No. 97-1642

In the Supreme Court of the United States

OCTOBER TERM, 1997

THE UNITED STATES DEPARTMENT OF THE ARMY,
PETITIONER

v.

BLUE FOX, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Administrative Procedure Act provides that any person "suffering legal wrong because of agency action" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. As amended in 1976, Section 702 also waives the government's sovereign immunity for such suits where they seek relief other than "money damages." Respondent in this case, a subcontractor on a federal project, was not paid the full amount due to it under its agreement with the prime contractor, and could not collect the unpaid amount from a surety because the prime contractor had not posted the payment bond required by federal law. The question presented in this case is:

Whether 5 U.S.C. 702 permits respondent to bring an action for an "equitable lien" against the government in order to recover from the government the amount of money the prime contractor owed to respondent, but failed to pay.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 121 F.3d 1357. The opinion of the district court (Pet. App. 21a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1997. A petition for rehearing was denied on November 7, 1997. Pet. App. 19a-20a. On January 27, 1998, and February 26, 1998, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to March 7, 1998, and then to April 6, 1998, and the petition was filed on the latter day. Certiorari was granted on June 26, 1998. 118 S. Ct. 2365. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7, and relevant portions of Section 10 of the Administra-

tive Procedure Act, 5 U.S.C. 702-703, and the Miller Act, 40 U.S.C. 270a *et seq.*, appear in the appendix to this brief.

STATEMENT

1. As enacted in 1946, Section 10(a) of the Administrative Procedure Act (APA) entitled any "person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute," to judicial review of that action. Act of June 11, 1946, ch. 324, 60 Stat. 243 (codified at 5 U.S.C. 702 (1970)). As originally enacted, however, the APA did not expressly waive the United States' sovereign immunity. Consequently, for decades the federal courts continued to develop a complex body of law concerning the application of sovereign immunity to suits challenging agency action. See H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4-11 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 4-12 (1976). As then Assistant Attorney General Scalia explained to Congress, by the 1970s, "[n]o one c[ould] read the significant Supreme Court cases on sovereign immunity * * * without concluding that the field is a mass of confusion." H.R. Rep. No. 1656, *supra*, at 6; S. Rep. No. 996, *supra*, at 5.

In 1970, the Administrative Conference of the United States and the Administrative Law Section of the American Bar Association proposed that Congress simplify judicial challenges to agency action by amending 5 U.S.C. 702 to waive the United States' immunity to suits other than those seeking "money damages." See *Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 3 (1970). Six years later, the proposal was enacted into law. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721. Thus, 5 U.S.C. 702 in its current form continues to declare that persons suffering legal wrong or aggrieved by agency action within the meaning of a relevant statute are entitled to judicial review thereof. Now, how-

ever, Section 702 also provides that any such action for judicial review—if it "seek[s] relief other than money damages"—shall not be dismissed nor relief therein be denied on the ground that the suit "is against the United States or that the United States is an indispensable party." 5 U.S.C. 702. Section 702 further qualifies that waiver of immunity with a proviso declaring that it neither affects "other limitations on judicial review," nor "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Ibid.*

2. In 1993, petitioner—the United States Department of the Army (Army)—contracted with Verdan Technology, Inc. (Verdan) to install a telephone switching system at an Army depot in Umatilla, Oregon. The final, modified contract price of $432,392.13 included the cost of constructing a facility to house the system, and installation and testing.[1] Verdan, in turn, retained respondent Blue Fox, Inc., as a subcontractor on the project. Pet. App. 2a-4a, 21a-22a. In return for respondent's agreement to construct a concrete block building to house the telephone system and to install certain safety and support systems, Verdan agreed to pay respondent $186,347.80. *Id.* at 4a, 22a.

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[1] The contract between the Army and Verdan was a product of Small Business Administration (SBA) efforts through Section 8(a) of the Small Business Act, 15 U.S.C. 637(a). Under that provision, SBA has established a business development program for firms deemed to be socially and economically disadvantaged. Through the Section 8(a) program, SBA contracts with government agencies to provide certain services or supplies, and then subcontracts those contracts to eligible firms. Pet. App. 2a. In this case, the Army awarded the telephone switching contract to SBA, and SBA in turn subcontracted with Verdan. *Id.* at 2a, 21a-22a. SBA, the Army, and Verdan signed a tripartite agreement under which SBA subcontracted with Verdan for performance on the contract, and then delegated responsibility for administering the contract to the Army. *Id.* at 2a-3a, 21a-22a. As a result, the Army was responsible for paying the contract amount— $432,392.13—to Verdan, and SBA did not receive any funds in connection with the contract. *Id.* at 2a-3a, 22a.

a. Under the Miller Act, 40 U.S.C. 270a *et seq.*, a contractor that performs "construction, alteration, or repair of any public building or public work of the United States" generally must post two types of bonds. 40 U.S.C. 270a(a). First, the contractor must post a "performance bond * * * for the protection of the United States" against defaults by the contractor. 40 U.S.C. 270a(a)(1). Second, it must post a "payment bond * * * for the protection of all persons supplying labor and material," 40 U.S.C. 270a(a)(2); the payment bond in effect guarantees payment by the prime contractor to subcontractors and other suppliers on the federal project.[2]

b. Although the Army's original solicitation required the contractor to furnish payment and performance bonds if the contract price exceeded $25,000, the Army later treated the contract as a services contract for which no bond was required. Pet. App. 3a, 22a. As a result, the Army's amended solicitation deleted any mention of a bond requirement, and Verdan did not post any Miller Act bonds. *Ibid.*

Although respondent was an experienced prime contractor and subcontractor on federal contracts, J.A. 25, it did not condition its subcontract with Verdan on proof that Verdan had posted a payment bond; nor did it ask Verdan or the Army to show that Verdan in fact had posted such a bond. *Id.* at 25-26. Instead, respondent simply assumed that Verdan had posted a payment bond, apparently because Verdan required respondent to post bonds for the protection of respondent's own subcontractors. *Ibid.*; Pet. App. 37a. As a result, respondent failed to learn that Verdan had not posted a payment bond until approximately June 15, 1994,

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[2] As originally enacted, the Miller Act required that bonds be obtained on contracts exceeding $2,000. Act of Aug. 24, 1935, ch. 642, 49 Stat. 793. In 1978, that figure was increased to $25,000. Act of Nov. 2, 1978, Pub. L. No. 95-585, 92 Stat. 2484. In 1994, after the events underlying this suit, the amount was increased to $100,000. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, Tit. IV, § 4104(b)(1)(A), 108 Stat. 3342.

after respondent had completed performance under its subcontract. Pet. App. 4a, 22a, 37a.

