2007-5063, -5064, -5089

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

FRANK P. SLATTERY, JR., on behalf of himself and on behalf of all other similarly situated shareholders of Meritor Savings Bank,

Plaintiff-Cross Appellant,

and

STEVEN ROTH,
and INTERSTATE PROPERTIES,

Plaintiffs-Cross Appellants,

v.

UNITED STATES,

Defendant-Appellant.

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US COURT OF APPEALS
FEDERAL CIRCUIT

Appeal from the United States Court of Federal Claims in 93-CV-280,
Senior Judge Loren A. Smith.

EN BANC BRIEF FOR PLAINTIFF/CROSS-APPELLANT FRANK P. SLATTERY, JR.

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May 28, 2010

CERTIFICATE OF INTEREST

Counsel for Plaintiff/Cross-Appellant Frank P. Slattery, Jr., certifies as follows:

1. The full name of every party or amicus represented in this case by me is:

   Frank P. Slattery, Jr., on behalf of Meritor Savings Bank, for himself and for all other shareholders of Meritor Savings Bank.

2. The name of the real party in interest is:

   The named plaintiff brings this action in lieu of the FDIC on behalf of Meritor Savings Bank in the interest of all Meritor shareholders.

3. All parent corporations and any publicly held companies that own ten percent or more of the stock of the party or amicus represented by me are:

   There are no such corporations.

4. The names of all law firms and the partners or associates that appeared for the party or amicus in the trial court, or are expected to appear in this court, are:

   Winston & Strawn LLP: Tom Buchanan
   Eric W. Bloom
   Jacob R. Loshin
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RESPONSE TO *EN BANC* QUESTIONS

This Court's *en banc* order posed the following three questions which we answer as follows:

1. What is the appropriate standard for determining whether an entity is a "non-appropriated fund instrumentality" ("NAFI")?

Answer: Under this Court's existing doctrine, an entity can be a NAFI only if Congress has clearly expressed its intent to disclaim financial responsibility for the entity. (*See* Section I.A)

2. Is the Federal Deposit Insurance Corporation ("FDIC") a NAFI?

Answer: No. Congress has not disclaimed financial responsibility for the FDIC. (*See* Section I.B)

3. If the FDIC is a NAFI, what is the effect on the jurisdiction of the Court of Federal Claims over this suit against the United States?

Answer:

A. Even if the FDIC were a NAFI, that fact alone cannot rescind the Tucker Act's waiver of sovereign immunity. Because the FDIC has acted within its sovereign powers as a federally-created agent of the United States, the Court of Federal Claims had jurisdiction over this suit. (*See* Section II)

B. Even if sovereign immunity could ordinarily bar jurisdiction in the Court of Federal Claims for suits involving the FDIC, the Court of Federal Claims had jurisdiction over this suit because the Government waived sovereign immunity by consenting to suit. (*See* Section III)

INTRODUCTION AND SUMMARY

This case is a derivative action on behalf of the shareholders of Meritor Savings Bank to recover damages for a breach of contract by the FDIC that plunged a formerly healthy bank into receivership. After more than eight years of litigation and months of trial, the Court of Federal Claims determined that the FDIC breached the agreement it made with Meritor when, during the financial crisis of the 1980s, it persuaded Meritor to acquire a failing bank. Although the agreement had saved the government nearly $700 million, the government's subsequent breach caused at least $276 million in damages to Meritor's shareholders. A panel of this Court affirmed the conclusions of the Court of Federal Claims with respect to liability and those damages. The sole issue for the *en banc* Court is whether those judgments, and the seventeen years of litigation that went into them, should be thrown out because of a purported jurisdictional defect the Government raised for the first time after trial.

Despite the plain text of the Tucker Act—which waives sovereign immunity and lodges jurisdiction in the Court of Federal Claims for "any" contract actions against the United States—the Government now maintains that Congress has rescinded its broad waiver with respect to the FDIC. The reason, in the Government's view, is because the FDIC supposedly constitutes a "non-

appropriated fund instrumentality" ("NAFI")—a government agency for which Congress takes no financial responsibility.

As we explain in Part I, however, the trial court and the panel majority properly applied this Court's NAFI doctrine when they both found that the FDIC is not a NAFI. The notion that Congress has disclaimed financial responsibility for the FDIC would come as a shock to anyone who has seen a sticker in a bank window, promising that insured deposits have the "full faith and credit" of the United States. It would come as a surprise, too, to those who remember Congress's past appropriation of funds to the FDIC in prior financial crises, such as the savings and loan crisis of the 1980s. And it would puzzle those reassured by the FDIC's direct line of credit from the Treasury—dramatically increased amidst the current financial crisis at the FDIC's behest. Any of these facts would be enough to confirm that the FDIC is not a NAFI under existing doctrine, and combined, that conclusion is inescapable.

But even if the FDIC were somehow deemed a NAFI under existing doctrine, NAFI status cannot bar Court of Federal Claims jurisdiction. As we explain in Part II, this Court has previously rejected application of the NAFI doctrine in takings cases and there is no basis to treat breach of contract cases under the Tucker Act any differently. In fact, the NAFI doctrine is a misguided judge-made rule that contravenes the plain statutory language of the Tucker Act

and arose from an acknowledged misreading of Supreme Court dicta. If this Court concludes that it needs to take a fresh look at the NAFI doctrine (or if the Court concludes that the doctrine precludes jurisdiction here), the Court should replace the NAFI doctrine with a simple test that confers Tucker Act jurisdiction where a federally-created entity is sued for its sovereign acts as an agent of the United States.

In any event, as we explain in Part III, even if this Court were to conclude that the NAFI doctrine ordinarily bars jurisdiction over a case like this one, and even if that the doctrine is a valid limitation on the Court of Federal Claims, the unique circumstances of this case warrant affirmance in light of the Government's failure to raise its sovereign immunity defense until after trial—and after eight years of litigation.

FACTUAL BACKGROUND

Understanding the issues in this case requires familiarity with (a) the nature of the FDIC; (b) the FDIC's breach of its contract with Meritor; (c) the trial in the Court of Federal Claims; and (d) the appellate proceedings to date.

A. Congress's creation of the FDIC

In 1933, with financial markets in turmoil and the banking system in grave health, President Roosevelt promised the American people, "Your Government does not intend that the history of the past few years shall be repeated."[1] The FDIC was borne of that promise. Congress created the FDIC as an independent federal agency to insure deposits held by financial institutions. Its directors are appointed by the President and confirmed by the Senate; it must provide Congress with a report of its activities every year, and provide the Treasury with a report of its finances every quarter. 12 U.S.C. §§ 1812, 1827.

Although the FDIC's primary function is to manage the Deposit Insurance Fund ("DIF"), formerly the Bank Insurance Fund ("BIF"), its charge to maintain the security of insured deposits has made it the "primary Federal regulator" of insured depository institutions. Gov.Br.2. In that role, the FDIC supervises banks for safety and soundness, and for compliance with consumer protection laws. It has the power to terminate a bank's status as an insured institution and member of

[1] http://www.fdic.gov/about/history/3-12-33transcript.html

the Federal Reserve System; to issue subpoenas; to prevent banks from hiring executives of whom it disapproves; to liquidate or otherwise resolve failed depository institutions; and to issue regulations governing a bank's management, operations, capital, accounting, and executive compensation practices. 12 U.S.C. §§ 1818(a), (o), (n), 1831i, 1821(d), 1831p-1.

B. The FDIC's breach of its contract with Meritor

When the recession and high interest rate environment of the early 1980s put great strain on the banking industry, the FDIC sought to avoid bank failures and protect the insurance fund by encouraging solvent banks to merge with failing ones. Western Savings Fund Society, a Pennsylvania thrift, was one of those failing institutions. On the brink of closure, Western's collapse would have cost the FDIC at least $696 million to meet its obligations to insured depositors. *Slattery v. United States*, 53 Fed. Cl. 258, 260 (Ct. Cl. Aug. 14, 2002). Meanwhile, Meritor Savings Bank, formerly known as the Philadelphia Savings Fund Society, was a strong Pennsylvania thrift. *Id.* So the FDIC sought to facilitate a merger of these two institutions.

Meritor, however, had no need to merge with Western, and of course had much to lose from acquiring an insolvent thrift whose liabilities exceeded its assets by hundreds of millions of dollars. It needed inducement from the FDIC. And so the FDIC offered a critical guarantee that the difference between Western's

liabilities and assets would be treated as an intangible capital asset, "goodwill," for regulatory capital purposes, to be amortized over fifteen years. With that assurance, Meritor agreed to the merger, and it was completed on April 3, 1982. The FDIC heralded it as "a solid, minimum-cost solution to the problems of one of our most seriously troubled savings banks." *Id.* at 264.

By the late 1980s, however, the FDIC had come to regret its goodwill concession and became increasingly concerned with the threat the Western goodwill posed to the insurance fund. In a series of actions, the FDIC insisted that Meritor adopt increased capital requirements that ignored the goodwill accounting to which Meritor had originally agreed. When those new requirements proved impossible to meet, the FDIC revoked Meritor's deposit insurance, and Meritor was seized and sold on December 11, 1992.

C. Trial in the Court of Federal Claims

Frank L. Slattery, a Meritor shareholder, brought this shareholder derivative suit in the Court of Federal Claims on May 4, 1993. The suit principally alleged that the government breached its contract with Meritor by reneging on its promise to treat Western's liabilities as goodwill capital.

Although the suit was initially stayed pending resolution of the *Winstar* appeals by this Court and the Supreme Court, the stay order was modified to permit the Government to file dispositive motions. A000076(Dkt.24). In 1994,

the Government filed several such motions, arguing that the court lacked jurisdiction to entertain a derivative action, that the plaintiff lacked standing, that an action filed by another shareholder in the Eastern District of Pennsylvania barred this action, and that various facts entitled the Government to dismissal or summary judgment. A000076-78(Dkt.25,34,43). The Government did not, however, raise the NAFI issue at this time.

