No. 23-48

IN THE
Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

PEGGY A. WHIPPLE
DOUGLAS L. HEALY
HEALY LAW OFFICES, LLC
3010 East Battlefield
Suite A
Springfield, Missouri 65804
(417) 864-7018

DAVID C. FREDERICK
Counsel of Record
KATHLEEN W. HICKEY
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

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GLOSSARY

ARRA	American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115
BABs	Build America Bonds
BBEDCA	Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, 99 Stat. 1037, 1038
GAO	Government Accountability Office
GAO *Glossary*	Gov't Accountability Off., *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Sept. 2005), https://www.gao.gov/assets/gao-05-734sp.pdf
IRC	Internal Revenue Code

The government does not deny the profound importance of this case or the fundamental truth that its refusal to honor promises made by Congress threatens the "principle as old as the Nation itself: The Government should honor its obligations." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1331 (2020). The Federal Circuit's stamp of approval provides a dangerous blueprint for federal agencies to evade congressional promises without political accountability. Because all similar challenges funnel into the Federal Circuit, unelected agency officials always will succeed in doing so. Only this Court's review can prevent such abuses.

The government's technical responses to the statutory language underscore the lack of an express directive by Congress for the government's 180-degree change of course: from encouraging entities like petitioners to issue bonds to reneging on the promised refunds for interest payments. Unlike sequestration that hampers the government's own operations, the government's newfound interpretation saves the federal fisc at the direct expense of the States and municipalities that relied to their detriment on Congress's promise.

I. THIS COURT'S PRECEDENT REQUIRES THE GOVERNMENT TO HONOR ITS OBLIGATIONS

The government does not contest the importance of the first question presented: whether the government must honor its obligations to States and municipalities under money-mandating statutes unless Congress lawfully repeals those obligations. Instead, the government unpersuasively claims that Congress impliedly repealed its BABs payment obligation because that obligation constitutes direct spending subject to sequestration.

A. Congress Did Not Repeal The Government's Obligation To Petitioners

Congress never expressly repealed the government's BABs payment obligation. To justify their holdings, the courts below relied on an implied-repeal theory,[1] which this Court deems "not favored" and a "rarity." *Maine*, 140 S. Ct. at 1323. For centuries, this Court has emphasized that "repeal by implication ought not to be presumed" unless "the inference be necessary and unavoidable." *Harford v. United States*, 12 U.S. (8 Cranch) 109, 109-10 (1814). This Court's "aversion to implied repeals is 'especially' strong 'in the appropriations context.'" *Maine*, 140 S. Ct. at 1323 (quoting *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992)). This Court recognizes implied-repeal theories in only limited cases, including where a subsequent statute reforms the "statutory payment formulas in ways 'irreconcilable' with the original methods." *Id.* at 1325.

The government (at 17-19) invokes that scenario, but it does not apply. The subsequent statutes at issue "did not reference [ARRA or the BABs program] at all, let alone 'irreconcilably' change [them]." *Maine*, 140 S. Ct. at 1326 (quoting *United States v. Mitchell*, 109 U.S. 146, 150 (1883)) (cleaned up).

The government relies (at 17-18) on two cases that only confirm the deficiency of its implied-repeal theory. In *Mitchell* and *Fisher*, this Court found implied repeal when appropriations bills decreased the amount of certain public employees' salaries from amounts set in previous bills. *See Mitchell*, 109 U.S. at 150 (federal interpreters' salaries decreased from

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[1] The trial court disclaimed the need to rely on an implied-repeal theory, but then applied that theory. App. 46a; Pet. 15.

$400 to $300); *United States v. Fisher*, 109 U.S. 143, 145-46 (1883) (judges' salaries decreased from $3,000 to $2,600). In both cases, the subsequent bills expressly referenced the relevant payment formula for those specific employees and therefore "distinctly reveal[ed] a change in the policy of congress *on this subject*." *Mitchell*, 109 U.S. at 149 (emphasis added); *see also Fisher*, 109 U.S. at 146 ("the words of the statute make the intention of congress manifest" with "no ambiguity and no room for construction"). Here, the subsequent statutes "created no such conflict as in *Mitchell* and *Fisher*" because they "did not reference [the initial statute's] payment formula at all." *Maine*, 140 S. Ct. at 1326. The government inexplicably maintains (at 21) that "Congress alone" decided to stop making full BABs payments. But it cites no congressional action referencing the BABs payment obligation at all, let alone repealing it in "'the most clear and positive terms.'" *Maine*, 140 S. Ct. at 1324 (quoting *United States v. Vulte*, 233 U.S. 509, 514-15 (1914)). Rather, after years of full performance, the government simply stopped paying the promised refund to BABs issuers.