Verdan paid respondent $139,761.66 of the $186,347.80 owed on the subcontract, leaving $46,586.14 unpaid. Pet. App. 4a, 22a-23a. Respondent notified the Army on May 26 and June 15, 1994, that it had not been fully paid. *Id.* at 4a, 23a. After receiving those notices, the Army made additional disbursements to Verdan, totaling $86,132.33, for work performed. *Id.* at 4a. Before the project was completed, however, the Army terminated its contract with Verdan for various defaults, including failure to adhere to the contractual delivery schedule. *Id.* at 23a; J.A. 59, 65-66. At the time the Army terminated the contract, $84,910.52 in contract funds had not been disbursed to Verdan. Pet. App. 5a, 23a. That $84,910.52 had been designated for certain installation and testing tasks that Verdan failed to complete. *Id.* at 23a; J.A. 61. No funds due to Verdan for work actually performed had been held back or retained by the Army. Pet. App. 23a; J.A. 60, 61.

The Army then turned to Dynamic Concepts, Inc. (Dynamic) to complete the Umatilla project, modifying an existing contract with Dynamic to cover the project. Pet. App. 5a, 23a. Pursuant to that modification, the Army paid Dynamic $126,772.78. The Army used the undisbursed balance of $84,910.52 from the Verdan contract, plus approximately $42,000 from subsequent fiscal year funds, to pay for completion of the project. *Ibid.*; J.A. 21, 61; see J.A. 38-40.

3. Respondent filed suit against Verdan in the Tribal Court of the Yakima Indian Nation for breach of contract. In January 1995, respondent obtained default judgments against Verdan and its officers. Pet. App. 5a, 23a-24a. Respondent alleges, however, that it will not be able to collect on those judgments. *Id.* at 5a, 35a-36a. Accordingly, in May 1995, respondent filed suit against the Army, seeking to recover from the Army the $46,586.14 that Verdan owed

on the subcontract.[3] Predicating jurisdiction on 28 U.S.C. 1331 and the APA, 5 U.S.C. 702-704, 706, see Pet. App. 34a, respondent sought an "equitable lien" on any funds from the Verdan contract not paid to Verdan, or on any funds available or appropriated for completion of the Umatilla project, and an order directing payment of those funds to it, plus attorney's fees and interest. *Id.* at 38a-40a. Respondent also sought an injunction to prevent the Army from paying any more money on the Verdan contract or the follow-on contract with Dynamic until respondent was paid. *Id.* at 40a. Respondent did not move for preliminary relief, however, and the Army eventually paid Dynamic all of the funds remaining from the Verdan contract, plus additional funds, once Dynamic completed its work. Pet. App. 5a n.3, 23a.

4. The district court granted summary judgment in the Army's favor. Pet. App. 31a. The court reasoned that the APA waives the government's immunity only with respect to relief other than money damages. "[T]he question is," the court continued, "whether [respondent] seeks money damages for a loss suffered, or whether [respondent] seeks funds to which it is entitled by statute." *Id.* at 28a. Respondent premised its suit on the allegation that the Army had erred in failing to require Verdan to post a Miller Act bond. *Id.* at 24a, 37a. But even if the Miller Act required that a bond be posted, the district court reasoned, the "Army had no contractual obligation or statutory obligation to pay [respondent]. The Miller Act neither places a duty on the government to insure that a bond is furnished, nor places the government and the subcontractor in privity of contract." *Id.* at 29a. As a result, the relief respondent was seeking did not constitute enforcement of a statutory obligation. In-

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[3] See Pet. App. 33a-40a (Complaint); see also *id.* at 24a. Although respondent also named SBA as a defendant, the district court granted summary judgment in SBA's favor, Pet. App. 31a, and the court of appeals affirmed, *id.* at 12a-14a. Respondent has not sought review of that ruling.

stead, it constituted an award of the "money damages [respondent] suffered when Verdan failed to pay [respondent] in full." *Id.* at 30a. The court therefore concluded that "[t]he waiver of sovereign immunity provided by the APA does not apply to the claim of [respondent] against the Army." *Ibid.*

5. a. The Ninth Circuit reversed in relevant part. Pet. App. 1a-18a. The panel majority acknowledged that the APA could provide the necessary waiver of sovereign immunity only if respondent sought relief other than money damages. *Id.* at 6a. The majority concluded, however, that the monetary relief respondent sought constituted specific relief and not money damages. According to the Ninth Circuit:

> Here, [respondent] seeks an equitable lien only for the very thing to which it is entitled under the contract. [Respondent] does not seek any consequential damages to compensate losses suffered beyond the contract price. Therefore, the district court had jurisdiction to consider its claim under the APA.

Pet. App. 7a.

The court of appeals explained its conclusion in two steps. First, the court read *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), as holding that 5 U.S.C. 702 waives the United States' immunity against actions for "specific relief," which the court read as synonymous with "equitable relief" or relief awarded in "equitable actions." See Pet. App. 7a-8a ("[T]he APA waives immunity for equitable actions."); *id.* at 10a ("Any equitable rights held by subcontractors as against [the federal agency] which may have been unenforceable where sovereign immunity existed, became enforceable upon immunity being waived."). Second, the court examined whether an equitable lien constitutes "equitable relief," and determined that it does. *Id.* at 8a-11a; see *id.* at 10a ("[E]quitable liens are properly characterized as equitable remedies * * *."). Because it concluded that Section 702 waives the United States' immunity for all equitable actions

or remedies, and that a claim for an equitable lien is an equitable action seeking an equitable remedy, the court of appeals held that a suit for an equitable lien falls within the scope of the waiver of immunity in Section 702. Pet. App. 8a-9a; see *id.* at 10a ("[S]uch equitable liens are properly characterized as equitable remedies, rather than money damages.").

The court of appeals also rejected the district court's conclusion that a monetary remedy may constitute "specific relief" permissible under Section 702 only where the plaintiff seeks to enforce a statutory right to payment. Pet. App. 7a-8a. Citing *Aetna Casualty and Surety Co.* v. *United States*, 71 F.3d 475, 479 (2d Cir. 1995), the court held that "there is no requirement in *Bowen* or the APA that the specific relief requested be statutorily granted. That is, a party need not rely upon a statute in order to obtain federal court jurisdiction [over a claim for monetary relief] under the APA." Pet. App. 8a.

b. Judge Rymer dissented. Pet. App. 14a-18a. "Never before," she observed, "has a court held that a subcontractor may sue an agency of the United States, which has not agreed to be sued, for contract monies that the prime contractor should have paid to the subcontractor but didn't." *Id.* at 14a. For decades, she pointed out, courts had uniformly rejected subcontractor claims against the government. *Ibid.* Now, however, the majority had upset that settled law in contravention of the terms of Section 702. "[N]o matter how you slice [respondent's] claim," Judge Rymer explained, "it seeks funds from the treasury to compensate for the Army's failure to require Verdan to post a bond," and "the law is well settled that this may not be done unless the contracting agency has agreed to be sued * * *." Pet. App. 14a-15a.

