitioners "fail to consider the structure of ARRA." Pet. App. 12a. Although the title of ARRA conforms to the requirements for an "appropriation Act" set forth in 2 U.S.C. 622(5) and 1 U.S.C. 105, the statute has two parts: "Division A—Appropriations Provisions" and "Division B—Tax, Unemployment, Health, State Fiscal Relief, and Other Provisions." Pet. App. 14a. The court explained that the provisions in "Division A constitute[] 'appropriations,'" but the provisions in Division B are "direct spending and revenue provisions." *Id.* at 15a (brackets omitted). "Section 1531, which established the Direct Payment * * * program and amended 31 U.S.C. § 1324 to fund the program as a tax refund, is under Division B[]." *Id.* at 14a. Because ARRA did not

"provide the budget authority" for the Direct Payment program through "Division A's 'Appropriation Provisions,'" but rather "designated the budget authority to be the permanent appropriation under 31 U.S.C. § 1324," the court held that the program is "subject to sequestration as direct spending." *Id.* at 15a-16a.

3. The court of appeals affirmed, adopting the Court of Federal Claims' opinions as its own. Pet. App. 1a, 4a. The court of appeals agreed that the Direct Payment program is subject to sequestration because Section 1324 constitutes direct spending. *Id.* at 4a. The court also agreed that petitioners' complaint failed to plead the existence of a contract because it relied "solely on a statutory provision that does not create a government contract." *Ibid.* The court thus found "no basis to overturn the decision of the trial court and agree[d] with the trial court's well-reasoned analysis." *Ibid.*

ARGUMENT

Petitioners renew their contention (Pet. 12-23) that the courts below erred in holding that the Department of the Treasury was required, under applicable sequestration legislation, to reduce payments to Direct Payment bond issuers. Petitioners also renew their contention (Pet. 23-32) that the courts below erred in holding that Congress did not intend to create a contract with Direct Payment bond issuers. Both holdings were correct, and the decisions below do not conflict with any decision of this Court or another court of appeals. Petitioners' disagreement with the lower courts' application of well-settled legal principles to the facts of this case does not warrant further review. The petition for a writ of certiorari should be denied.

1. Petitioners contend (Pet. 12-23) that the courts below erred in holding that Congress, through seques-

tration legislation, obligated Treasury to reduce payments to Direct Payment bond issuers. That holding was correct and does not warrant this Court's review.

a. ARRA created the Direct Payment program by amending Sections 54AA and 6431 of the Internal Revenue Code to authorize tax refunds for public entities that issue Direct Payment bonds. ARRA § 1531, 123 Stat. 358-360; see 26 U.S.C. 54AA, 6431 (2012). ARRA did not directly appropriate any funds to pay those refunds. Instead, Congress amended 31 U.S.C. 1324, the standing appropriation for tax refunds, to authorize payment of the Direct Payment refunds. See 31 U.S.C. 1324(a) ("appropriat[ing]" "[n]ecessary amounts * * * for refunding internal revenue collections as provided by law"); 31 U.S.C. 1324(b)(2) (authorizing "[d]isbursements" "from the appropriation made by this section" for "refunds due from credit provisions of the Internal Revenue Code" and other enumerated provisions, including Section 6431).

As the Court of Federal Claims explained (Pet. App. 28a), the relevant question is whether Section 1324 is subject to sequestration. The courts below correctly held that it is. *Id.* at 4a, 28a-37a.

Sequestration, as relevant here, affects "direct spending." 2 U.S.C. 900(c)(6), 900(c)(8), 906(k)(1). Direct spending is defined as "budget authority provided by law *other than* appropriation Acts." 2 U.S.C. 900(c)(8) (emphasis added). Accordingly, the "crucial issue" is whether Section 1324 "authorizes direct spending, or whether it is an 'appropriation Act.'" Pet. App. 28a. If it is not an "'appropriation Act,'" then "it is subject to sequestration, and the plaintiffs would be unable to prevail on their statutory claims." *Ibid.*