B. Congress Did Not Intend BABs Payments To Be Direct Spending Subject To Sequestration

The courts below erred by disregarding Congress's double protection of BABs from sequestration. First, Congress provided budget authority for the BABs program through appropriation acts, namely, ARRA and 31 U.S.C. § 1324, which are exempt from sequestration. Second, Congress defined the BABs payment obligation as an overpayment of tax to be refunded.

1. The BABs payment obligation constitutes "budget authority provided by . . . appropriation Acts"

No one disputes that sequestration does not apply to "budget authority provided by . . . appropriation Acts." 2 U.S.C. § 900(c)(8). The government and the trial court also agree that Congress defined "appropriation Act" in 1 U.S.C. § 105. *See* App. 30a-31a; Opp. 10.[2] Finally, as both the trial court and the government acknowledge, "the title of the ARRA conforms with 1 U.S.C. § 105." App. 13a; *see* Opp. 7. The inquiry should end there: ARRA, which created the BABs program, is an appropriation act exempt from sequestration.[3]

The government's efforts to dodge that conclusion lack merit. First, it wrongly contends (at 12-13) that the relevant inquiry is whether § 1324, not ARRA, is an appropriation act. Because sequestration does not apply to "budget authority provided by . . . appropriation Acts," 2 U.S.C. § 900(c)(8), the inquiry concerns whatever statute provided "budget authority" for the BABs program. The term "budget authority" means "the authority provided by Federal law to incur financial obligations." *Id.* § 622(2)(A).

As the government acknowledges (at 2), ARRA is the statute that "created . . . [BABs]," "authorized state

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[2] The government does not attempt to defend the trial court's misreading of GAO's definition of an "Appropriation Act." *See* Pet. 19-20 (citing App. 31a).

[3] The government does not meaningfully defend (at 13) the trial court's finding that ARRA is not an appropriation act based on its review of ARRA's structure. App. 13a. As the petition explains (at 19), that finding would narrow § 105's plain text, which establishes only a required "style and title" for appropriation acts and does not reference structure.

and local governments to issue those bonds," and "amended the [IRC] to authorize issuers . . . to receive a refundable tax credit." ARRA, therefore, constitutes "the authority provided by Federal law to incur financial obligations" for the BABs program and, therefore, provides "budget authority." 2 U.S.C. § 622(2)(A). That ARRA necessarily amended other tax laws to create a taxable bond program does not alter that conclusion. Because ARRA provides the budget authority at issue, the relevant inquiry is whether ARRA is an appropriation act.[4]

Section 1324 independently is an appropriation act. The government insists (at 10) that § 1324 cannot be an appropriation act because the legislation codifying § 1324 did not contain the requisite title per § 105. But the legislation the government references only "revise[d], codif[ied], and enact[ed] without substantive change certain general and permanent laws . . . as title 31." Act of Sept. 13, 1982, Pub. L. No. 97-258, preamble, 96 Stat. 877. It thus "restate[d] in comprehensive form" existing laws. H.R. Rep. No. 97-651, at 1 (1982).

That bill's history confirms that § 1324 restated a prior appropriation act's provision. *See id.* at 2, 67 (citing Act of June 19, 1948 as the "source" for § 1324); Act of June 19, 1948, ch. 558, preamble, 62 Stat. 560 (titled "An Act [m]aking supplemental appropriations for the Treasury . . . for the fiscal year ending June 30, 1949"). Congress specifically included appropriation language in § 1324 to reflect the title of the source appropriation act. *See* H.R. Rep. No. 97-651, at 67

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[4] The government erroneously asserts (at 7) this issue was raised "for the first time" when petitioners sought reconsideration, but the trial court acknowledged it previously had "implicitly rejected the argument." App. 5a.

("the words 'Necessary amounts are appropriated to the Secretary of the Treasury' are added to reflect the introductory language of" the source act).

Further, because the source statute for § 1324 came "under the jurisdiction of the House and Senate Committees on Appropriations," GAO *Glossary* 13, it also meets GAO's definition of an appropriation act. *See* H.R. Rep. No. 80-2089 (1948); S. Rep. No. 80-1608 (1948). Section 1324, therefore, is an appropriation act as defined by § 105 and the GAO *Glossary*.