Judge Rymer further explained that Congress had protected subcontractors by requiring prime contractors to post payment bonds under the Miller Act. Pet. App. 15a. Where

such bonds were not posted, however, "neither the Federal Tort Claims Act, the Miller Act nor the Tucker Act, waives sovereign immunity to permit a subcontractor to sue the United States directly in its own right for monies the subcontractor should have received, but did not receive, from the prime contractor." *Ibid.* "[I]n the absence of an agency waiver," Judge Rymer explained, "subcontractors cannot achieve 'by indirection a result that they could not reach directly under the Miller Act.' " Pet. App. 16a.

Judge Rymer also disagreed with the majority's conclusion that 5 U.S.C. 702 permits monetary relief whenever the action or remedy is "equitable." *Id.* at 17a. Instead, she reasoned, the APA's waiver permits monetary awards only if "the government has a duty" to pay money "which can be specifically enforced." *Id.* at 16a. In this case, she concluded, the government "has none." *Ibid.* Although in her view the Army should not have approved the Verdan contract absent the posting of an adequate surety bond—and the absence of the bond is what "caused [respondent's] loss"—requiring the Army to pay money to respondent was simply one way of giving respondent the "money damages" remedy that the APA proscribes. *Id.* at 16a-17a.

SUMMARY OF ARGUMENT

The federal government cannot be sued in the absence of an express waiver of sovereign immunity, and any such waiver must be narrowly construed. The waiver of immunity in 5 U.S.C. 702 permits claims for "judicial review" of "agency action" to be brought against the United States, but only where they seek relief "other than money damages." By holding that Section 702's waiver of immunity permits unpaid subcontractors to obtain an equitable lien on funds in the United States Treasury, the Ninth Circuit provided relief that Section 702 does not allow.

I. A. Although Section 702 waives the United States' sovereign immunity in part, it excludes suits seeking "money

damages" from the scope of the waiver. In *Bowen* v. *Massachusetts*, 487 U.S. 879, 893, 895 (1988), this Court held that a suit is for "money damages" if it seeks a monetary remedy as "compensation for an injury to [the claimant's] person, property, or reputation," or otherwise requests money to "substitute" for a legal duty the government breached. A monetary remedy, however, may not be a prohibited award of "money damages"—and may instead constitute "specific relief" permitted by Section 702—if it "give[s] [the claimant] the very thing to which he was entitled" from the government in the first instance. 487 U.S. at 895 (internal quotation marks omitted).

B. Under this Court's precedents, a plaintiff is entitled to money from the Treasury only if Congress by law expressly so directs. *OPM* v. *Richmond*, 496 U.S. 414, 416, 424, 432 (1990). As a result, money from the Treasury cannot be the "very thing to which [the plaintiff] was entitled" from an agency—and therefore must constitute "money damages"—unless the plaintiff identifies a specific statute that obligated the agency to pay the plaintiff public funds from the Treasury in the first place. In *Bowen*, Massachusetts sought to enforce such a statutory payment mandate; there, the State sought an order compelling compliance with a clause in the Medicaid Act providing that the Secretary of Health and Human Services "shall pay" for covered services. Absent such a statutory payment mandate, however, courts may not create new substantive rights to money in the Treasury based on their own notions of equity.

C. Respondent can identify no applicable statutory money-payment obligation. Although respondent's claim rests primarily on the Army's alleged violation of the Miller Act, 40 U.S.C. 270a *et seq.*, that statute does not require the payment of federal funds to subcontractors. At most, it requires federal agencies (including the Army) to ensure that prime contractors like Verdan post payment bonds for the protection of subcontractors like respondent. But if

ensuring the posting of a bond is the statutory duty the Army breached, then the money respondent seeks cannot be "specific relief"—and must be money damages—because it does not give respondent "the very thing to which [it] was entitled," *i.e.*, Army action to ensure that the contractor posts a payment bond from a qualified surety. Instead, it gives respondent a "substitute" award that compensates respondent for the losses it suffered when no bond was posted. Such substitute monetary remedies are barred by the "money damages" prohibition of Section 702.

The Ninth Circuit's reliance on an "equitable lien" is similarly deficient. Congress has nowhere recognized "equitable liens" as a proper basis for imposing payment obligations on the Treasury. Absent statutory authorization, courts are prohibited from creating new rights to funds in the Treasury through the invocation of judically-developed equitable principles. *Richmond*, 496 U.S. at 416, 424, 432.

D. The Ninth Circuit's construction of Section 702, as authorizing the imposition of new payment obligations so long as they are "equitable," is inconsistent with the text and history of that provision. As the Third and D.C. Circuits (and the district court below) have recognized, Section 702 does not by its terms open the Treasury to monetary liability on any substantive basis so long as it is "equitable" in nature. To the contrary, Section 702 preserves the longstanding rule that no person is entitled to money from the Treasury except as Congress specifically directs. "Nothing herein," Section 702 declares, "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. The legislative history of the 1976 amendment likewise demonstrates that Congress did not intend to license federal courts to create and then enforce non-statutory entitlements to federal funds whenever the claim or relief can be characterized as "equitable." Instead, it

shows that Congress contemplated no additional monetary liability, and expected actions like this one to be barred.

E. The Ninth Circuit's theory that a payment obligation may arise under the federal common law through an equitable lien is not supported by this Court's cases. This Court has uniformly held that the payment obligations of the Treasury arise from Acts of Congress, not from judicial doctrines articulated by the courts. None of the decisions of this Court relied upon by the Ninth Circuit recognizes a common-law or equitable right to federal Treasury funds *vis-à-vis* the federal sovereign.

II. The Ninth Circuit's decision misconstrues the nature of "judicial review" of "agency action" for which the 1976 amendment to Section 702 partially waives the United States' immunity. A common-law claim for an "equitable lien" is not a suit challenging "agency action"; nor does it constitute a suit seeking "judicial review." Moreover, recharacterizing respondent's suit to identify the purported "agency action" being subjected to "review" reveals that the monetary relief respondent seeks is in fact a prohibited award of money damages.

III. Finally, Section 702 bars suit under the APA if another statute that consents to suit "expressly or impliedly forbids" the relief that is sought. 5 U.S.C. 702. Both the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, and the Miller Act, 40 U.S.C. 270a *et seq.*, grant consent to suit in this context, and they impliedly preclude the "specific" monetary relief that respondent seeks.