The courts below correctly held (Pet. App. 4a, 28a-37a) that Section 1324 is not an "appropriation Act." As the Court of Federal Claims explained (Pet. App. 30a-31a), the Congressional Budget and Impoundment Control Act of 1974, Pub. L. 93-344, 88 Stat. 297, defines the term "'appropriation Act'" as "an Act referred to in section 105 of title 1." 2 U.S.C. 622(5). Section 105, in turn, states that "[t]he style and title of all Acts making appropriations for the support of Government shall be as follows: 'An Act making appropriations (here insert the object) for the year ending September 30 (here insert the calendar year).'" 1 U.S.C. 105. As petitioners do not dispute, the term "'appropriation Act'" in the definition of "'direct spending'" in 2 U.S.C. 900(c)(8)(A) "should be read *in pari materia* and given the same meaning as it has in § 622(5) of the same Title." Pet. App. 31a (citing *United States* v. *Davis*, 139 S. Ct. 2319, 2329 (2019) ("[Courts] normally presume that the same language in related statutes carries a consistent meaning."). And here, "[t]he Act in which Congress enacted section 1324 did not use the style and title specified in 1 U.S.C. § 105 and did not make appropriations for a specific calendar year." Pet. App. 31a-32a; see Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877 (creating Section 1324 as part of "[a]n Act [t]o revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, 'Money and Finance'") (emphasis omitted).

Similarly, the U.S. Government Accountability Office (GAO) defines an "appropriation act" as "[a] statute, under the jurisdiction of the House and Senate Committees on Appropriations, that generally provides legal authority for federal agencies to incur obligations

and to make payments out of the Treasury for specified purposes." GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP, at 13 (Sept. 2005) (GAO Glossary); see 31 U.S.C. 1112(c)(1) (mandating that GAO "establish, maintain, and publish standard terms and classifications for fiscal, budget, and program information"); *Maine Community Health Options* v. *United States*, 140 S. Ct. 1308, 1319, 1322 (2020) (relying on the GAO Glossary to interpret federal law). As the Court of Federal Claims explained, Section 1324 "did not fall under the legislative jurisdiction of the House or Senate Committees on Appropriations" and "was not considered under the rules of either chamber governing floor consideration of appropriation bills." Pet. App. 32a-33a.

By contrast, the GAO Glossary defines "[d]irect spending" as "temporary or permanent, definite or indefinite (as to amount) but it is an appropriation or other budget authority made available to agencies in an act other than an appropriation act." GAO Glossary 45. That accurately captures Section 1324—which indefinitely provides funds to cover the payment of tax refunds, but bears none of the features of an appropriation Act. See Pet. App. 33a.

Eliminating any doubt, Congress specifically "exempt[ed]" from sequestration "[r]efundable income tax credits" paid to individuals under Section 1324. 2 U.S.C. 905(d) (emphasis omitted). As the Court of Federal Claims explained, "[i]f section 1324 were not subject to sequestration as an appropriation act, Congress would have had no need to exempt from sequestration payments of refundable tax credits to individuals." Pet. App. 36a. Adopting petitioners' interpretation would make that express exemption superfluous, violating the

"'cardinal principle of statutory construction'" that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (citation omitted). In other words, "accepting [petitioners'] arguments would have the effect of adding Direct Payment [bonds] to the list of programs exempted from sequestration, even though Congress itself had not done so." Pet. App. 36a-37a; see *TRW Inc.* v. *Andrews*, 534 U.S. 19, 20 (2001) ("Where 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.").

b. Petitioners' contrary arguments lack merit.

Petitioners principally argue (Pet. 18-21) that ARRA itself is an "appropriation Act." Because petitioners failed to raise that argument until their motion to reconsider, the Court of Federal Claims concluded that it was "untimely" before rejecting it. Pet. App. 10a. Regardless, petitioners' principal argument is meritless, for two reasons.

First, Congress did not appropriate any funds in ARRA itself to pay tax refunds for bond issuers. Instead, as explained above, see pp. 2-3, 9, *supra*, Section 1531 of ARRA amended the Internal Revenue Code, to authorize issuers of Direct Payment bonds to receive a refundable tax credit. See 26 U.S.C. 54AA, 6431 (2012). Section 1531 also amended Section 1324(b)(2), which provides permanent funding for tax refunds, to include tax refunds for Direct Payment bonds. ARRA § 1531, 123 Stat. 358-360. As a result, the Direct Payment program is structured as a tax refund, funded through Section 1324. As the lower courts thus correctly recog-

nized, the only statute relevant to determining whether sequestration applies to the Direct Payment refunds is Section 1324. Pet. App. 4a, 13a-15a.