The government also asserts (at 11-12) that BABs payments are subjected to sequestration because Congress expressly exempted other refund payments listed in § 1324, but omitted BABs from that list. *See* 2 U.S.C. § 905(d). That argument fails. First, this Court rejected it in *Maine*, requiring the government to show "something more than the mere omission to appropriate a sufficient sum." 140 S. Ct. at 1323. The Court regards each of two statutes effective unless Congress's intention to repeal is "'clear and manifest'" or the laws are "'irreconcilable.'" *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)). "[M]ere omission" of the BABs payments from a list of exceptions does not satisfy that standard. *Id.*

Second, Congress's decision not to list the BABs payments as exempted from sequestration in § 905(d) is easily explained by § 900(c)(8), which exempts appropriation acts. Because Congress already had shielded the BABs program from sequestration by creating and funding it through appropriation acts, there was no need to exempt it again in § 905(d).

Third, the government also disregards Congress's express exemptions for "non-defense balances," which encompass BABs payments. *See* 2 U.S.C. § 905(e);

BBEDCA § 256(*l*), 99 Stat. 1091.[5] The government does not dispute that its BABs payment obligation is a "non-defense" balance.

The government also misses the point (at 15) of ARRA § 5, insisting that it "does not[] shield [BABs] refunds from any future sequestration." Petitioners never claimed as much; rather, ARRA § 5 demonstrates Congress's intent to reassure potential issuers that the government would in fact make the promised payments over the life of the BABs by excluding them from spending limitations. The government offers no reason why Congress shielded the BABs payment obligation from spending offsets in § 5, but then left it vulnerable to sequestration. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (statutory words "must be read in their context and with a view to their place in the overall statutory scheme").

2. The BABs payment obligation is not direct spending, but an "overpayment" of tax that must be "refunded" from "internal revenue collections"

Congress defined the BABs payment obligation as an "overpayment" of tax that Treasury "shall . . . refund." ARRA § 1531(c)(5), 123 Stat. 360 (amending 26 U.S.C. § 6401). A "refund" is "the return of money that the government improperly collected or collected in excess of the amount owed." GAO *Glossary* 84. Use of "refund," therefore, demonstrates Congress's intent to ensure the government had no right to keep the

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[5] The government asserts (at 20) that "the Court's review would be frustrated by" the lack of a factual record to classify the non-defense balances as obligated or unobligated. The petition, however, raises the purely legal issue of whether petitioners stated a claim for relief.

excess collections; instead, the government must return them to the rightful owner.

Notably, before ARRA's 2009 enactment, GAO already had determined that the government's obligation to pay interest on refunds of "overpayment" of tax would not be subject to sequestration. The government contends (at 14-15) that this exemption "applies only to interest owed on an overpayment." That argument defies the plain language that the "[r]efund[]" itself *and* the interest would not be subject to sequestration. GAO, *Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations*, GAO/AIMD-96-79, at 106 (May 1996). It also defies logic; Congress cannot sequester funds that do not belong to the government (i.e., overpayments).

II. THE DECISIONS BELOW CONCERN THE SUSTAINABILITY OF CONTRACTS WITH THE GOVERNMENT

The government also never refutes the importance of the second question presented: whether a statutory provision creates a contractual obligation when its language and the parties' course of dealing reflect the government's intent to contract.[6] Although previous cases left open that question, the Court's analysis of similar matters confirms the government contracted with petitioners.

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[6] The government incorrectly claims (at 22) that petitioners concede that if their statutory claims failed then so would their contract claims. *See* C.A. Opening Br. 39 n.5.

A. ARRA's Statutory Text Plainly Indicates Congress's Intent To Enter A Binding Contract

Section 3(a) uses contract-based terms committing the government "[t]o provide investments" and "[t]o invest in" necessary infrastructure." 123 Stat. 115-16.[7] The government contends (at 24) that petitioners fail to identify precedent suggesting that "the terms 'invest' or 'investment'" indicate the existence of "a contract." But the ordinary meaning of "invest" contemplates a contractual obligation. *See* Pet. 24 ("invest" is defined as "to commit (money) in order to earn a financial return"). And this Court *has* considered that an "investment contract" means "some tangible and definable consideration in return for an interest." *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 560 (1979); *see* Pet. 25.

Contrary to the government's suggestion (at 24), the fact that the "investment" language appears in ARRA's statement of purpose affirms petitioners' theory. The key inquiry is whether "the legislature intends to bind itself contractually." *National R.R. Passenger Corp. v. Atchison T. & S.F. Ry. Co.*, 470 U.S. 451, 465-66 (1985). Congress's own articulation of its intent through a statement of purpose informs that inquiry.