ARGUMENT

RESPONDENT'S SUIT FOR AN "EQUITABLE LIEN" IS NOT AUTHORIZED BY 5 U.S.C. 702

Prior to the decision below, no court had ever held that the United States and its agencies are obligated to pay public funds to subcontractors on federal projects, under an equitable lien theory or any other, whenever the prime contractor that should have paid the subcontractor failed to do so. Pet. App. 14a (Rymer, J., dissenting). To the contrary, "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation." *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241 (1947). Just as "[t]hey cannot acquire a lien on public buildings," *ibid.*, they cannot obtain liens on public funds.

In this case, the Ninth Circuit held that the partial waiver of sovereign immunity inserted into the Administrative Procedure Act (APA) in 1976 altered that settled rule. According to the Ninth Circuit, the waiver of immunity in 5 U.S.C. 702 subjects the United States to monetary liability based on any substantive source of law so long as the cause of action or relief, such as the "lien" in this case, is characterized as "equitable." The Ninth Circuit's decision misconstrues the "money damages" exclusion of Section 702, misperceives the nature of "judicial review" of "agency action" authorized by Section 702, and offers relief that other statutes forbid.

I. BECAUSE RESPONDENT'S SUIT SEEKS "MONEY DAMAGES," IT IS OUTSIDE THE SCOPE OF THE WAIVER OF IMMUNITY IN 5 U.S.C. 702

It is a fundamental principle of sovereign immunity that a court has no jurisdiction over claims against the United States unless Congress by statute expressly and unequivocally waives the United States' immunity to suit. See *United*

States v. *Mitchell*, 463 U.S. 206, 212 (1983). Moreover, when the United States does consent to be sued, "the terms of [the] waiver of sovereign immunity define the extent of the court's jurisdiction," *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986), and any such waiver must be strictly construed in favor of the sovereign, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941).

By declaring that a claim seeking judicial review of agency action shall not "be dismissed nor relief therein be denied on the ground that it is against the United States," the 1976 amendment to the APA undeniably effected a limited waiver of immunity. *Bowen* v. *Massachusetts*, 487 U.S. 879, 891-892 (1988). That waiver, however, extends only to claims seeking relief "other than money damages." 5 U.S.C. 702. Because it is "money damages" that respondent seeks from the Army in this case, the district court was correct to dismiss this suit.

A. An Award Of Money From The Treasury Is "Specific Relief" Rather Than "Money Damages" Only If Public Funds Are The Very Thing To Which The Plaintiff Was Entitled From The Government In The First Instance

In *Bowen* v. *Massachusetts*, this Court considered the meaning of Section 702's exclusion for suits seeking "money damages." There, the Secretary of Health and Human Services had issued a final order declining to reimburse Massachusetts for certain expenses under its Medicaid Program, and the State brought suit seeking to "set aside" that order. Rejecting the United States' contention that the suit was for "money damages," the Court explained that suits for "money damages" stand in contradistinction to suits which are in the nature of "an equitable action for specific relief." 487 U.S. at 893; see also *id.* at 897. The former provides the "victim with monetary compensation for an injury to his person, property, or reputation," while the latter merely forces the defendant

to undertake action, such as the return of property to which the plaintiff is entitled. *Id.* at 893.

"The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" 487 U.S. at 893. Instead, the Court observed:

> The term "money damages," 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies "are not *substitute* remedies at all, but attempt to give the plaintiff the very thing to which he was entitled."

Id. at 895 (quoting *Maryland Dep't of Human Resources* v. *HHS*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (Bork, J.) (quoting in turn D. Dobbs, *Handbook on the Law of Remedies* 135 (1973))).

Applying that analysis, the Court in *Bowen* held that the suit before it did not seek "money damages." The Medicaid statute on which the suit was based expressly imposed a money-payment mandate, declaring that the Secretary "shall pay" certain sums when specified conditions are met. 487 U.S. at 900. Consequently, the State did not seek "money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it [sought] to enforce the statutory mandate itself, which happens to be one for the payment of money." *Ibid.*; see also *id.* at 895, 907 (State "is seeking funds to which a statute allegedly entitles it" (quoting *Maryland Dep't of Human Resources*, 763 F.2d at 1446)). Thus, in *Bowen*, money from the Treasury constituted "specific relief" rather than "money damages" because the plaintiff alleged that a specific statute entitled it to the funds that the agency had denied it.

Bowen did not hold, however, that money from the Treasury could be "the very thing to which [the claimant] was entitled"—and thus "specific relief" rather than "money

damages"—in the absence of an express statutory mandate directing an agency to pay money to the claimant. To the contrary, as we demonstrate below, only an Act of Congress can impose a substantive obligation to pay money from the Treasury, and thus only an Act of Congress can make money from the Treasury "the very thing" to which a claimant is entitled in a suit against a federal agency under the APA.

B. Money From The Treasury Is Not The Very Thing To Which A Plaintiff Is Entitled From An Agency Unless Congress Has Recognized A Payment Obligation In The Explicit Terms Of A Federal Statute

Federal courts, as courts of limited jurisdiction, do not have power or authority to create entitlements to federal funds according to their own principles of equity. To the contrary, even where immunity has been waived to permit judicial review, "payments of money from the Federal Treasury are limited to those authorized by statute." *OPM* v. *Richmond*, 496 U.S. 414, 416 (1990); cf. *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (courts may not award damages against a federal agency absent "a waiver of sovereign immunity" and a "source of substantive law * * * [that] provides an avenue for relief").[4] As a result, money from the Treasury cannot be "the very thing to which [a claimant] was entitled" from a federal agency in the first instance—and thus "specific relief" rather than "money damages" in a suit under Section 702—unless the claimant's

[4] Throughout this brief, we use the terms "Act of Congress" and "statute" as shorthand terms to encompass positively enacted sources of law, as opposed to judicially-created (common-law) sources. They thus include self-executing provisions of the Constitution, federal statutes, and possibly administrative regulations, to the extent they have the force and effect of law, are funded, and are adopted pursuant to an Act of Congress that authorizes the agency to articulate an obligation to pay money. See *Atchison, T. & S.F. Ry.* v. *Scarlett*, 300 U.S. 471, 474 (1937) (regulation has "the same force as though prescribed in terms by the statute").

lawsuit seeks to enforce a *statutory* mandate for the payment of money.