The court denied all of the Government's motions on March 14, 1996, and lengthy discovery soon commenced. A000060-66. The parties exchanged thousands of documents; took approximately fifty-five depositions, some lasting as many as five days; produced expert reports, with six expert depositions; and briefed extensive cross-motions for summary judgment, which the court denied. The Government, again, did not raise the NAFI issue at this time.

A six-month trial on liability began in October 1999. The trial involved thousands of exhibits and twenty-eight witnesses, many of whom made admissions devastating to the government. The former Chairman of the FDIC testified that the FDIC "had an obligation to treat [Meritor's] goodwill as capital for all purposes" (A101583), a promise without which the FDIC "couldn't have done the deal" with Meritor (A101527-8). He added, "I would have expected our examiners to give full credit to [the goodwill agreement], as we agreed to do, in their examinations." Tr.Tr.1545:17-22 (Oct. 27, 1999). But the examiners admitted that they did *not*

give credit to the goodwill. For example, one testified that he and his fellow examiners viewed Meritor's goodwill as "fluff" that they would "immediately deduct" when analyzing Meritor's capital. A100796-97, A100824, A100825, A100828.[2] The court heard closing arguments on June 14, 2000, and the parties filed extensive post-trial briefing.

Nearly a year later, while awaiting a ruling on liability, the Government finally chose to raise the NAFI issue in an April 9, 2001, motion for judgment on the pleadings. A000105(Dkt.275). The Government argued that the FDIC was a NAFI because Congress had purportedly disclaimed financial responsibility for it by designing it to be funded exclusively from assessments on member banks. With this eleventh-hour gambit, the Government sought to dismiss the entire suit.

In an August 14, 2002, decision, the court found the government liable for successive breaches of its goodwill agreement and for causing Meritor's failure. With respect to the NAFI issue, the court found "a compelling record to support the proposition that Congress has given the full faith and credit of the Treasury to the FDIC and fully intends to appropriate public money to FDIC if it becomes necessary." *Slattery v. United States*, 53 Fed. Cl. 258, 273 (Ct. Cl. Aug. 14, 2002).

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[2] *See also, e.g*, A102964-65 (testimony of Regional Director Fritts); A300076 (testimony of examiner Valinote); A101169, A101174 (testimony of bank examiner Dennis Fitzgerald). The FDIC's examination reports also supported the finding that the examiners failed to treat the bank's goodwill as capital, as promised. *See, e.g.*, A300058, A300066-67.

Finding such intent sufficient to demonstrate that Congress had not disclaimed financial responsibility for the FDIC, the court concluded that the FDIC was not a NAFI.

After a subsequent month-long trial, the court awarded $371,733,059 in damages attributable to the government's breach—still far less than the liability the government would have faced if Western had failed.

D. Appellate proceedings

A panel of this Court affirmed the trial court's liability finding, partially affirmed the damage award (reducing it to $276 million), and denied Slattery's cross-appeal that the damage award should have been $696 million. The panel majority also affirmed the trial court's jurisdiction ruling, holding that the FDIC is not a NAFI.

The panel agreed with the trial court that "neither [the FDIC's] authorizing statute nor any judicial ruling negates the congressional intent, frequently reiterated, that the full faith and credit of the United States stands behind the FDIC's obligations." *Slattery v. United States*, 583 F.3d 800, 808 (Fed. Cir. 2009). Reviewing this Court's NAFI cases, the panel observed that "precedent consistently illustrates that an entity doing the work of the government will be deemed a NAFI only where there is a 'clear expression' that Congress intended to exclude the entity from access to appropriated funds." *Id.* at 809. And in "the

context in which the FDIC was formed, and the continuing governmental affirmations of monetary support, the only reasonable interpretation is that the legislative intent was to assure payment of the FDIC's obligations." *Id.* at 812.

In dissent, Judge Gajarsa considered it dispositive that "the FDIC's expenses are funded by its own revenue by raising fees imposed upon member banks" and that "there is no statutory language authorizing appropriation of general funds." *Id.* at 830. The majority, however, emphasized that those facts did not negate Congress's "many expressions that [it] intended to back the FDIC with the full faith and credit of the United States." *Id.* at 810.

This Court ordered rehearing *en banc* to examine anew the appropriate standard for determining whether an entity is a NAFI; whether the FDIC meets that standard; and if so, what effect it would have on the jurisdiction of the Court of Federal Claims over this suit.

ARGUMENT

The remainder of this brief answers the questions posed by the Court's *en banc* order of March 19, 2010. Section I explains the Court's standard for determining whether an entity is a NAFI and shows why the FDIC cannot be deemed a NAFI under that standard. Section II explains why, even if the FDIC were a NAFI, such status cannot bar Court of Federal Claims jurisdiction. Section III demonstrates why, even if NAFI status could ordinarily bar jurisdiction, it must not preclude jurisdiction over this suit because the Government waived its sovereign immunity defense.

I. Under Existing Doctrine, The FDIC Is Not A NAFI.

The chief flaw pervading the Government's brief is its reliance on an exceedingly broad and mistaken formulation of this Court's NAFI doctrine. In the Government's view, an agency is a NAFI whenever "Congress did not stipulate that Federal funds may be used to pay a judgment against" the agency. Gov.Br.10. But that test has never been the law. And a proper understanding of the basis for the NAFI doctrine makes clear that it could never be the law. Instead, as we explain in Part A, the essence of the NAFI doctrine is to deem an agency a NAFI, and thereby deny jurisdiction, only where Congress has clearly disclaimed all financial responsibility for the agency. And as we explain in Part B, there is overwhelming evidence that Congress has not disclaimed financial responsibility

for the FDIC. For these reasons, the Court of Federal Claims, a panel of this Court, and multiple other circuits have all correctly held that the Court of Federal Claims has jurisdiction to hear suits based on the FDIC's breach of contract.[3]

A. An entity cannot be a NAFI, under the appropriate standard, unless Congress has clearly disclaimed financial responsibility for the entity.

To appreciate the error in the Government's formulation of the NAFI doctrine, it is important to understand the doctrine's purpose, its limits, and the ways in which courts have applied it over time.

1. We begin with first principles. The jurisdiction of the Court of Federal Claims results from a simple bargain Congress struck over a century ago when it passed the Tucker Act. The government would waive its sovereign immunity, allowing itself to be brought into court, so long as the court was one of its choosing—once the Court of Claims, today the Court of Federal Claims. The Court of Federal Claims' jurisdiction is therefore coextensive with the Tucker Act's waiver of sovereign immunity. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983).

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[3] *See Auction Co. of Am. v. FDIC*, 132 F.3d 746, 749-50 (D.C. Cir. 1997) (holding that a contract with the FDIC "will allow a Tucker Act suit" in the Court of Federal Claims, and therefore, that claims against the FDIC are subject to federal statute of limitations); *Farha v. FDIC*, 963 F.2d 283, 288 (10th Cir. 1992) (holding that the Tucker Act gave the Claims Court exclusive jurisdiction over FDIC's breach of contract, and therefore, that such claim could not be pursued in district court).

And the waiver of sovereign immunity Congress enshrined in the Tucker Act was both unequivocal and broad:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon *any claim against the United States* founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon *any express or implied contract* with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (emphasis added); *see also Mitchell*, 463 U.S. at 215 (characterizing Tucker Act as "perhaps the widest and most unequivocal waiver of federal immunity from suit") (quotation omitted). Although the Tucker Act expressly waives sovereign immunity for "any claim against the United States" founded upon "any express or implied contract," various decisions by the Claims Court and panels of this Court have appended a narrow exception to that broad waiver. Under this exception, the United States cannot be sued when it acts through a unique government entity known as a "non-appropriated fund instrumentality" ("NAFI").

NAFIs are undisputedly "government agencies" exercising the power and authority of the United States, but unlike other such agencies, NAFIs are a rare breed "for which the government ha[s] not accepted financial responsibility." *AINS, Inc. v. United States*, 365 F.3d 1333, 1337 (Fed. Cir. 2004). And when Congress has disclaimed such financial responsibility for an agency, thereby creating a NAFI, the "NAFI doctrine" holds that Congress has not waived

sovereign immunity for the agency's actions. Thus, for example, the archetypical NAFI has been a "military post exchange," essentially a general store on a military base. Because the "'government assume[d] none of the financial obligations of the exchange[s]'"—and they were instead funded exclusively with revenue from the items they sold—the NAFI doctrine assumes that the government did not intend to waive sovereign immunity for such entities. *Id.* at 1337 (quoting *Standard Oil Co. of Cal. v. Johnson*, 316 U.S. 481, 485 (1942)).

The rationale for this exception cannot be found in the text of the Tucker Act—which waives sovereign immunity for *all* entities of the United States, NAFI or otherwise. *Mitchell*, 463 U.S. at 213. This Court has instead found the rationale in an assumption about congressional intent: Because all judgments from the Court of Federal Claims must be paid out of the U.S. Judgment Fund—a general appropriation for paying judgments against the government—this Court has presumed that Congress would not have intended to pay judgments on behalf of an entity for which it "'assumes none of the financial obligations'"—*i.e.*, a NAFI. *AINS*, 365 U.S. at 1337 (quoting *Standard Oil*, 316 U.S. at 485).[4] And so, when Congress has made sufficiently clear its intent to disclaim all financial

[4] This Court has frequently cited 28 U.S.C. § 2517 as the basis for this presumption, without fully explaining its import. As we explain below (*infra* at 40-41), § 2517 does not require that judgments be paid from funds appropriated *to an agency*, but rather from general funds appropriated for paying judgments against the United States.

responsibility for an entity, such presumed intent has been thought to rescind the Tucker Act's broad waiver of sovereign immunity.