Second, Congress divided ARRA into two parts, Division A and Division B. Pet. App. 13a-14a. As the Court of Federal Claims explained (*id.* at 14a-15a), Division A—titled "Appropriations Provisions"—contains, as the title suggests, appropriations provisions. But Division B—titled "Tax, Unemployment, Health, State Fiscal Relief, and Other Provisions"—contains direct spending and revenue provisions. *Id.* at 14a; see ARRA § 2, 123 Stat. 115 (table of contents). Section 1531, which establishes the Direct Payment program, is located in Title I of Division B. *Id.* § 1000(c), 123 Stat. 306-308 (table of contents for Div. B, Tit. I). Congress even provided a separate short title for that portion of the statute, calling it "the American Recovery and Reinvestment Tax Act of 2009." *Id.* § 1000(a), 123 Stat. 306. Petitioners offer no sound basis to deem everything in ARRA, including all of Division B, an "appropriation Act."

Petitioners alternatively argue (Pet. 21) that Section 1324 itself is the relevant "appropriation Act," emphasizing that Section 1324 uses the word "appropriated" in its text. But, as the Court of Federal Claims explained, not all legislation that provides budget authority or appropriates funds is an "'appropriation Act'"; to the contrary, it is well established that "a statute can provide an appropriation without being an appropriation act." Pet. App. 34a. "'[D]irect spending,'" by its statutory definition, is "budget authority provided by law *other than* appropriation Acts." 2 U.S.C. 900(c)(8)(A) (emphasis added). Similarly, GAO defines "direct spending" as "an appropriation or other budget authority

made available to agencies in an act other than an appropriation act." Pet. App. 33a (quoting GAO Glossary 45) (emphasis omitted). And as explained above, see pp. 10-11, *supra*, Section 1324 does not satisfy any of the requirements that distinguish appropriation Acts from other spending laws.[1]

Petitioners' various attempts to argue that ARRA specifically exempted the Direct Payment program from sequestration fare no better. Even assuming Congress could have drafted ARRA to exempt a particular program from any sequestration measures imposed by a later Congress, none of the provisions on which petitioners rely purports to accomplish that.

Petitioners first contend (Pet. 17) that by "carefully and specifically" defining the Direct Payment refunds as an "'overpayment'" of tax, Congress intended to ensure that the Direct Payment program would not be subject to sequestration. Petitioner's argument hinges (Pet. 17 & n.6) on GAO's determination, years before ARRA's 2009 enactment, that the government's obligation to pay interest on refunds of "overpayment" of taxes under 26 U.S.C. 6611(a) would not be subject to sequestration. But Section 6611 applies only to interest owed on an overpayment, and it is only that interest that GAO characterized as exempt from sequestration. See GAO, *Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations,*

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[1] The distinction between appropriation acts and other spending is not a mere technicality. As the Court of Federal Claims explained, important rules turn on the distinction: for example, "both houses of Congress have adopted special rules for the consideration of appropriation bills distinct from the rules governing the consideration of general legislation," and "[b]oth houses also prohibit the inclusion of general legislation in appropriation bills." Pet. App. 29a.

1996, GAO/AIMD-96-79, at 106 (May 31, 1996). Section 6611 has no relevance here, where petitioners do not claim that the government improperly subjected interest owed on an overpayment to sequestration.

Petitioners also assert (Pet. 6, 15) that Section 5 of ARRA excludes all of ARRA's funding programs from any spending limitations. That is incorrect. Section 5 has nothing to do with the sequestration at issue here, but instead concerns another type of budgeting enforcement mechanism, known as "Pay-As-You-GO," or PAYGO. House Committee on the Budget, *FAQs on PAYGO* (July 13, 2020), https://budget.house.gov/publications/report/faqs-paygo. In 2007, the House of Representatives established a PAYGO rule that allowed members to raise a point of order against any piece of legislation that is not budget neutral. *Ibid.* That PAYGO rule was modified in January 2009, before ARRA's enactment, to create an exception for designated emergency spending. See H.R. Res. 5, 110th Cong. (2009). The "emergency designation[]" in ARRA "for purposes of pay-as-you-go principles" thus had the effect of excluding ARRA from that PAYGO rule. ARRA § 5, 123 Stat. 116 (capitalization and emphasis omitted). But Section 5 of ARRA was not designed to, and does not, shield Direct Payment refunds from any future sequestration.