1. This Court's cases resonate with that theme. In *OPM* v. *Richmond*, for example, this Court held that, once the claimant became statutorily ineligible for certain benefits, a federal court could not order the payment of benefits under the doctrine of "equitable estoppel." There, as here, a partial waiver of sovereign immunity permitted a direct suit against the government. See 5 U.S.C. 7703(a)(1). Nonetheless, this Court held that only an Act of Congress, and not naked principles of equity, could establish a substantive entitlement to federal funds. "[T]he payment of money," the Court declared, "must be authorized by a statute." 496 U.S. at 424; see *id.* at 416 ("We hold that payments of money from the Federal Treasury are limited to those authorized by statute * * *."). And the Court reiterated that point in rejecting the claimant's argument that his benefits could be paid from the Judgment Fund, rather than from the benefits appropriation, stating: "[F]unds may be paid out," even from the Judgment Fund, "only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Id.* at 432.

This Court had applied the principle articulated in *Richmond* more than a century before *Richmond* was decided. In *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1846), for example, this Court relied on that principle to hold that pay due to federal employees (in that case, seamen of the frigate Constitution) from the Treasury could not be garnished or attached by creditors. The "money in the hands of the purser * * * due to seamen for wages," the Court reasoned, constituted "public money," *id.* at 20; "[s]o long as the money remains in the hands of the disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury," *id.* at 20-21. Because those wages constituted public funds, the Court held, they could not be paid out on the basis of rights or obligations other than those

created or recognized by Congress itself. "The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended." *Id.* at 20.

Thirty-one years after deciding *Buchanan*, the Court again applied that principle. In *Knote* v. *United States*, 95 U.S. 149, 154 (1877), the President asserted that, through his pardon power, he could require the return of forfeited funds to their former owners. This Court held otherwise. "[I]f the proceeds [of the seizure] have been paid into the treasury," the Court held, then "the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress." *Ibid.* Only six years ago, this Court applied that same rule yet again in *Republic National Bank* v. *United States*, 506 U.S. 80 (1992), this time holding that the Judiciary, no less than the President, lacks power to order the return of forfeited funds absent appropriate legislation. *Id.* at 94 (opinion of the Court delivered by Rehnquist, C.J.). There, however, the Court did identify a statute permitting that relief: Congress had authorized the return of seized property and enacted a specific appropriation therefor.[5]

2. The rule that money may be paid from the Treasury only on the basis of payment obligations recognized by Acts of Congress flows directly from the Constitution. Under our system of separated powers, federal courts do not make fiscal policy. Nor do they have authority to allocate resources of the United States based on judicial notions of

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[5] See 28 U.S.C. 2465 ("Upon entry of judgment for the claimant * * * such property shall be returned forthwith to the claimant or his agent * * *."); *Republic Nat'l Bank*, 506 U.S. at 95-96 (appropriation provided by 28 U.S.C. 1304, 2414, and 2465); *id.* at 90-91 (Blackmun, J., joined by Stevens and O'Connor, JJ.) (28 U.S.C. 2465's requirement that the property "be returned forthwith" is a sufficiently "specific" appropriation of funds.).

equity or fairness. The Appropriations Clause, Art. I, § 9, Cl. 7, provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *." As this Court has explained, the Appropriations Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Richmond*, 496 U.S. at 428; see 2 J. Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858) (object of the Clause "is to secure regularity, punctuality, and fidelity, in the disbursements of public money"); see also *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937).

Because the Constitution expressly allocates the power of the purse to Congress, courts properly decline to create or recognize an obligation to pay money from the Treasury except as Congress by law directs. Thus, even though the Tucker Act, 28 U.S.C. 1491, expressly grants the Court of Federal Claims jurisdiction over certain monetary claims against the United States, it does not follow that Tucker Act plaintiffs may obtain money from the Treasury regardless of the substantive basis for their claims. *United States* v. *Testan*, 424 U.S. 392, 400 (1976). Instead, a Tucker Act plaintiff must assert a claim based on one of the substantive sources of law the Tucker Act itself identifies, *i.e.*, a claim "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). And the plaintiff "must demonstrate" that the statutorily-recognized "source of substantive law he relies upon can fairly be interpreted as *mandating* compensation by the Federal government for the damage sustained." *United States* v. *Mitchell*, 463 U.S. at 216-217 (internal quotation marks and footnotes omitted)

(emphasis added); *Testan*, 424 U.S. at 400 (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (1967)); see also *Meyer*, 510 U.S. at 484 (agency's sue-and-be-sued clause does not, in and of itself, allow a claim for money without an entitlement from a source of substantive law).

Thus, where a plaintiff relies on an "express or implied contract" as the substantive source of law for his Tucker Act claim, the plaintiff must show that he has a valid and binding contract with the government—*i.e.*, a contract that is authorized by statute and properly funded—and that federal principles of contract law entitle him to compensation. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-386 (1947); *Hooe* v. *United States*, 218 U.S. 322 (1910). And where a Tucker Act plaintiff seeks money based on the violation of an Act of Congress, he must show that the Act "in itself can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 402 (internal quotation marks omitted). Indeed, the "grant of a right of action" for damages "must be made with specificity," *id.* at 400, and no monetary award against the United States based on the Constitution, an Act of Congress, or a regulation is permissible *unless* the relevant source of law "specifically authorize[s] awards of money damages." *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 739-740 (1982); see also *id.* at 741 (Tucker Act claim cannot be predicated on "regulations * * * which do not explicitly authorize damages awards").

3. Congress knows how to create monetary liability on the part of the United States and authorize courts to award monetary relief. For example, as described above, it has statutorily authorized certain federal officials to enter into contracts on its behalf and, through the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, made the United States amenable to damages awards based on "express or implied contract[s]." Similarly, the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671, *et seq.*, declares that the "United States shall be liable

* * * to tort claims, in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, subject to certain exceptions. Finally, where Congress chooses to subject a federal instrumentality like the Postal Service to monetary liability more generally as if it were a private party, it declares without qualification that the instrumentality may "sue and be sued." See *Franchise Tax Board* v. *United States Postal Serv.*, 467 U.S. 512 (1984). By so declaring, Congress may evince an intent to "launch[] [the instrumentality] into the commercial world," making its amenability to suit and its "liability" in commercial matters largely "the same as any other business." *Id.* at 520 (internal quotation marks omitted).[6]

When Congress amended the APA in 1976 to waive the United States' immunity to certain suits for judicial review of agency action, it did not similarly launch federal agencies into the commercial world, and it did not utilize language similar to that of the Tucker Act or the FTCA. Instead, Congress simply declared that an otherwise proper suit seeking judicial review of agency action "shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. 702.