2. Because this doctrine elevates presumed congressional intent over plain statutory text, however, it must be applied with careful restraint. *Accord, e.g.*, *United States v. Monsanto*, 491 U.S. 600, 610 (1989) ("Congress' intent is best determined by [looking to] the statutory language that it chooses.") (quotation omitted). Just as we "'should not take it upon ourselves to extend the waiver [of sovereign immunity] beyond that which Congress intended,'" neither "'should we assume the authority to *narrow* the waiver that Congress intended.'" *Taylor v. United States*, 303 F.3d 1357, 1361 (Fed. Cir. 2002) (quoting *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979)) (emphasis added).

Because only the clearest intent can overcome the Tucker Act's plain text, jurisdiction "must be exercised absent a *firm indication* by Congress that it intended to absolve the appropriated funds of the United States." *L'Enfant Plaza Properties, Inc. v. United States*, 668 F.2d 1211, 1212 (Ct. Cl. 1982) (emphasis added); *see also, e.g.*, *AINS*, 365 F.3d at 1342-43; *Core Concepts of Fla., Inc. v. United States*, 327 F.3d 1331, 1334 (Fed. Cir. 2003); *Furash & Co. v. United States*, 252 F.3d 1336, 1339 (Fed. Cir. 2001). This requires an assurance not only that appropriated funds have not been used in the past, but also that there is no likelihood Congress "could appropriate funds if necessary" in the future. *L'Enfant*,

668 F.2d at 1212; *see also*, *e.g.*, *AINS*, 365 F.3d at 1342. Only then, when Congress has clearly severed all financial ties, can we be certain that Congress has intended to exclude an entity from its broad waiver of sovereign immunity. And as we explain below (*infra* at 19-23), *L'Enfant*'s explication of these principles was not only compelled by the Tucker Act's express waiver, but was also mandated by earlier NAFI decisions.

3. Although the Government cannot deny that the existing NAFI doctrine requires from Congress a clear disclaimer of financial responsibility, the Government suggests that the "jurisdictional burden" should be shifted, and *L'Enfant* overruled. Gov.Br.25-29. In the Government's view, *L'Enfant*'s requirement of a clear disclaimer "departed from the long-established axiom that a waiver of sovereign immunity must be 'strictly construed.'" Gov.Br.27. Thus, if "the authorizing statute is silent on the question of funding," suggesting no clear disclaimer of financial responsibility, the Government argues that Congress should not be deemed to have waived sovereign immunity. Gov.Br.27.

The Government's suggestion, however, rests on a fundamental misunderstanding of the NAFI doctrine. It ignores the fact that the Tucker Act has *already* waived sovereign immunity—expressly, broadly, and unambiguously. *See Army & Air Force Exchange Serv. v. Sheehan*, 456 U.S. 728, 734 (1982) (acknowledging canon that waivers of sovereign immunity must be "unequivocally

expressed," but observing that "the Tucker Act effects one such explicit waiver"); *Mitchell*, 463 U.S. at 215 (observing that Tucker Act "unmistakably" provides consent to suit). The NAFI doctrine thus looks to congressional intent not to discern whether Congress has waived sovereign immunity, but rather to discern whether Congress has *rescinded* its own broad waiver. And the Tucker Act's clear statement waiving sovereign immunity for "any" contract claim against the United States can be reversed only by equally clear proof of intent to the contrary.

To infer such contrary intent from Congress's mere silence would violate the "well settled" rule that "repeals by implication are not favored" and "will not be found unless an intent to repeal is clear and manifest." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (quotation omitted). Yet, the Government would have this Court ignore the Tucker Act's clear waiver of sovereign immunity and burden Congress with the duty of providing a *second* clear statement—this time, to explain that its original waiver meant what it said. But because "the Tucker Act supplies a waiver of immunity," the Supreme Court has warned that "separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity."

Mitchell, 463 U.S. at 218-19. If adopted, the Government's approach would put this Court directly at odds with the Supreme Court.[5]

For good reason, then, this Court has never permitted the Tucker Act's broad waiver of sovereign immunity to be carved away by anything less than a clear statement of congressional intent to disclaim "financial responsibility" for an agency. *AINS*, 365 F.3d at 1337; *see also*, *e.g.*, *id.* at 1342-43 (quoting *L'Enfant*, *supra*); *Core Concepts*, 327 F.3d at 1336 (assessing "whether Congress has clearly expressed its intent"); *Furash*, 252 F.3d at 1339 (same); *United States v. Gen. Elec. Corp.*, 727 F.2d 1567, 1570 (Fed. Cir. 1984) (same). Only then is it plausible to conclude that Congress has rescinded the Tucker Act's waiver of sovereign immunity as to a particular federal entity.

4. And so, even when encountering a purely "self-funding agency, free and clear of any appropriations," this Court has found that Congress has disclaimed financial responsibility only when there is *no other evidence* of Congress's desire to *accept* responsibility. *AINS*, 365 F.3d at 1341; *see also Core Concepts*, 327 F.3d at 1336-37; *Furash*, 252 F.3d at 1341-1342; *Denkler v. United States*, 782 F.2d 1003, 1005 (Fed. Cir. 1986). Contrary to the Government's argument (at 11),

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[5] As explained in Part II, *United States v. Hopkins*, 427 U.S. 123 (1976), does not support the Government's approach. *Hopkins* did not endorse any particular NAFI test, nor did it even endorse the NAFI doctrine itself.

the fact that "Congress did not appropriate funds" was not decisive in any of these cases.

This Court recognized as much when, in *AINS*, it distilled NAFI doctrine into a four-factor test. Although the first two factors required that an entity (1) not receive appropriations and (2) be primarily self-funded, the other two factors further required that (3) there be no situation where appropriated funds could be used and that (4) Congress have provided a "'clear expression . . . that the agency was to be separated from general federal revenues.'" *AINS*, 365 F.3d at 1342-43 (quoting *L'Enfant*, 668 F.2d at 1212). The Court remarked that it has "not found a NAFI absent any one of these factors" and that "every NAFI must meet all four factors." *Id.* Contrary to the Government's argument (at 26), the latter two factors do not create an "additional" and purportedly improper "burden"; rather, they are merely catch-alls meant to acknowledge the reality that Congress can express its intent to take financial responsibility in ways other than appropriating funds.

In short, an agency's "self-sufficiency as a corporation is not determinative of its NAFI status." *Core Concepts*, 327 F.3d at 1336. And in several cases where other indicia of financial responsibility were evident, this Court and its predecessor have found that Congress did not intend to disclaim responsibility.

For example, in *National State Bank of Newark v. United States*, 357 F.2d 704 (Ct. Cl. 1966), the Court of Claims found that the Federal Housing

Administration's ("FHA") mortgage insurance program was not a NAFI. The FHA provided insurance to lenders, financed by premiums lenders paid into a Housing Insurance Fund. But it was clear to the court that the FHA's "insurance function [was] a government activity" and was "hardly the picture we would expect for a 'normal' insurance corporation." *Id.* at 708. Although the FHA paid its benefits in the form of interest-bearing debentures to be repaid from the insurance fund, the debentures were backed by the "full faith and credit" of the United States. *Id.* at 711-12. In finding that the FHA was not a NAFI, the court deemed it "significant that the debenture scheme provides for a United States guaranty of all Housing Insurance Fund debentures." *Id.* at 712.

Likewise, in *L'Enfant*, the Comptroller of the Currency was not a NAFI, despite being "financially self-supporting from the revenues it derives from assessments of the banks it regulates." 668 F.2d at 1212. Although the Comptroller had at one time received appropriations, they "were discontinued primarily because of the sufficiency of the funds being received from the regulated banks." *Id.* But the possibility that *future* funds could be appropriated "if a deficiency should occur" meant that Congress had not fully disclaimed financial responsibility. *Id.*; *see also McCarthy v. United States*, 670 F.2d 996, 1002 (Ct. Cl. 1982) (deeming self-funded Agency for International Development program not a

NAFI in light of Agency's authority to use appropriated funds if any were appropriated in the future).

And again, in *United States v. General Electric Corp.*, 727 F.2d 1567 (Fed. Cir. 1984), this Court held that a revolving fund used to facilitate foreign military sales was not a NAFI. The fund was designed to be essentially self-sufficient, "at no cost to the government," by financing acquisitions of military supplies with revenue from sales of those supplies to foreign governments. *Id.* at 1570. But despite this general self-sufficiency, the fund was not a NAFI—principally because appropriated funds could be used in the event cash flow from sales was insufficient to timely pay contractors. *Id.* at 1571. So too in *Hughes Aircraft Co. v. United States*, where a similar program used a "reimbursable budget authorization" to finance a joint military venture for which the United Kingdom would fully reimburse all costs. 534 F.2d 889, 909 (Ct. Cl. 1976). And similarly, in *Breitbeck v. United States*, 500 F.2d 556 (Ct. Cl. 1974), the fact that the Saint Lawrence Seaway Development Corporation was self-supported by charges and tolls did not make it a NAFI because it was also permitted to borrow funds from the Treasury. In light of this borrowing authority, there was "no such clear cleavage between the Corporation's own funds and those of the United States that one can say that Congress wished to cut the agency entirely loose from the Treasury or from appropriated funds." *Id.* at 559.