Finally, petitioners contend (Pet. 13-14) that the government's payment obligation remains in effect because Congress repealed 26 U.S.C. 6431 in 2017, but did not make the repeal applicable to bonds issued before December 31, 2017. See Act of Dec. 22, 2017, Pub. L. No. 115-97, § 13404(a), (b), and (d), 131 Stat. 2138. There is no dispute, however, that the Direct Payment program remains in effect for timely issued bonds, or that the

government must continue to make payments on those bonds. The dispute instead is whether the payment rate is affected by sequestration. Petitioners have pointed to nothing in the 2017 statute repealing the Direct Payment program indicating that Congress intended to alter the sequestration rates that Treasury had already been using for years.

c. Petitioners contend (Pet. 12-16) that the decision below conflicts with *Maine Community Health Options*, *supra*. That is incorrect.

In *Maine Community Health*, the Court considered the Risk Corridors program established in Section 1342 of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119. 140 S. Ct. at 1315. When Congress enacted the ACA in 2010, it did not "simultaneously appropriate funds for the yearly payments the Secretary could potentially owe under the Risk Corridors program." *Id.* at 1316. And when Congress appropriated funds for the Center for Medicare and Medicaid Services in subsequent years, Congress included a rider prohibiting the use of these funds for Risk Corridor payments. *Id.* at 1317. This Court held that the "plain terms" of the Risks Corridors provision created a mandatory payment obligation that was "neither contingent on nor limited by the availability of appropriations or other funds." *Id.* at 1320-1323. The Court further held that Congress did not impliedly repeal the government's obligation to make Risk Corridors payments through the appropriations riders because the "mere failure to appropriate does not repeal or discharge an obligation to pay." *Id.* at 1324.

Importantly, however, *Maine Community Health* distinguished situations where Congress fails to appropriate money, as in the Risk Corridors program, from

situations where Congress enacts laws that "reform[] statutory payment formulas in ways 'irreconcilable' with the original methods." 140 S. Ct. at 1325-1326. "[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Dorsey* v. *United States*, 567 U.S. 260, 274 (2012). When "the plain import of a later statute directly conflicts with an earlier statute," the later law governs. *Ibid.* (citation omitted).

For example, in *United States* v. *Mitchell*, 109 U.S. 146 (1883), a statute fixed the salary for interpreters in certain Territories at $400 each year. *Id.* at 148. Congress then passed an appropriations act that reduced the salary to $300 per year and altered how the government would distribute "additional pay of said interpreters." *Id.* at 148-149. The Court held that the new legislation controlled because it "distinctly reveals a change in the policy of Congress on this subject." *Id.* at 149. Similarly, in *United States* v. *Fisher*, 109 U.S. 143 (1883), a statute set the compensation for certain territorial judges at $3000 per year. *Id.* at 144. Congress subsequently passed an act appropriating, "in full compensation for [each of those judges'] service" during the next fiscal year, $2600. *Ibid.* The Court held that pursuant to "well-settled rules of interpretation," "[t]he later act must * * * prevail, and the earlier act must for the time covered by the appropriation acts above referred to be considered as suspended." *Id.* at 145, 146. *Maine Community Health* did not purport to disturb the Court's precedents recognizing that Congress may modify its previous acts—to the contrary, it reaffirmed the contin-

uing vitality of those decisions. 140 S. Ct. at 1325-1326 (discussing *Mitchell* and *Fisher*).