The 1976 amendment to Section 702 thus is "purely procedural in nature." S. Rep. No. 996, 94th Cong., 2d Sess. 19 (1976). Unlike the FTCA and the Tucker Act, it does not identify any substantive source of law that could in turn be the basis for the imposition of money-payment obligations on the Treasury, and of course it expressly preserves the government's immunity to "money damages." Nor does the 1976 amendment appropriate funds to satisfy any judgments

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[6] Given the federal interests involved, the agency's liability still depends on federal rather than state law. See E. Chemerinsky, *Federal Jurisdiction* § 6.2.2, at 303-304 (1989) (federal jurisdiction and federal law necessary to protect federal property interests). Moreover, the plaintiff must always find a cause of action that operates against federal governmental entities. *Meyer*, 510 U.S. at 484.

that might result. Simply put, nothing in Section 702 evidences an intent to impose new substantive obligations to pay money from the Treasury.

Because Section 702 does not itself impose substantive money-payment obligations, anyone demanding public money in reliance on the waiver of immunity contained therein must locate a right to the funds in the express terms of some *other* federal statute. *Richmond*, 496 U.S. at 416, 424, 432; *Mitchell*, 463 U.S. at 216-217 (where statute "does not create any substantive right enforceable against the United States," the "substantive right must be found in some other source of law" (internal quotation marks omitted); *Testan*, 424 U.S. at 398-400 (if provision "is itself only a jurisdictional statute" and "does not create any substantive right against the United States" for money, plaintiff must locate the entitlement in another provision). Just as federal courts cannot enter judgments awarding money from the Treasury as compensatory damages except "on the basis of * * * a substantive right to compensation" recognized in "the express terms of a specific statute," 496 U.S. at 432, so too they cannot order payments from the public fisc as "specific relief" under Section 702 absent an equally explicit statutory money-payment mandate. As Judge Rymer observed in dissent below, unless there is a statutory money-payment mandate, "the government has [no] duty" to pay that "can be specifically enforced." *Id.* at 16a.

For that reason, the Third Circuit was correct to hold that "the crucial distinction" between a suit for monetary "specific relief," which is permitted by 5 U.S.C. 702, and an action for "money damages," which is not, is that the former "seek[s] funds *to which a statute* allegedly entitles" the plaintiff, while the latter demands "money for the losses * * * suffered by virtue of the agency's failure to do that which it was required to do." *Dia Navigation Co.* v. *Pomeroy*, 34 F.3d 1255, 1267 (1994) (emphasis added;

internal quotation marks omitted); see also Pet. App. 28a (district court opinion) ("Here, the question is whether [respondent] seeks money damages for a loss suffered, or * * * funds to which it is entitled by statute."); *Hubbard* v. *Administrator, EPA*, 982 F.2d 531, 536 (D.C. Cir. 1992) ("*Bowen's* holding * * * does nothing for [plaintiff's] cause" because plaintiff's "basic claim is not for enforcement of any legal mandate that the EPA pay him a sum of money; rather, it is to force the EPA to offer him the job it denied him."). Consequently, where a plaintiff does not allege a statutory entitlement to public funds, money from the Treasury is not "the very thing to which [it] was entitled" from the federal agency. *Bowen*, 497 U.S. at 900.

C. Because No Statute Entitles Respondent To Federal Funds, Its Claim For Monetary Relief Is Barred As An Action For Money Damages

In *Bowen*, Massachusetts sought specific relief to enforce a statutory payment mandate. The Medicaid Act provision at issue there declared that "[f]rom the sums appropriated therefor * * * the Secretary * * * *shall pay* to each State" certain sums for covered medical services. 42 U.S.C. 1396b(a) (emphasis added). Because Massachusetts sought review of an administrative decision under an Act of Congress directing the agency to pay money for covered services, this Court upheld its suit as an action for "specific relief"; the claim, the Court explained, merely sought "to enforce the statutory mandate itself, which happens to be one for the payment of money." 487 U.S. at 900. The same cannot be said of respondent's suit here.

1. Although the Ninth Circuit majority did not identify the "agency action" that injured respondent and was being subjected to "judicial review," see pp. 43-47, *infra*, the only purportedly wrongful government conduct identified was the Army's alleged violation of the Miller Act, 40 U.S.C. 270a *et seq.* In particular, the Army failed to require the posting

of a Miller Act payment bond which, respondent asserts, would have protected it from Verdan's default. Pet. App. 24a, 37a; see also *id.* at 3a, 13a.

The Miller Act, however, nowhere directs government agencies to pay money to subcontractors. Instead, it requires prime contractors that perform "construction, alteration, or repair of any public building or public work of the United States" to post a "payment bond * * * for the protection of all persons supplying labor and material." 40 U.S.C. 270a(a)(2). Because the Miller Act places responsibility for obtaining a bond on the prime contractor and not the government, it arguably imposes "no affirmative obligations on the government" at all. *Arvanis* v. *Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1290 (7th Cir. 1984), cert. denied, 469 U.S. 1191 (1985); Pet. App. 29a (district court opinion) ("The Miller Act neither places a duty on the government to insure that a bond is furnished, nor places the government and the subcontractor in privity of contract.").

In any event, if ensuring that prime contractors post Miller Act bonds is a duty that the Army allegedly breached, then the money award respondent seeks here cannot be "specific relief"—and must be money damages—because it does not give respondent "the very thing to which [it] was entitled," *i.e.*, action by the Army to assure that the prime contractor posts a payment bond from a qualified surety. Instead, the monetary remedy imposed by the Ninth Circuit gives respondent the paradigm of "money damages"—substitute relief in the form of money to compensate respondent for the loss it suffered when the Army failed to do what it allegedly should have done. As the dissent observed, "no matter how you slice [respondent's] claim, it seeks funds from the treasury to compensate for the Army's failure to require Verdan to post a bond." Pet. App. 14a (Rymer, J., dissenting); compare *Department of the Army* v. *FLRA*, 56 F.3d 273, 276 (D.C. Cir. 1995) (successful challenge to agency action for failure to provide required

notice entitles employees only to "specific relief" in the form of proper notice, since "proper notice," not greater compensation, "was the thing to which * * * employees were entitled").