In none of these cases did the courts require Congress to stipulate that appropriated funds would actually "be used to pay a judgment against" an entity (Gov.Br.10), for such requirement would negate the Tucker Act and effectively necessitate a second express waiver of sovereign immunity. *Cf. United States v. Winstar Corp.*, 518 U.S. 839, 922 (Scalia, J., concurring) (government need not "turn square corners" twice). Instead, the thread running through all of these cases has been an attempt to carefully discern evidence of Congress's intent to retain at least some financial responsibility for the entity, despite a general desire for it to be self-funding. And that intent has been found (1) where Congress pledged its full faith and credit to guarantee an insurance entity's ability to pay benefits (*National State Bank*); (2) where prior appropriations created a plausible possibility that Congress would provide funds in the future (*L'Enfant*); or (3) where Congress permitted an entity to borrow temporary funding (*General Electric*, *Hughes Aircraft, Breitbeck*).

B. Congress has not disclaimed financial responsibility for the FDIC.

With these established principles in mind, it becomes readily apparent that the FDIC is not a NAFI. The Government strains to portray the FDIC as just another private insurance company operating consistent with "industry practice," for "all insurance companies ultimately pay out judgments from accounts

comprised of premia paid in by those that they insure." Gov.Br.24. The FDIC, we are to believe, "is no different." Gov.Br.24.

But the FDIC is *very* different. No ordinary insurance company enjoys congressional affirmations and reaffirmations that it is backed by the full faith and credit of the United States. No ordinary insurance company has received billions of dollars in appropriated funds. No ordinary insurance company is entitled to borrow billions more from the Treasury. And no ordinary insurance company has been entrusted with regulatory power to preserve the health of the banking industry. To be sure, Congress has hoped over the years that deposit insurance would usually fund itself. But unlike an ordinary insurance company, as we explain below, the FDIC enjoys (1) the full faith and credit of the United States, (2) the habit of receiving appropriated funds, and (3) the ability (even if bankrupt) to borrow large sums from the Treasury. For all of these reasons, Congress's intent to take financial responsibility for the FDIC remains a cornerstone of our national banking policy. The FDIC cannot be a NAFI.

1. Congress has expressly and emphatically declared its intent for the FDIC to enjoy the "full faith and credit" of the United States.

In many cases, discerning congressional intent can be a difficult task, for Congress "is not always explicit" about what it intends. *AINS*, 365 F.3d at 1343. But this is not one of those cases. Here, Congress has gone out of its way to make

clear, repeatedly, that it intends to back the FDIC with the full faith and credit of the United States.

In 1982, for example, Congress passed the following resolution:

> Resolved by the Senate (the House of Representatives concurring), That the Congress reaffirms that deposits, up to the statutorily prescribed amount, in federally insured depository institutions are backed by the Full Faith and Credit of the United States.

Senate Concurrent Resolution 72, 97th Cong., 128 Cong. Rec. 1530 (Mar. 17, 1982). Congress reaffirmed that same intent in 1987:

> SEC. 901. REAFFIRMATION OF SECURITY OF FUNDS DEPOSITED IN FEDERALLY INSURED DEPOSITORY INSTITUITONS.
>
> (a) FINDINGS – The Congress finds and declares that –
>
> > (1) since the 1930's, the American people have relied upon Federal deposit insurance to ensure the safety and security of their funds in federally insured depository institutions; and
> >
> > (2) the safety and security of such funds is an essential element of the American financial system.
>
> (b) SENSE OF CONGRESS – In view of the findings and declarations contained in subsection (a), it is the sense of the Congress that it should reaffirm that deposits up to the statutorily prescribed amount in federally insured depository institutions are backed by the full faith and credit of the United States.

Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, sec. 901, 101 Stat. 552.

Congress's pledge to back the FDIC with full faith and credit, moreover, is no idle promise; it is a promise upon which Congress has intended for the public to rely. After all, Congress has required by statute that insured banks post a sign informing all depositors that their FDIC-insured deposits "are backed by the full faith and credit of the United States Government." 12 U.S.C. § 1828(a)(1)(B). And as the FDIC itself trumpets, the sign is "a symbol of confidence for Americans."[6]

If Congress intended to disclaim financial responsibility for the FDIC, these repeated assurances would be a strange way to do it. Indeed, they accomplish exactly the opposite: They express Congress's deliberate intent to stand behind the FDIC should any appropriated funds be needed. These congressional expressions of full faith and credit make this case fundamentally different from any other in which this Court has found a NAFI. And in the only case where the funds of a similar insurance entity were backed by the full faith and credit of the United States, the entity was *not* deemed a NAFI. *Nat'l State Bank*, 357 F.2d at 706 (explaining that FHA's Housing Insurance Fund paid benefits in debentures issued

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[6] http://www.fdic.gov/consumers/banking/confidence/symbol.html. The FDIC assures the public: "FDIC deposit insurance is backed by the full faith and credit of the United States government. This means that the resources of the United States government stand behind FDIC-insured depositors." *Id.*; *see also* Temporary Liquidity Guarantee Program, 73 Fed. Reg. 72244, 72252, 12 C.F.R. 370.5(h)(2) (FDIC representation that its program "is subject to the full faith and credit of the United States . . .").

by the Fund but "fully and unconditionally guaranteed as to principal and interest by the United States").

It appears the Government is no longer arguing, as it once did, that its own assurances and those of Congress should not really be believed. *See Slattery v. United States*, 583 F.3d 800, 811 (Fed. Cir. 2009) (summarizing Government's view that "these various resolutions and promises cannot be relied upon"). Instead, the Government's only substantive answer is to assert, without explanation, that Congress's full faith and credit commitments "did not relate to the BIF [*i.e.*, the Bank Insurance Fund], but instead related to the FDIC acting in its receivership capacity."[7] Gov.Br.23. The distinction makes no sense. Congress has pledged its full faith and credit to *insured deposits*, the payment of which is the very purpose of the BIF. 12 U.S.C. § 1821(a)(4)(B). When a bank fails, depositors may in a trivial sense be paid *by* "the FDIC acting in its receivership capacity," as the receiver liquidates and winds up the insolvent bank. 12 U.S.C. §§1821(c)(2)(A)(ii), (c)(5). But insured depositors are paid *from* the BIF. *See, e.g.*, Prepaid Assessments, 74 Fed. Reg. 59057 (Nov. 17, 2009) (explaining that

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[7] The Government's additional response, that "sovereign immunity has not been waived because the statutory scheme does not permit appropriated funds to be used for the FDIC's expenses" (Gov.Br.23) is flatly contrary to this Court's NAFI precedents, which do not require an existing appropriation. And as we have explained (*supra* at 17-19), the Government's plea to change this Court's doctrine should be rejected.

"liquid assets of the DIF have been used to protect depositors of failed institutions" and warning that "the pace of resolutions continues to put downward pressure on cash balances"). Where a bank's deposit liabilities exceed its assets, the BIF makes up the difference. The BIF has no use but to pay insured depositors.

To be sure, the FDIC in its receivership and regulatory capacity seeks to minimize costs to the BIF by selling assets or, as it did in this case, entering into a contract to merge a failing bank into a healthy one. But there is no sense in which those activities do "not relate to the BIF" Gov.Br.23. Protecting the BIF's ability to pay insured depositors is the *raison d'etre* for those activities; indeed, protecting the BIF is required by statute. *See* 12 U.S.C. § 1823(c)(4) (requiring FDIC to resolve failing institutions at "least possible cost" to the insurance fund). After all, as the Court of Federal Claims found in this case, the FDIC entered its contract with Meritor to save the $696 million it would have had to expend from the BIF to reimburse Western's insured depositors. *Slattery v. United States*, 53 Fed. Cl. 258, 263 (Fed. Cl. 2002); *see also* Testimony of William M. Isaac, Former FDIC Chairman, at [1512:1-19] (describing how merger assistance avoided "enormous losses" to the insurance fund). And the FDIC's breach of that contract likewise resulted from its concern that undercapitalized banks posed a risk to the insurance fund. *See Slattery v. United States*, 583 F.3d 800, 805-06 (Fed. Cir. 2009).

The FDIC's breach-of-contract obligations in this case thus cannot possibly be unrelated to the deposits. *Id.* at 831 (Gajarsa, J., dissenting). To the contrary, they were incurred to avoid greater outlays from a fund that Congress intends to back with the full faith and credit of the United States.

2. Congress has repeatedly supported the FDIC with appropriated funds.

Although Congress's expressions of full faith and credit are enough to demonstrate that Congress has not disclaimed financial responsibility for the FDIC, the intent Congress expressed in word has been confirmed time and again by deed. Over the years, Congress has appropriated hundreds of billions of dollars to insure deposits through the FDIC. In good times, revenue from assessments has been enough to give deposit insurance "an appearance of being self-financing." Testimony of Robert D. Reischauer, Director, Congressional Budget Office, Hearing on Deposit Insurance Reform Before the H. Comm. on Banking, Finance, & Urban Affairs, 101st Cong. 372, 382 (Sept. 26, 1990). But in times of economic distress—precisely when deposit insurance is most needed—the fact that Congress has made deposit insurance "an unconditional guarantee to qualified depositors, which is equivalent to an entitlement program," means for all practical purposes that Congress will appropriate funds when necessary. *Id.* at 377.

Thus, amidst the crisis that prompted creation of the FDIC in 1933, Congress originally appropriated $150 million for deposit insurance.[8] Banking Act of 1933, Pub. L. No. 73-66, § 12B(c), 48 Stat. 162; Banking Act of 1935, Pub. L. No. 74-305, § 12B(c), 49 Stat. 684. And when the savings and loan crisis of the 1980s bankrupted the fund established to insure deposits in savings and loan institutions, Congress appropriated billions of dollars to the FDIC to "put the Federal deposit insurance funds on a sound financial footing." Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, §§ 101(5), 211(6)(E)-(F), 103 Stat. 183; *see also id.* § 211(6)(J) (authorization of appropriations to back up Savings Association Insurance Fund); *id.* § 11A(c) (authorization of appropriations to back up FSLIC Resolution Fund); *id.* § 21A(h)(4) (authorization of appropriations to Resolution Trust Corporation).