Here, in contrast to the provisions at issue in *Maine Community Health*, and consistent with those in *Mitchell* and *Fisher*, Congress used "clear and positive terms," *Maine Community Health*, 140 S. Ct. at 1324, when it modified preexisting obligations by enacting the sequestration provisions in the Budget Control Act and the Taxpayer Relief Act. Unlike the ACA, which did not "appropriate funds for the yearly payments the Secretary could potentially owe under the Risk Corridors program," *id.* at 1316, ARRA originally created the Direct Payment program in 2009 by amending the Internal Revenue Code to provide a tax credit to bond issuers equal to 35 percent of the interest owed to bondholders, see pp. 2-3, 9, *supra*. In 2011, the Budget Control Act instituted across-the-board cuts of non-exempt direct spending—including the Direct Payment program, see pp. 3-5, 9-12, *supra*—and expressly stated that budgetary resources that are sequestered are "permanently cancelled," 2 U.S.C. 906(k)(1). And in 2013, the Taxpayer Relief Act in turn mandated that those spending reductions were to be implemented "[n]otwithstanding any other provision of law." § 901(b), 126 Stat. 2370; see *Shoshone Indian Tribe of the Wind River Reservation* v. *United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) ("The introductory phrase '[n]otwithstanding any other provision of law' connotes a legislative intent to displace any other provision of law that is contrary to the Act."), cert. denied, 544 U.S. 973 (2005). As the Court of Federal Claims thus explained, "[t]he Taxpayer Relief Act expressly modifies the government's existing payment obligations, and it does so in a way that directly conflicts

with the earlier payment program created by section 1531 of the ARRA." Pet. App. 46a.

Petitioners disagree (Pet. 15-16) with the Court of Federal Claims' holding that the Budget Control Act and the Taxpayer Relief Act reformed Section 1531's payment provisions. But petitioners do not dispute that Congress could have altered the Direct Payment program—only whether Congress in fact did so here. Petitioners' disagreement with the application of the principles set forth in *Maine Community Health* to the facts of this case does not warrant this Court's review.

In any event, petitioners' contention that the Court of Federal Claims relied on "a general, non-specific clause" that only "vaguely mandated" that "'sequestration be implemented,'" Pet. 16 (citation omitted), is incorrect. Insofar as petitioners suggest that Congress can amend a statutory payment rate only by referencing a particular statute, see Pet. 15 (arguing that the Taxpayer Relief Act "did not reference ARRA or the Direct Payment program at all") (brackets omitted), this Court has never endorsed that unwritten limit on Congress's power, in *Maine Community Health* or anywhere else. Nor is there anything "vague" about the sequestration legislation here. As explained above, see pp. 5-6, 18-19, *supra,* the decisions below relied on clear and direct language in the Budget Control Act and the Taxpayer Relief Act requiring the government to apply the prevailing sequestration rates, unless and until Congress cancels or alters the ongoing sequestration, which currently remains in effect through fiscal year 2031.[2]

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[2] A list of reductions since fiscal year 2013 is available at IRS, *Effect of Sequestration on State & Local Government Filers of*

Petitioners further contend that the Budget Control Act and 2 U.S.C. 905(e) expressly exempt the Direct Payment program from sequestration because they exempt "'non-defense balances,'" and the purpose of the Direct Payment program is "to fund job creation and infrastructure investment, not national defense efforts." Pet. 22-23 (citation omitted). But neither law exempts all "non-defense balances"; rather, Section 905(e) exempts only "*unobligated* balances" outside the defense category, 2 U.S.C. 905(e), and the Budget Control Act exempts certain "*obligated* balances" in particular circumstances, § 256(*l*), 99 Stat. 1091 (emphasis added). Petitioners argued below that the Direct Payment funds constitute both "obligated" and "unobligated" balances without reconciling the obvious conflict. See Pet. App. 38a (citation omitted). And petitioners now concede that, because they "did not plead facts concerning the exemption of [Direct Payment program] payments from sequestration," "the record does not contain sufficient facts to permit a finding that [Direct payment program] payments qualify as 'obligated' or 'unobligated' balances." Pet. 22 n.9. Petitioners suggest that "this issue is neither material nor an impediment to the Court's resolution of this case," *ibid.*, but the Court's review would be frustrated by petitioners' continuing failure to identify which exemption they believe applies, and their corresponding failure to allege facts substantiating whichever claim they are making.