In any event, it could not be clearer that the Miller Act imposes no substantive obligation to pay federal funds to subcontractors. For more than a century, Congress and the courts have recognized that subcontractors have no enforceable rights against the United States and cannot obtain workers' or materialmen's liens on federal property if they are not paid. As this Court declared in *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241 (1947), "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation."[7]

To provide relief from the harsh effects of that rule without harming the government's financial interests, Congress in 1894 enacted the Heard Act, ch. 280, § 1, 28 Stat. 278. Under the Heard Act, any person entering into a formal contract with the United States for construction or repair of a public building or public works was required to execute the "usual penal bond, with good and sufficient sureties," and to "promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract." *Ibid.* An unpaid subcontractor was authorized to "bring suit" on the bond "in the name of the United States for his or their use and benefit against said

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[7] See, *e.g.*, *Hill* v. *American Surety Co.*, 200 U.S. 197, 203 (1906) ("As against the United States, no lien can be provided upon its public buildings or grounds."); *Buchanan*, 45 U.S. (4 How.) at 21 (money retained by the government for the benefit of its employees may not be reached by employees' creditors unless Congress specifically authorizes it); see also H.R. Rep. No. 97, 53d Cong., 1st Sess. (1893) (report on Heard Act, predecessor to the Miller Act, as discussed pp. 25-26, *infra*) (observing that "there is no law now in existence for the protection of mechanics and material-men in this class of cases, as it is contrary [to law] to allow mechanics' or material-men's liens on public buildings or public works").

contractor and sureties * * * *Provided*, [t]hat such action and its prosecutions shall involve the United States in no expense." The Heard Act thus sought to "substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual," a substitution made necessary by the fact that "no lien can be provided upon" federal property. *Hill* v. *American Sur. Co.*, 200 U.S. 197, 203 (1906).

In 1935, Congress repealed the Heard Act and replaced it with the Miller Act, 49 Stat. 793, ch. 642, 40 U.S.C. 270a *et seq.* The Miller Act, like the Heard Act, requires contractors on specified federal construction contracts to post a payment bond to protect subcontractors. 40 U.S.C. 270a(a)(2). And the Miller Act, also like the Heard Act, affords unpaid subcontractors the right to sue on the payment bond "in the name of the United States for the use of the person suing," 40 U.S.C. 270b(a), (b), without creating any rights in the subcontractor *vis-à-vis* the government. Indeed, Section 270b(b) expressly states that "[t]he United States shall not be liable for the payment of any costs or expenses of any such suit." While Congress has amended the Miller Act periodically, and has authorized specified agencies to waive Miller Act requirements under certain circumstances,[8] Congress has never altered the settled rule that subcontractors do not have enforceable rights against the United States for funds that their contractors fail to pay them.

In light of the plain terms and history of the Miller Act, courts of appeals have universally rejected attempts by unpaid subcontractors to recover from the government, whether those claims were asserted under the FTCA,[9] the

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[8] See *e.g.*, Act of Apr. 29, 1941, ch. 81, 55 Stat. 147; Act of June 3, 1955, Pub. L. No. 60, 69 Stat. 83; Act of Nov. 2, 1966, Pub. L. No. 89-719, Tit. I, § 105, 80 Stat. 1138-1139; Act of Nov. 2, 1978, Pub. L. No. 95-585, 92 Stat. 2484; Pub. L. No. 103-355, Tit. IV, § 4104(b)(2), 108 Stat. 3342.

[9] See *Hardaway Co.* v. *United States Army Corps of Eng'rs*, 980 F.2d 1415 (11th Cir.) (no FTCA claim by subcontractor for government's

Tucker Act,[10] or general equitable principles. Thus, in *Automatic Sprinkler Corp. of America* v. *Darla Environmental Specialists*, 53 F.3d 181 (1995), the Seventh Circuit rejected the claim of an unpaid subcontractor, stating:

> The principle of governmental immunity is simple: anyone who seeks money from the Treasury needs a statute authorizing that relief. * * * Automatic Sprinkler has not pointed to such a statute; none exists.

53 F.3d at 182. As a result, "subcontractors must look exclusively to the general contractors (and the bonds) for payment. They cannot obtain liens on the federal projects and buildings, and they cannot collect directly from the Treasury." *Ibid.* ("[W]hen a prime contractor on a federal construction project fails to obtain a Miller Act payment bond and then defaults without paying his subcontractors * * *, the hapless subcontractor, not the United States, is left holding the bag." (internal quotation marks omitted)).

Because the Miller Act does not obligate the Army to pay respondent, respondent's claim does not seek money as "the very thing to which [respondent] was entitled" from the Army. Instead, respondent seeks money from the govern-

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allegedly negligent failure to investigate assets of surety), cert. denied, 510 U.S. 820 (1993); *Westbay Steel, Inc.* v. *United States*, 970 F.2d 648 (9th Cir. 1992) (no FTCA claim for negligent approval of bond sureties and no jurisdiction under FTCA to award an equitable lien); *Arvanis*, 739 F.2d at 1292 (rejecting FTCA claim based on government's failure to require Miller Act bond as attempt "to achieve by indirection a result that [subcontractors] could not reach directly under the Miller Act"); *McMann* v. *Northern Pueblos Enters.*, 594 F.2d 784, 785-786 (10th Cir. 1979) (same); *Devlin Lumber & Supply Corp.* v. *United States*, 488 F.2d 88, 89 (4th Cir. 1973) (per curiam) (same); *United States* v. *Smith*, 324 F.2d 622, 624-625 (5th Cir. 1963) (same).

[10] See *United Elec. Corp.* v. *United States*, 647 F.2d 1082, 1084 (Ct. Cl.) (subcontractors with no contractual relationship with the government cannot sue under Tucker Act, and Miller Act is not money-mandating statute for Tucker Act purposes), cert. denied, 454 U.S. 863 (1981); see also pp. 47-50, *infra*.

ment to compensate it for the losses it incurred when the Army failed to do what, under respondent's view of the Miller Act, the Army should have done, *i.e.*, required Verdan to post a bond. Because such a "substitute" money remedy is barred as "money damages" under Section 702, see *Bowen*, 487 U.S. at 893, respondent's suit was properly dismissed by the district court.

2. Presumably because the Miller Act does not require the Army to pay respondent, the Ninth Circuit relied on respondent's contract with Verdan as a basis for awarding monetary relief. Respondent's suit is for "specific relief," the Ninth Circuit opined, because it "seeks an equitable lien only for the very thing to which it is entitled under the contract," *i.e.*, a money payment for the work it performed. Pet. App. 7a.[11] But the contract was between respondent and Verdan, not between respondent and the Army; as a result, it entitled respondent to payment from Verdan, not to payment from the Army. See *Merritt* v. *United States*, 267 U.S. 338 (1925) (no claim against United States under contract absent privity between United States and plaintiff). By requiring the government to pay when Verdan did not, the Ninth Circuit provided precisely the sort of "substitute" performance barred as money damages under the APA. See *Bowen*, 487 U.S. at 893. Besides, Section 702 (unlike the Tucker Act) does not refer to contracts as a substantive basis for retroactive money awards against the Treasury, *Richmond*, 496 U.S. at 416 (monetary awards "limited to those authorized by statute"), and the Tucker Act precludes plaintiffs from seeking equitable relief under the APA to enforce contract rights in any event, see pp. 47-48, *infra*.