Attempting to minimize the significance of these past congressional appropriations, the Government plays a shell game with the funds: It argues that Congress's demonstrated willingness to appropriate billions to "other funds managed by the FDIC" says nothing about its willingness to back up the BIF.

[8] The fact that the FDIC reimbursed the Treasury fifteen years later is immaterial. Congress's initial appropriation did not require repayment. Moreover, although a repaid appropriation did not prevent this Court from deeming Federal Prison Industries a NAFI in *Core Concepts*, that case was different because the appropriations had been given to fund discrete projects of entities that were predecessors to Federal Prison Industries. 327 F.3d at 1335-36. Nor did Federal Prison Industries enjoy congressional expressions of full faith and credit (*supra* at 24-29) and authority to borrow from the Treasury (*infra* at 33-35).

Gov.Br.17-18. The distinction between the funds, however, is wholly artificial. The issue here is whether Congress has taken financial responsibility for the FDIC's deposit insurance, not whether Congress has appropriated dollars to any given *fund*.

And in any event, the only difference between the bank fund and the funds for savings and loan institutions was the degree to which each fund needed money from Congress. Because the thrift crisis was worse than the bank crisis, Congress appropriated funds for thrifts.[9] But no statutory provision prohibits the FDIC from receiving appropriated funds for bank insurance if the need arises, and no evidence suggests Congress considers banks somehow less worthy of support than thrifts. Moreover, if there could be any doubt that the Government's distinction is arbitrary, Congress itself eliminated the distinction by merging the SAIF (savings and loans) into the BIF (banks) to create a single deposit insurance fund now known as the DIF. *See* Deposit Insurance Funds Act of 1996, Pub. L. No. 104-208, § 2704, 110 Stat. 3009 (requiring SAIF to be merged into BIF, contingent on no insured savings associations existing); Federal Deposit Insurance Reform Act of

[9] Likewise, Congress's appropriation to the FSLIC Resolution Fund to pay *Winstar* damages arising from FSLIC's regulation of thrifts does not demonstrate that Congress somehow intended to absolve itself of responsibility for very similar claims arising from the FDIC's regulation of banks. Gov.Br.22. Rather, the difference simply reflects that most all of the *Winstar* claims involved thrifts, and that the size of those claims prompted Congress to act.

2005, Pub. L. No. 109-171, § 2102, 120 Stat. 9 (requiring unconditional merger). To claim that "the DIF . . . has never received an appropriation" (Gov.Br.12n.3) is therefore inaccurate, since the DIF acquired the SAIF's assets—including billions of dollars in appropriated funds.[10]

Shell games aside, the proper analysis under the NAFI doctrine asks not whether Congress has in fact appropriated money to any particular fund, but simply whether Congress has shown an intent to disclaim financial responsibility for the FDIC. Congress's history of appropriations shows no intent to disclaim responsibility and every intent to *take* responsibility should the need arise.[11] Just as the fact of prior appropriations to the Comptroller of the Currency disqualified the Comptroller from being a NAFI, so too do prior appropriations disqualify the FDIC. *L'Enfant*, 668 F.2d at 1212 (prior appropriations suggested intent to appropriate "if a deficiency should occur").

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[10] The SAIF carried a $13 billion balance just before it was merged into the BIF. *See* http://www.fdic.gov/about/strategic/report/2005annualreport/saif.html. That balance would surely have been negative if Congress had not appropriated funds to the SAIF.

[11] Given the current financial crisis, and the current insolvency of the DIF, it is quite possible that Congress would directly appropriate funds to the FDIC before this case could be transferred and resolved by a district court. A narrow focus on current appropriations would thus have the bizarre result of making the FDIC a NAFI one day but not the next—over the course of the same ongoing litigation.

3. Congress has pledged general Treasury funds to the FDIC to ensure that it can meet its obligations.

If any further confirmation of Congress's intent to retain financial responsibility for the FDIC were needed, it can be found in the fact that Congress has given the FDIC direct access to Treasury funds. Congress permits the FDIC to borrow from the Treasury, and it requires the Treasury to provide funds regardless of the FDIC's financial condition. 18 U.S.C. § 1824(a). Far from an ordinary loan, this amounts to a guaranteed line of credit from the Treasury intended "to provide additional resources" to the insurance fund. H. Rep. No. 102-293, at 33 (1991). Indeed, Congress has dramatically increased the FDIC's borrowing authority at times when the FDIC has been at the greatest risk of insolvency: from $5 billion to $30 billion in 1991;[12] temporarily unlimited borrowing authority during the financial crisis of 2008;[13] and most recently, from $30 billion to $100 billion in 2009, with temporary authority to borrow $400 billion more.[14] These actions have effectively shifted the risk of insolvency from the FDIC to the Treasury.

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[12] Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 101, 105 Stat. 2236.

[13] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 5241(a), 122 Stat. 3765.

[14] Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, § 204(c), 123 Stat. 1632.

Indeed, this latest increase has been prompted by the FDIC's dire financial condition. Its insurance fund ended 2009 with a negative balance of over $20 billion.[15] Although the Government asserts in this Court that "the FDIC has not sought . . . a single dollar of taxpayer funds" (Gov.Br.17), it has taken quite a different position in Congress. There, FDIC Chairwoman Sheila Bair warned that the agency's $30 billion borrowing authority "provide[ed] a thin margin of error," and she urged an increase "to leave no doubt that the FDIC can immediately access the necessary resources to resolve failing banks and provide timely protection to insured depositors." Letter from Sheila Bair to Senator Christopher Dodd, Chairman, Committee on Banking, Housing, and Urban Affairs, March 5, 2009, 155 Cong. Rec. H3018-03, at H3022. Moreover, although the Government asserts here that the FDIC "recently required its member institutions to pre-pay three years of premia to replenish the DIF" (Gov.Br.17), the FDIC told Congress that increased borrowing authority "would give [it] flexibility to *reduce* the size of the recent special assessment." Bair Letter, *supra* (emphasis added).

In short, Congress's repeated decisions to increase the FDIC's credit line are not the actions of an ordinary lender, but rather those of a financial steward—one who has taken responsibility to ensure that the FDIC can meet its deposit insurance obligations. It is of little consequence that the FDIC must promise to repay the

[15] http://www.fdic.gov/news/news/press/2010/pr10036.html

money it borrows. Gov.Br.19. No insolvent private insurance company, after all, could easily take out a loan with a mere promise to repay. But Congress has made certain the FDIC can. As a House report explained when Congress increased the FDIC's borrowing authority in 1991, "If the industry cannot fulfill the promise of deposit insurance to reimburse depositors in case of failure, the government and taxpayers will have to honor this commitment instead." H. Rep. No. 102-330, at 95 (1991). Congress has not shrunk from its commitment. And in every case where Congress has given a self-funded entity authority to borrow from the public fisc—even if later reimbursed—the entity has *not* been deemed a NAFI. *See Breitbeck*, 500 F.2d at 559 (authority to borrow from Treasury); *Hughes Aircraft*, 534 F.2d at 909 (temporary appropriated funds to be reimbursed by foreign government); *Gen. Elec. Corp.*, 727 F.2d at 1570-71 (same).

4. Unlike any other NAFI case, this litigation arises from the use of regulatory power delegated by Congress to the FDIC.

Two additional factors set this case apart from any other in which this Court has found an agency to be a NAFI.

First, all prior NAFI cases have involved claims by employees or third-party contractors, not by regulated entities from which NAFIs collect assessments. Here, however, the FDIC is "the primary Federal regulator" of insured depository institutions, and it breached its agreement with one of the banks it regulated. Gov.Br.2. Therefore, the Government's argument that any judgments must be paid

by levying assessments on banks amounts to a claim that the *regulated* be made to pay for the misdeeds of their *regulator*. It is difficult to imagine that Congress could have intended so perverse an incentive.[16] Forcing the banks to pay for the FDIC's actions in this case would be akin to forcing an agency's employees to pay for the judgment in a suit against the agency for underpaying its employees.

Second, all prior NAFI cases have involved contract claims arising from government agencies acting in a quasi-commercial capacity—for example, contracting with a vendor for IT and computer support services (*AINS*) or with a distributor of products produced by Federal Prison Industries (*Core Concepts*). But the FDIC's breach of contract with Meritor had an entirely different cast: What the FDIC promised Meritor was not the payment of money, from appropriated funds or otherwise; it was regulatory forbearance, a pledge not to change bank capital requirements. The Government's liability in this case thus arises from a pure exercise of police power, delegated to the FDIC by Congress.

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[16] In a paper on its website, the FDIC explains that "[m]oral hazard arises whenever an insured party, by virtue of being insured, fails to take precautions to prevent the event being insured against." Kevin P. Sheehan, Catastrophe Securities and the Market Sharing of Deposit Insurance Risk (http://www.fdic.gov/bank/analytical/banking/2003apr/article1.html)
In a twist of irony, the Government suggests that the FDIC is now the insured, that it can breach contracts in its sovereign or regulatory capacity, and that it can do so with impunity since the regulated banks would pick up the tab for any agency misconduct.

In this respect, it has less in common with an ordinary commercial contract than with a government taking, an action to which the NAFI doctrine does not apply. Indeed, when this Court declined to apply the NAFI doctrine to takings claims, it distinguished the NAFI cases on the ground that they involved contracts with a governmental entity that may not have "authority to obligate appropriated funds"—that is, to require that Congress expend funds to perform the obligations of the contract. *See Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1366 (Fed. Cir. 2005). But where performance involves the use of regulatory power and not the expenditure of funds, Congress's delegation of authority for an agency to use that power suffices to make the government responsible for its use. *Id.*

In these circumstances, it makes perfect sense for a judgment to be paid out of general appropriations rather than by assessments on banks the FDIC regulates. And when combined with Congress's refusal to disclaim financial responsibility for the FDIC—by its pledge of full faith and credit, its prior appropriations for deposit insurance, and its willingness to lend Treasury funds—the evidence is overwhelming: The FDIC bears no meaningful resemblance to the entities this Court has considered NAFIs.