In any event, Section 905(e) states that "[u]nobligated balances of budget authority carried over from prior fiscal years, except balances in the defense category, shall be exempt from reduction under any order issued under

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Form 8038-CP, https://www.irs.gov/tax-exempt-bonds/effect-of-sequestration-on-state-local-government-filers-of-form-8038-cp.

this subchapter." 2 U.S.C. 905(e). Petitioners do not explain how the Direct Payment funds qualify as "unobligated balances," nor could they. As the Court of Federal Claims explained, an "'unobligated balance'" is a term of art, defined in the GAO Glossary "as being from fixed-period appropriations or no-year accounts"; but Section 1324 is neither. Pet. App. 40a-41a (citation omitted). Petitioners likewise fail to explain how the Direct Payment funding falls within the Budget Control Act's exemption for certain "obligated balances." An "obligated balance" is "'[t]he amount of obligations already incurred for which payment has not yet been made.'" *Id.* at 38a-39a (quoting GAO Glossary 71). As the court explained, the Direct Payment funds "are not 'obligated' until a bond issuer applies for the refund and the IRS determines how much is due to the bond issuer for the given tax year." Pet. App. 39a (citing 26 U.S.C 6431(b) (2012)). And "the IRS can no longer authorize payment or obligate funds at the original payment rate due to sequestration." *Ibid.*

Finally, petitioners contend (Pet. 33-34) that the decision below empowers "unnamed officials at federal agencies" to undo statutory obligations. But the decision to impose sequestration, and the resulting reduction in annual Direct Payment refunds, was made by Congress alone. And it is to Congress that petitioners must turn for the relief they seek.

2. Petitioners also assert (Pet. 23-32) that the lower courts erred in dismissing their contract claim. But the decisions below are correct and petitioners have not identified a conflict with any decision of this Court or any court of appeals. Further review is unwarranted.

a. Petitioners suggest (Pet. 3, 23) that certiorari is warranted to determine when "a statutory provision

creates a contractual obligation." But as the Court of Federal Claims explained, petitioners have already conceded that "if their statutory claims failed then so would their contract claims." Pet. App. 46a-47a (citing D. Ct. Doc. 22, at 50:9-51:5, available at C.A. App. 102-103). As explained above, see pp. 8-21, petitioners' statutory claims do fail, and thus their contract claims do too.

In any event, the test for determining whether the government intended to bind itself contractually by statute is well established. As the Court of Federal Claims held, petitioners simply fail to satisfy that test. Pet. App. 47a-51a. Petitioners' disagreement with that conclusion does not warrant this Court's review.

In *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451 (1985), the Court reaffirmed that, "the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Id.* at 465-466 (quoting *Dodge* v. *Board of Educ.*, 302 U.S. 74, 79 (1937)). "This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state." *Id.* at 466. "Policies, unlike contracts, are inherently subject to revision and repeal." *Ibid.*

The Court further explained that "the party asserting the creation of a contract must overcome this well-founded presumption"; the Court "proceed[s] cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *National R.R. Passenger Corp.*, 470 U.S. at 466. "[I]t is of first importance to examine the language of the statute." *Ibid.*

(quoting *Dodge*, 302 U.S. at 78); see *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 104 (1938) ("Where the claim is that the State's policy embodied in a statute is to bind its instrumentalities by contract, the cardinal inquiry is as to the terms of the statute.").

The Court of Federal Claims applied that unbroken line of precedent in holding that Section 1531 is devoid of any language suggesting that Congress intended to contract with Direct Payment bond issuers. Pet. App. 47a-51a. Section 1531 does not contain any "clear indication" that Congress intended to bind the government contractually: it does not "provide for the execution of a written contract" and in no way "create[s] or speak[s] of a contract." *National R.R. Passenger Corp.*, 470 U.S. at 465-467. Rather, Section 1531 establishes a statutory payment program for issuers of qualifying bonds, which does not suffice to establish that Congress intended to assume contractual duties. *Wisconsin & Mich. Ry. Co.* v. *Powers*, 191 U.S. 379, 387 (1903) (a law does not create contractual obligations merely by offering "benefits to those who comply with its conditions").

b. None of the cases on which petitioners rely (Pet. 23 n.11 & 27-29) suggests an open question as to what statutory features demonstrate Congress's intent to contract. In most of the cited cases, the Court did not confront that question at all. In *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), the parties agreed that the statute, a legislative covenant, "constituted a contract." *Id.* at 18. In *United States* v. *Winstar Corp.* 518 U.S. 839 (1996), the Court considered whether the government had breached undisputed contracts by passing legislation that altered the regulatory treatment of goodwill assets. *Id.* at 860 (plurality opinion). In *Maine Community Health*, the Court declined to address

whether the law formed "an implied-in-fact contract" after it resolved the case on statutory grounds. 140 S. Ct. at 1331 n.15. Petitioners' remaining cases only confirm that "[w]here the claim is that the State's policy embodied in a statute is to bind its instrumentalities by contract, the cardinal inquiry is as to the terms of the statute." *Indiana ex rel. Anderson*, 303 U.S. at 104; see *National R.R. Passenger Corp.*, 470 U.S. at 466 ("[T]o construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.").