The government also disregards (at 25) Congress's repeated use of the term "shall" – used six times in the pertinent section – by insisting that this Court has not "suggest[ed] that such language reflects Congress's intent to contract." But the Court recently explained that such language reflects an intent by Congress

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[7] The government incorrectly contends (at 24) that petitioners did not argue below that the "invest" or "investment" language in ARRA establishes a contract. *See* C.A. Reply 20-21.

to obligate the government: "[t]he first sign that the statute imposed an obligation is its mandatory language: 'shall.'" *Maine*, 140 S. Ct. at 1320. Although *Maine* addressed whether the statute created an obligation rather than a contract, *see id.* at 1331 n.15, the term is the same in either context: "the word 'shall' usually connotes a requirement," *id.* at 1320.

B. The Existence Of The Parties' Course Of Dealing Confirms A Contract

This Court has not squarely decided whether, in addition to statutory language, the parties' course of dealing evidences the government's intent to contract. *See* Pet. 23 n.11. But this Court repeatedly *has* found it necessary to look beyond specific statutory provisions to determine the existence of contractual obligations. *See* Pet. 27-29. The courts below disregarded that precedent by failing to consider other relevant evidence of Congress's intent to contract – namely, the parties' course of dealing and the nature of the transaction.

The government repeatedly invokes (at 22-23) *National Railroad Passenger*, but that case supports petitioners' claims. There, this Court rejected the railroads' contract claim in part because of the nature of the parties' relationship. 470 U.S. at 468-69. Here, the nature of the transaction and the parties' course of dealing suggest the opposite. Unlike in *National Railroad Passenger*, no government "regulation of this area" (*id.* at 469) undermined petitioners' expectations of a contractual commitment. By contrast, here Congress authorized the taxable BABs program to incentivize state and local governments to create new infrastructure projects to help pull the Nation out of severe recession. Accordingly, reassuring potential issuers that the government would hold up its end of the bargain was essential. Petitioners accepted Congress's

offer, issued BABs instead of tax-exempt bonds, and built new infrastructure. And, for no less than three years, the government fulfilled its end of the contract and refunded payments to petitioners. *See* App. 21a.

The government also fails to distinguish *United States v. Winstar Corp.*, 518 U.S. 839 (1996), noting (at 25) only that *Winstar* "was analyzing a written agreement." But that decision *also* included a detailed analysis of "the realities of the transaction," explaining that "[w]ords and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." 518 U.S. at 863 (plurality).

Significantly, *Winstar* concluded that the plaintiffs' actions "would have been irrational . . . without seeking . . . some sort of contractual commitment" from the government. *Id.* Likewise, here, it "would have been irrational" for petitioners to issue taxable BABs without a commitment by the government to provide the promised cash refund over the entire life of the BABs. For the same reason, the government erroneously contends (at 25) that "ARRA impos[ing] conditions on [BABs] issuers" is "irrelevant." It would be similarly irrational for petitioners to comply with those conditions – including by irrevocably forgoing tax exemption on the bonds – without any commitment in return.

III. THE GOVERNMENT DOES NOT REFUTE THAT THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE

The government never attempts to deny that its actions in this case threaten "a cornerstone of fiscal policy": the longstanding principle that the government must honor its obligations. *Maine*, 140 S. Ct. at 1331. If the Court does not correct the Federal Circuit's error, federal agency officials may be permitted

to retreat from promises made by Congress, with state and local governments left to bear the cost. Pet. 32-34.

Public-power issuers overall project at least $333 million in damages by 2031. *See* Am. Pub. Power Ass'n et al. Br. 2-4 ("APPA Br."). On the whole, the government's refusal to honor its obligation is expected to cost state and local governments at least $3.4 billion by 2031. *See* Int'l Mun. Lawyers Ass'n et al. Br. 14 ("IMLA Br."). These already massive numbers stand to grow if Treasury extends sequestration beyond 2031.

Finally, the government's failure to honor its BABs payment obligation already has "diminished many issuers' faith" that the government will fairly and consistently uphold its end of a bargain. APPA Br. 12. The Federal Circuit's judgment corrodes trust in the federal government and undermines future cooperation and partnership with state and local governments. *See* IMLA Br. 16.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PEGGY A. WHIPPLE
DOUGLAS L. HEALY
HEALY LAW OFFICES, LLC
3010 East Battlefield
Suite A
Springfield, Missouri 65804
(417) 864-7018

DAVID C. FREDERICK
Counsel of Record
KATHLEEN W. HICKEY
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

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