II. Even If The FDIC Were A NAFI, That Status Cannot Bar Jurisdiction In The Court Of Federal Claims.

But even if the FDIC were considered a NAFI, that conclusion would merely require this Court to decide whether the NAFI doctrine, in any form, is a valid

limitation on Court of Federal Claims jurisdiction. Given that the FDIC is so clearly *not* a NAFI under this Court's precedents, we do not believe the Court needs to reach the validity of the underlying doctrine in this case. But if the Court does reach that issue, it must conclude that the NAFI doctrine subverts the plain language of the Tucker Act, conflicts with the Supreme Court's approach to the Act, and differs dramatically from this Court's application of the Act in similar contexts. Accordingly, if the Court reaches the issue of the NAFI doctrine's validity, it should revise the doctrine to make it consistent with the plain language of the Tucker Act, which waives sovereign immunity and grants jurisdiction for "*any* claim against the United States" founded on contract. The test should simply be whether the actions of any given federally-created entity are those of the "United States." The Court already applies this test to takings claims under the Tucker Act, permitting jurisdiction so long as an entity is an agent of the United States acting within its authority. *Lion Raisins*, 416 F.3d at 1368. The same should apply to contracts.

A. The NAFI doctrine is a judge-made rule that has no basis in Supreme Court precedent or statutory text.

For its entire existence, the NAFI doctrine has hovered upon precarious and shifting legal ground. Over the years, four different justifications have been offered to support it, none of which provides an adequate legal basis for the doctrine.

1. It all began with a misunderstanding. In *Standard Oil Company of California v. Johnson*, 316 U.S. 481 (1942), the Supreme Court addressed whether a "military post exchange," akin to a general store on a military base, was a "department of the United States" as that term was used in the California Motor Vehicle Fuel License Tax Act. The Court held that post exchanges were "arms of the government" because the government had created them "for the performance of governmental functions." *Id.* at 485. The case had nothing to do with the Tucker Act and nothing to do with jurisdiction. But in recounting the *facts* of the case, the Court observed that the "government assumes none of the financial obligations of the exchange." *Id.* And then, in *Borden v. United States*, 116 F. Supp. 873 (Ct. Cl. 1953), the Court of Claims mistook *Standard Oil*'s statement of fact for a dictate of law, reasoning that a post exchange cannot be sued if the government assumes none of its financial obligations. "Clearly under the decision in *Standard Oil*," the court explained, a plaintiff "may not sue the Exchange Service, because consent has not been granted." *Id.* at 877.

The reason was not so clear to Judge Whitaker, however, who pointed out in dissent that § 1491 of the Tucker Act "long ago . . . authorized suits against the United States on express or implied contracts" and that the "Army cannot set aside an Act of Congress." *Id.* at 879; *see also Pulaski Cab Co. v. United States*, 157 F. Supp. 955, 958 (Ct. Cl. 1958) (Whitaker, J., concurring) (characterizing NAFI

doctrine as "abhorrent"). Nor has the reason been clear to this Court, which has acknowledged that "*Standard Oil* did not compel" *Borden*'s result. *AINS*, 365 F.3d at 1337.

2. With the rationale for the NAFI doctrine fatally undermined by Judge Whitaker's "spirited insistence" on its error (*id.*), the Court of Claims searched about for another justification. And in *Kyer v. United States*, 369 F.2d 714 (Ct. Cl. 1966), although acknowledging the Tucker Act's "broad" scope, the court purported to find a justification in a different statutory provision, which provides: "Every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor . . . ." 28 U.S.C. § 2517. The court reasoned that this provision "limited" the Tucker Act's broad grant of jurisdiction because "it is essential that the contract sued on be one which could have been satisfied out of appropriated funds." *Kyer*, 369 F.2d at 718; *see also Keetz v. United States*, 168 Ct. Cl. 205, 205 (Ct. Cl. 1964) ("[T]his court does not have jurisdiction to grant a judgment against the Exchange Service, since recovery against the Exchange Service would be payable solely from non-appropriated funds . . . and 28 U.S.C. § 2517(a) requires that all judgments rendered by us shall be paid out of appropriated funds.").

The court appears to have read § 2517 as requiring that judgments from the Court of Claims be paid out of funds appropriated *to an agency*, thus making it

impossible to pay a judgment on behalf of an agency that itself lacks appropriated funds from which to pay judgments. But the text of § 2517 says no such thing, and requires only that judgments be paid out of "any general appropriation therefor"—that is, any general appropriation *for paying judgments*. This interpretation is confirmed by the provision establishing the U.S. Judgment Fund, which provides a general appropriation "to pay final judgments" that are "payable . . . under section . . . 2517." 28 U.S.C. § 1304(a).[17] Because those general funds have been appropriated for paying any judgments rendered by the Court of Claims under §2517, the requirement of an appropriation to the agency in question cannot be a bar to jurisdiction or a limit on the plain text of the Tucker Act.[18]

3. By 1970, the NAFI doctrine, particularly as it was most frequently applied to military post exchanges, had come under so much attack that it attracted the attention of Congress. To "correct the 'injustice and inequity worked by this Tucker Act 'loophole,'" Congress amended the Act to leave no doubt that it waived sovereign immunity for military post exchanges. *McDonald's Corp. v. United States*, 926 F.2d 1126, 1129 (Fed. Cir. 1991) (quoting S. Rep. No. 268, 91st

[17] *See also* Evan C. Zoldan, *The King is Dead, Long Live the King!: Sovereign Immunity and the Curious Case of Nonappropriated Fund Instrumentalities*, 38 CONN. L. REV. 455, 490-97 (2006) (reviewing legislative history of § 2517 and concluding that *Kyer*'s and *Keetz*'s interpretation is "untenable").

[18] Picking up where Judge Whitaker left off, Judge Nies of this Court has lucidly explained the error of relying on § 2517. *See Gen. Elec.*, 727 F.2d at 1573 (Nies, J., concurring).

Cong., 1st Sess. 2 (1969)). The amendment provided that for the purpose of the Tucker Act's broad waiver of sovereign immunity for claims against the United States, "an express or implied contract with [various post exchanges] shall be considered an express or implied contract with the United States." 28 U.S.C. §1491(a)(1). Instead of interpreting Congress's action as a rebuke to the NAFI doctrine, however, some have taken it as yet one more justification, reasoning that "Congress did not . . . alter the general rule excluding NAFIs from Tucker Act jurisdiction." *AINS*, 365 F.3d at 1339.

But because the rule has always been a judicial invention, not a legislative one, Congress's failure to fully eliminate the NAFI doctrine does not bind this Court. By clarifying that the Tucker Act's broad waiver *includes* post exchanges, the text does not thereby *exclude* every other governmental entity. Indeed, such a construction would render the Tucker Act's broad waiver superfluous. *See South Carolina v. Catawba Indian Tribe, Inc*, 476 U.S. 498, 510 n.22 (1986). Nor can the NAFI doctrine be saved by speculation that "Congress 'intended that sovereign immunity was to remain as to all [NAFIs] except for military exchanges.'" Gov.Br.10 (quoting *Wolverine Supply, Inc. v. United States*, 17 Cl. Ct. 190, 192-93 n.4 (Cl. Ct. 1989)).

Indeed, as the Supreme Court has warned, "It does not follow . . . that Congress' failure to *overturn* a [judicial] statutory precedent is reason for this

Court to adhere to it." *Central Bank v. First Interstate Bank*, 511 U.S. 164, 186-87 (1994) (emphasis added). Even if it were Congress's intent to retain the NAFI doctrine, congressional "inaction cannot amend a duly enacted statute." *Id.*

Moreover, the Supreme Court has also warned that courts "walk on quicksand" when they try to discern from Congress's inaction any intent to retain a judicial doctrine. *Id.* The best evidence from the legislative history suggests that Congress considered the NAFI doctrine—all of it—to be an "injustice" and a judicially-created "loophole" in the Tucker Act. *McDonald's*, 926 F.2d at 1129. Although the original version of the bill would have eliminated the entire doctrine, Congress ultimately omitted that language out of concern that it could make the United States liable for entities that were not agents of the United States at all—such as "informal associations of employees for recreational purposes," which the government "cannot supervise or control." *Id.* at 1130 (quoting Attachment to Letter from Secretary Hardin, Dep't of Agriculture, to Hon. Emanuel Celler (Sept. 24, 1969)). At most, then, Congress simply intended to avoid creating liability for entities that do not act as agents of the United States. Where a NAFI *is* an agent of the United States, however, Congress has shown no intent—much less clear intent—to exclude it from the Tucker Act.

4. The final justification sometimes given for the NAFI doctrine, and urged by the Government in this case, is that the Supreme Court supposedly

"recognized" and endorsed the doctrine in *United States v. Hopkins*, 427 U.S. 123 (1976). Gov.Br.25. But this argument depends on a clear misreading of *Hopkins*. The issue there was simply whether employment contracts are subject to the Tucker Act's waiver of sovereign immunity. And the Court held that "[s]ince the statute applies, by its terms, to 'any express or implied contract' we hold that it is applicable to employment contracts as well as those for goods or other services." *Hopkins*, 427 U.S. at 126. That holding had nothing to do with the NAFI doctrine. The Court mentioned the NAFI doctrine only by way of background: to explain the reason for Congress's passage of the 1970 amendment to the Tucker Act, under which the post exchange at issue in that case happened to fall. What the Government erroneously characterizes as the "*Hopkins* test" (Gov.Br.26) was no more than the Court's summary of the "decisions by the Court of Claims." 427 U.S. at 125. It would be an unfortunate irony for a doctrine mistakenly created from a misreading of *Standard Oil* to be sustained upon a similar misreading of *Hopkins*.