Petitioners' claim thus amounts to a disagreement with the Court of Federal Claims' application of well-settled principles in determining that Congress did not intend to create a contractual obligation here. But that claim does not warrant this Court's review, and petitioners' contentions (Pet. 24-27) lack merit in any event.

As an initial matter, petitioners did not argue in the Court of Federal Claims that the "'invest'" or "'investment'" language in ARRA, as a matter of its "'common meaning,'" establishes "a binding obligation." Pet. 24-25 (citations and internal quotation marks omitted). Moreover, petitioners fail to identify any decision of this Court or any other court suggesting that the terms "invest" or "investment" "speak of" a contract with the United States. *National R.R. Passenger Corp.*, 470 U.S. at 467. Further, the "investment" language that petitioners cite is not in Section 1531, which created the Direct Payment program, but rather in ARRA's general statement of purpose. See ARRA § 3a, 123 Stat. 115-116. Petitioners do not—and could not—maintain that all of ARRA contractually binds the government.

Section 1531's use of mandatory language (Pet. 25-26) also does not suggest that Congress intended to cre-

ate a contract. The Court in *Maine Community Health* emphasized the term "shall" in holding that Congress can create a statutory obligation to pay directly through a statute's text. See 140 S. Ct. at 1319-1323. The Court did not suggest that such language reflects Congress's intent to contract. Petitioners' observation (Pet. 25) that ARRA imposed conditions on Direct Payment bond issuers is likewise irrelevant; a statute cannot be read to create a contract merely because it provides "benefits to those who comply with its conditions." *Wisconsin & Mich. Ry. Co.*, 191 U.S. at 387.

Finally, although petitioners correctly note (Pet. 26-27) that Congress's reservation of the right to "repeal, alter or amend" an act can confirm that Congress did not intend to contract, *National R.R. Passenger Corp.*, 470 U.S. at 467 (citation omitted), the Court has never held that the opposite is true—*i.e.*, that the absence of such language reflects Congress's intent to contract.

c. Petitioners contend that, even absent clear contractual language in Section 1531, the lower courts should have found an intent to contract based on the "realities of the transaction." Pet. 29 (quoting *Winstar*, 518 U.S. at 863 (plurality opinion)). But the plurality in *Winstar* was analyzing a written agreement, negotiated and ratified by the parties, to determine whether documents promising to treat goodwill as satisfying regulatory capital requirements "simply reflect[ed] statements of then-current federal regulatory policy" or were instead "contractual undertakings." 518 U.S. at 862-863. The plurality found that those promises were part of the agreement between the parties—but to the extent there was ambiguity, it found "no reason to disagree" with "other courts that construed the documents," which had "found that the realities of the trans-

action favored reading those documents as contractual commitments, not mere statements of policy." *Id.* at 863. *Winstar* thus speaks to interpreting the terms of a written contract. *Id.* at 861-862. It does not, however, suggest that courts should rely on the dollar value of a program or the extent of regulation to extrapolate a contract from a statutory benefits program.

3. At bottom, petitioners disagree with the lower courts' application of this Court's precedents to hold that the Direct Payment program is subject to sequestration and that ARRA did not contractually guarantee refunds at a certain payment rate. Those case-specific contentions do not warrant this Court's review, especially because this program in no longer in force. In 2017, Congress repealed the sections of the Internal Revenue Code that incorporated the Direct Payment program. Act of Dec. 22, 2017, Pub. L. No. 115-97, § 13404(d), 131 Stat. 2138. Although Congress limited the effect of that amendment "to bonds issued after December 31, 2017," *ibid.*, that repeal limits the continuing significance of the program-specific questions presented by the petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2023