B. The NAFI doctrine ignores the plain language of the Tucker Act and conflicts with Supreme Court decisions interpreting the Act.

As we have explained (*supra* at 13-19), the NAFI doctrine is best understood as a judge-made presumption that Congress would not have intended to waive sovereign immunity for an entity over which it takes no financial responsibility. *L'Enfant*, 668 F.2d at 1212. But the problem with that presumption about

congressional intent is that it remains in irreconcilable conflict with the plain language of the Tucker Act, which expressly waives sovereign immunity for any contract claims against the United States, and of course contains no exception for "non-appropriated fund instrumentalities." We thus agree with the Government that this Court should, if it finds the FDIC is a NAFI under existing precedent, "dramatically simplify" the NAFI doctrine by removing the need to speculate about Congress's intent. Gov.Br.29. Yet we disagree profoundly about how: The Government would simplify the doctrine by ignoring the Tucker Act; we would simplify it by according the Act its full and proper weight.

In short, the NAFI doctrine in any form requires holding that the Tucker Act does not mean what it says—either its waiver of sovereign immunity is ignored completely (as the Government suggests) or it is carved away by speculation about congressional intent (as the doctrine currently requires). So casual an approach to the Tucker Act's plain language might once have been viable in light of earlier Supreme Court decisions reading the Act as a less-than-complete waiver of sovereign immunity. *See, e.g.*, *United States v. Mitchell*, 445 U.S. 535, 538 (1980). But no longer. Acknowledging that "terminology employed in some of our prior decisions has unfortunately generated some confusion," the Court resolved the confusion by abrogating its earlier decisions and declaring in no uncertain terms that "the Tucker Act constitutes a waiver of sovereign immunity."

United States v. Mitchell, 463 U.S. 206, 212 (1983). "If a claim falls within the terms of the Tucker Act," the Court instructed, "the United States has presumptively consented to suit." *Id.* at 216. And in a subsequent case, the Court indicated that little short of an *express* withdrawal of the Tucker Act waiver could overcome the presumptive consent to suit: Mere speculation from "indirect evidence" about what Congress might have intended, the Court held, "did not exhibit the type of unambiguous intention to withdraw the Tucker Act remedy . . . that is necessary to preclude a Tucker Act claim." *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 12 (1990) (quotation omitted); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-19 (1984); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 126-36 (1974).

Most devastating to the NAFI doctrine, the Court considered and rejected the two rationales commonly used to presume that Congress does not intend to waive sovereign immunity for NAFIs. First, the Court rejected the idea that Congress's denial of appropriations to an entity could be sufficient to withdraw the Tucker Act waiver, where neither the statute nor legislative history mentions the Tucker Act. Although Congress expressly declared that the Interstate Commerce Commission's ("ICC") authority under the "rails-to-trails" statute "shall be effective only to such extent or in such amounts as are provided in advance in appropriation Acts," the Court held that the absence of an advance appropriation

for the ICC's actions did not withdraw the waiver of sovereign immunity for those actions. *Id.* at 12-13. Because judgments under the Tucker Act "would be drawn from the Judgment Fund," not paid from appropriations to the ICC, Congress's express limitation on appropriations to the ICC did "not manifest the type of clear and unmistakable congressional intent necessary to withdraw Tucker Act coverage." *Id.* at 14; *see also Reg'l Rail Reorganization Act Cases*, 419 U.S. at 129 (despite Act's limit on amount of appropriated funds, Congress "gave no consideration to withdrawal of the Tucker Act remedy").

Second, the Court also rejected the idea that "Congress's desire" for the ICC to "operate at 'low cost' somehow indicates that Congress withdrew the Tucker Act remedy." *Preseault*, 494 U.S. at 14. The Court held that such "general desire to protect the public fisc," much like the desire that NAFIs be self-funding, "has little bearing on the Tucker Act question." *Id.* at 14-15; *see also Reg'l Rail Reorganization Act Cases*, 419 U.S. at 129 (statements in legislative history that "taxpayers would not be unduly burdened" did not withdraw Tucker Act jurisdiction). After all, the fact that "[t]he alternative chosen by Congress is less costly than a program of direct federal trail acquisition . . . might reflect Congress' rejection of a more ambitious program of federally owned and managed trails, rather than withdrawal of a Tucker Act remedy." *Preseault*, 494 U.S. at 16. So too with the desire for a NAFI to be self-funding.

The message from the Supreme Court is unmistakable: Congress's decisions about how to fund any particular entity say nothing about its intent to waive or retain sovereign immunity in the Court of Federal Claims. And in light of the Tucker Act's express waiver of sovereign immunity, judicial speculation about what Congress might have intended cannot withdraw that statutory waiver. To be sure, these decisions from the Supreme Court have so far involved only takings claims, not contract claims. But the Supreme Court has warned that the Tucker Act "makes absolutely no distinction between claims founded upon contracts and claims founded upon other specified sources of law." *Mitchell*, 463 U.S. at 216.

Faced with a conflict between the NAFI doctrine and the more recent decisions of the Supreme Court, this Court in *Lion Raisins* wisely declined to extend the NAFI doctrine to takings claims. 416 F.3d at 1366. The result, however, is a discordant approach to the Tucker Act, whereby the Act is deemed to have waived sovereign immunity in the takings context without doing so in the contract context—despite the Act's unequivocal waiver of sovereign immunity for *both*. If the Court finds that the FDIC is a NAFI under current precedent, the Court should correct this anomaly by following the Supreme Court in both contexts and eliminating the NAFI doctrine.[19]

[19] The anomaly is practical as well as doctrinal. Slattery originally alleged both takings and contract claims in the Court of Federal Claims. Although the court stayed the takings claim pending resolution of the contract claim, a decision

C. If the Court finds it necessary to reexamine the NAFI doctrine's validity, the doctrine should be replaced with the rule this Court adopted in *Lion Raisins*, which permits jurisdiction where an entity is a federally-created agent of the United States acting within the scope of its authority.

If reexamination of the NAFI doctrine proves necessary, the best approach is the one adopted by this Court in *Lion Raisins*. Because the Tucker Act waives sovereign immunity for any contract claim against the United States, jurisdiction in the Court of Federal Claims exists so long as the federally-created entity at issue was acting as the "United States"—that is, if it was an agent and instrumentality of the United States acting within the scope of its authority. *Id.* at 1362-63. Of course, the only way in which an entity can have sovereign immunity in the first place is if it acts as the sovereign. So the Tucker Act's waiver of sovereign immunity for the United States necessarily waives sovereign immunity for those entities created by the United States to carry out sovereign responsibilities. This test accords the language of the Tucker Act its full weight, and avoids a reading that would treat the Act as a less-than-complete waiver of sovereign immunity: If an entity is an arm of the United States sufficient to acquire sovereign immunity, it is also an arm of the United States subject to Congress's unambiguous waiver of that immunity.

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denying jurisdiction over the contract claim would not dispose of the takings claim. The result would be two parallel cases involving the same facts and issues, with the contract claim litigated (again) in the district court and the takings claim litigated in the Court of Federal Claims.

Not only does this rule accord with the Supreme Court's approach to the Tucker Act, as well as this Court's approach in other contexts, but it also avoids Congress's concern in 1970 that it might be held liable for the acts of non-federal entities or other non-agents over which the government has no control. *See supra* at 43. As the Court of Federal Claims once observed, "In common-sense terms, the object in all such jurisdictional disputes is to determine if the agency in question is 'doing work of the government.'" *Butz Eng'g Corp. v. United States*, 499 F.2d 619, 622 (Ct. Cl. 1974). We would do well to return to that object.

In this case, the FDIC *is* the United States, as it is not only an agency created by Congress but also one whose mandate is to execute the Nation's banking policy. Nor has it been contested that the FDIC was acting as the United States when it breached its agreement with Meritor.[20] Indeed, the Government acknowledges that

[20] It is a different and perhaps more difficult question whether the FDIC is an agent of the United States when acting in its role as *receiver* of Meritor. Although the FDIC-as-receiver steps into a bank's shoes, with a duty to "collect all obligations and money due the institution" (12 U.S.C. § 1821(d)(2)(B)), this Court has observed the "manifest conflict of interest" present when it is the FDIC-as-regulator who owes money to the institution on account of its breach of contract. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 2000).

Indeed, in this particular case, it would be difficult to deny that the FDIC-as-receiver has acted for the United States. Slattery was forced to file a derivative action because the FDIC-as-receiver refused numerous requests to bring this suit on Meritor's behalf. Most remarkably, the FDIC-as-reciever now argues in its *amicus* brief not only that *it* is a NAFI, but also that the "entire case should be dismissed" because the *FDIC-as-regulator* is also a NAFI. Br. at 1. Though the latter position serves the interests of the United States, we cannot imagine how it

the FDIC is the "primary *Federal* regulator" (Gov.Br.2, emphasis added) of insured depository institutions, and it has not challenged the lower court's finding that "the FDIC, whether a NAFI or not, is a government agency that uses governmental or sovereign powers to fulfill its mission." *Slattery v. United States*, 53 Fed. Cl. 258, 274 (Aug. 14, 2002). When the FDIC breached its contract with Meritor, it acted within its statutory authority to "tak[e] prompt corrective action to resolve the problems of insured depository institutions." 12 U.S.C. § 1831o; *see also Slattery*, 53 Fed. Cl. at 286 (discussing letter from FDIC to Meritor explaining statutory authority for capital requirements). For a federal entity like the FDIC, this should be enough under the Tucker Act to permit jurisdiction in the Court of Federal Claims.

III. Even If NAFI Status Could Ordinarily Bar Jurisdiction Over Suits Involving The FDIC, It Cannot Do So Here Because The Government Waived Sovereign Immunity By Consenting To Suit.

For one additional reason, this suit should not be dismissed even if the NAFI doctrine were to remain in place and even if the FDIC were to be deemed a NAFI. By failing to raise the NAFI issue until after trial and by affirmatively representing

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serves those of a receiver appointed to collect the obligations of Meritor. *See* FDIC Panel *Amicus* Br., 10 (admitting that "any damages award will come from the Judgment Fund, not from the DIF or any other FDIC fund"). But in any event, there can be no doubt that, in breaching its agreement with Meritor, the FDIC was acting as a regulator on behalf of the United States.

that the FDIC can be sued in the Court of Federal Claims, the Government waived its right to use the shield of sovereign immunity in this case.

In the context of state sovereign immunity, Justice Kennedy has expressed serious concern with use of the immunity defense to gain "unfair advantage" in litigation:

> In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.

Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring). In the years since, the Supreme Court and multiple circuits have made clear that sovereign immunity can be waived by the government in the course of litigation. In *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002), the Court held that a state waives its sovereign immunity when it removes a case from state to federal court, since permitting the state to "escape the result of its own voluntary act by invoking" sovereign immunity would "permit States to achieve unfair tactical advantages." *Id.* at 619 (quotation omitted), 621. So long as the government's attorney is authorized to represent the government, his waiver of immunity during litigation is binding. *Id.* at 621-23. And although sovereign immunity is often characterized as "jurisdictional," *Lapides* confirmed that it is not a "nonwaivable limit on the federal judiciary's subject-matter jurisdiction" and

instead "bears substantial similarity to personal jurisdiction requirements." *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring).

Moreover, just as personal jurisdiction must be raised at the earliest stage, multiple circuits have required much the same of sovereign immunity. A party "knows whether it purports to be an 'arm of the state,'" and "[i]f a state or state agency elects to defend on the merits in federal court, it should be held to that choice the same as any other litigant." *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 757 (9th Cir. 1999) (government waived sovereign immunity by failing to raise it until first day of trial); *see also, e.g.*, *Ku v. Tennessee*, 322 F.3d 431, 433-35 (6th Cir. 2003) (government waived sovereign immunity by failing to raise it until adverse judgment); *Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2005) (government "cannot simultaneously proceed past the motion and answer stage to the merits and hold back an immunity defense"). Indeed, this Court joined those circuits when a state raised sovereign immunity for the first time in an appeal of a Patent Office proceeding. "Principles of fairness and consistency," this Court held, "prohibit selective assertion of immunity to avoid appeal by the loser after the [state] won the first round." *Vas-Cath, Inc. v. Curators of Univ. of Mo.*, 473 F.3d 1376, 1383-84 (Fed. Cir. 2007).

These principles apply with as much force to the federal government under the Tucker Act as they do to state governments under the Eleventh Amendment.

Cf. New York v. Shinnecock Indian Nation, 523 F. Supp. 2d 185, 297-98 (E.D.N.Y. 2007) (applying *Lapides* analysis to "analogous" issue of Indian tribal sovereign immunity). The Tucker Act unmistakably grants subject matter jurisdiction to the Court of Federal Claims over any contract claim against the United States. The NAFI doctrine simply creates a sovereign immunity defense, which is "jurisdictional" only in the same sense as personal jurisdiction. *Accord El Sheikh*, 177 F.3d at 1329 (Plager, J., dissenting) (noting that "it has become customary to describe these matters as a lack of jurisdiction," but that "[o]ne way to describe this would be to say that [the plaintiff] has failed to state a claim").

The principles underlying Justice Kennedy's concern for unfair litigation tactics also apply with great force to the particular facts of this case. The Government litigated this case in the Court of Federal Claims for *eight years* before finally raising the NAFI issue. During those years, the Government filed several unsuccessful dispositive motions and took part in a six-month trial in which witnesses made admissions fatal to the Government's case. Only after all of that did the Government raise the NAFI issue and move to invalidate everything that had come before. Although the Government claimed at the time that its belated motion was prompted by the Court of Federal Claims' decision in *Furash*, that decision issued before the trial court even heard closing arguments in this case—

and fully a year before the Government filed its NAFI motion. A000105(Dkt.275 at 1n.1).[21]

Moreover, despite the Government's belated position that it could not be sued in the Court of Federal Claims, it repeatedly took the opposite position before various district courts, arguing—much like the state seeking removal in *Lapides*—that the FDIC cannot be sued in the district court on breach-of-contract claims because it can be sued *only* in the Court of Federal Claims. Indeed, the FDIC was making these representations at the very time Slattery filed this action.[22] Had Slattery filed in the federal district court, he would surely have faced a motion to

[21] The Government explained that it "was delayed by the need to research the arcane area of FDIC statutory authority and deliberate the implications of *Furash* in this context." A000105(Dkt.275 at 1n.1). We find it difficult to imagine that the able attorneys at the U.S. Department of Justice would have needed a year to understand this Court's NAFI doctrine.

[22] *See, e.g.*, *Far West Fed. Bank v. Office of Thrift Supervision*, 930 F.2d 883, 888 (Fed. Cir. 1991) ("The government [FDIC] states that . . . jurisdiction over Count IV can be found only under the Tucker Act and exclusively in the Claims Court."); *FDIC v. Hulsey*, 22 F.3d 1472, 1480 (10th Cir. 1994) ("The FDIC contends . . . that all breach of contract claims against the FDIC for amounts over $10,000 must be brought in the Claims Court."); *Farha v. FDIC*, 963 F.2d 283, 288 (10th Cir. 1992) (agreeing with FDIC that Tucker Act gave the Claims Court exclusive jurisdiction over FDIC's breach of contract, and therefore, that such claim could not be brought in district court); *Auction Co. of Am. v. FDIC*, 132 F.3d 746 (D.C. Cir. 1997) ("The FDIC has even argued, with some initial success, that because it is the United States, it can only be sued under the Tucker Act and hence in the Court of Federal Claims."); *FDIC v. Cobblestone Corp.*, 1992 WL 333961, at *4 n.7 (D. Mass. Oct. 28, 1992) ("The FDIC asserts that this Court cannot consider the takings issue because the United States Claims Court has exclusive jurisdiction over claims against the government for more than $10,000 under the Tucker Act.").

dismiss from the FDIC arguing just the opposite of what the FDIC argues today. And the FDIC, having persuaded federal courts at the time to transfer breach-of-contract cases against it to the Court of Federal Claims, would likely have prevailed. Nor is it surprising that the FDIC historically has taken the position that cases of this kind could *not* be brought in the district court, as litigating in the district court could subject the FDIC to even larger damages.

But it is also not surprising, after watching its case unravel at trial, that the Government would seek a second try here. If permitted to succeed with this tactic, it would not only be a "great waste of resources by the government," but also a manifest injustice to the plaintiffs forced to re-try this case, as the underlying events are now almost three decades old. *Slattery*, 53 Fed. Cl. at 270-71. As the Ninth Circuit has recognized, the "integrity of the judicial process is undermined if a party, unhappy with the trial court's rulings or anticipating defeat, can unilaterally void the entire proceeding and begin anew in a different forum." *Hill*, 179 F.3d at 756-57. More than eight years after this litigation began, the Government should not be permitted to profit from its own delay.[23]

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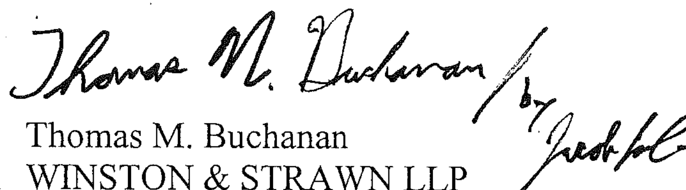
[23] When we raised this waiver issue in briefing before the panel, the Government claimed in its reply brief that our argument was untimely because it had not been made below. The Government cited this Court's rule that "*appellants* may not raise issues on appeal for the first time" in an effort to reverse a trial judgment. *Kachanis v. Dep't of Treasury*, 212 F.3d 1289, 1293 (Fed. Cir. 2000) (emphasis added). But it is well-established that this Court "may *affirm* a judgment of the trial court on any ground supported by the record, whether or not that basis was

CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the Court of Federal Claims be affirmed.[24]

Respectfully submitted,



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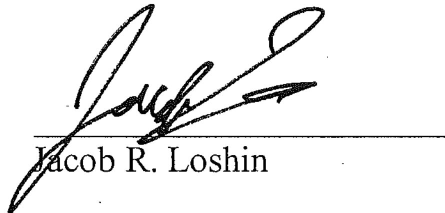
given by the court or urged by a party." *El-Sheikh v. United States*, 177 F.3d 1321, 1326 (Fed. Cir. 1999) (emphasis added).

[24] In the unlikely event the Court were to find that the Court of Federal Claims lacked jurisdiction, the proper course would be to order the action transferred, pursuant to 28 U.S.C. § 1631, to the United States District Court for the Eastern District of Pennsylvania.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and (C), I hereby certify that the foregoing brief contains 13,985 words, as counted by the word processing program used to prepare this brief and excluding parts of the brief exempted from the type-volume requirement.



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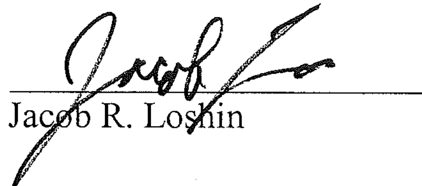
I hereby certify that on May 28, 2010, two copies of this brief were sent via U.S. Mail to each of the counsel listed below.



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