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[11] The Ninth Circuit also found that "[respondent] does not seek any consequential damages to compensate losses suffered beyond the contract price." Pet. App. 7a. Although not mentioned by the majority, respondent also sought interest on the unpaid sums. See Pet. App. 39a, 40a. Presumably, the interest was intended to compensate plaintiff for the lost use of the funds.

3. Finally, the Ninth Circuit relied on "equity." Respondent, the Ninth Circuit asserted, is "entitled" to government funds under the judicially-created doctrine of "equitable liens." According to the Ninth Circuit, once respondent informed the Army that Verdan had not paid respondent, a "lien" (in the amount of respondent's claim) was levied on Army contract funds held in the Treasury. Pet. App. 8a. While that reasoning is questionable even as a matter of equitable lien doctrine,[12] such a judicially-created rule cannot in any event create a money-payment obligation against the United States Treasury; instead, the obligation to pay out public funds can arise only from "the express terms of a specific statute." *Richmond*, 496 U.S. at 432; see pp. 16-23, *supra*. In fact, the Ninth Circuit's "equitable lien" theory cannot be meaningfully distinguished from the "equitable estoppel" theory this Court rejected in *Richmond*.

In *Richmond*, government officials advised Mr. Richmond that he would remain eligible for federal disability benefits despite part-time employment; that advice turned out to be incorrect, and Mr. Richmond lost disability benefits as a result. The Federal Circuit ordered the benefits reinstated, holding that the doctrine of "equitable estoppel" precluded the government from asserting that Mr. Richmond was statutorily ineligible after having caused him to rely on its contrary representations. This Court reversed, holding that substantive payment obligations may not arise from such judicially-crafted equitable doctrines but are instead "limited to those authorized by statute." 496 U.S. at 416; see *id.* at 424, 432.

The "equitable lien" doctrine on which the Ninth Circuit relied is no more valid a basis for the imposition of a money-

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[12] It is not enough that the creditor state that it is owed money. Instead, the creditor also must "sufficiently indicate[] an intention to make [the] particular property * * * security for [the] obligation." *Walker* v. *Brown*, 165 U.S. 654, 664-665 (1897) (internal quotation marks omitted). Respondent here did not make that intent clear.

payment obligation on the Treasury than the "equitable estoppel" theory this Court rejected in *Richmond*. To the contrary, if the government's *affirmative false* representations and the claimant's allegedly *justifiable* reliance thereon could not create such an obligation in *Richmond*, then the Army's failure to require Verdan to post a payment bond, and respondent's unjustified failure to inquire into whether Verdan had in fact posted such a bond, cannot create a governmental payment obligation here. As the Fourth Circuit has observed, "[i]t is a fundamental command of the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, that only Congress has the power to define the availability of relief against the government and that 'judicial use of * * * equitable doctrine[s] . . . cannot grant [a claimant] a money remedy that Congress has not authorized.'" *United Servs. Auto. Ass'n* v. *United States*, 105 F.3d 185, 188 (4th Cir. 1997). Because Congress has not by statute recognized an entitlement to funds from the Treasury on the basis of an equitable lien, the Ninth Circuit exceeded the judicial role when it created that entitlement itself. See *INS* v. *Pangilinan*, 486 U.S. 875, 883 (1988) ("[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." (quoting *Hedges* v. *Dixon County*, 150 U.S. 182, 192 (1893)).[13]

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[13] The Ninth Circuit's decision also confuses equitable *causes of action* with *equitable remedies*, and ignores the fact that the monetary relief provided in an equitable lien action often is a "substitute" remedy barred as "money damages" under *Bowen* in any event. Here, for example, the equitable lien substitutes payment from the government for the payment from the contractor that respondent never received. Indeed, the substitute nature of the remedy is especially apparent here, because the "very" fund to which the lien allegedly attached—and to which respondent claimed entitlement—no longer exists. Respondent sought an equitable lien on the contract funds held by the Army after Verdan was terminated. Pet. App. 38a-39a. Although respondent's complaint sought an injunction to prevent the Army from dissipating those funds, respondent never sought preliminary relief. As a result, "the Army * * * paid out the monies to which the lien" allegedly "attached." *Id.* at 12a. Even if the

D. The Ninth Circuit's Imposition of Monetary Liability On The Army Is Inconsistent With The Language And History Of The 1976 Amendment To Section 702

The Ninth Circuit's decision also rests at least in part on a fundamentally mistaken interpretation of Section 702. Departing from the distinction between "substitute" and "specie" remedies this Court drew in *Bowen*, 487 U.S. at 895, the Ninth Circuit read Section 702 as distinguishing between "law" and "equity." In particular, that court appeared to read the 1976 amendment to Section 702 as itself mandating the payment of money—thus rendering the United States substantively liable—in any suit so long as the cause of action or relief sought can be characterized as "equitable" rather than "legal" in nature. Pet. App. 7a-11a; see pp. 7-8, *supra*.

1. As an initial matter, "the line [S]ection 702 draws is not between actions at law and suits in equity." *Hubbard*, 982 F.2d at 539 (Randolph, J., joined by R.B. Ginsburg, J., concurring). Nor is it between "equitable" and "legal" remedies. See *id.* at 537 ("What may qualify as an 'equitable remedy' * * * is not synonymous with specific relief."). Instead, under this Court's decision in *Bowen*, the line Section 702 draws is between suits seeking "money

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exhaustion of funds might not normally "thwart [an] equitable lien claim," *ibid.*, it clearly makes such a claim one for "money damages" within the meaning of Section 702. As the D.C. Circuit explained in *City of Houston* v. *HUD*, 24 F.3d 1421 (1994), once the *specific funds* sought by the plaintiff have been spent, obligated, or otherwise exhausted, an award of money from any other source constitutes a prohibited award of money damages. "Section 702 permits monetary awards only when, as in *Bowen*, such an award constitutes *specific relief*—that is, when a court orders a defendant to pay a sum owed out of a specific *res*. * * * An award of monetary relief from any source of funds [other than the *res* to which the plaintiff claims entitlement] would constitute money damages rather than specific relief, and so would not be authorized by APA section 702." 24 F.3d at 1428. The Ninth Circuit here awarded respondent funds from a source other than the *res* to which the equitable lien allegedly attached.

damages"—monetary relief that compensates a victim for, or substitutes for, a duty that was breached—and suits seeking specific relief, *i.e.*, a remedy that "give[s] the plaintiff the very thing to which he was entitled" from the government in the first instance. *Bowen*, 487 U.S. at 893, 895. Absent a statute imposing a payment obligation on the Treasury, public money is not something to which any plaintiff is entitled.

In any event, the Ninth Circuit was incorrect to assert that "[a]ny equitable rights held by subcontractors as against [federal agencies] which may have been unenforceable where sovereign immunity existed, became enforceable upon immunity being waived," Pet. App. 8a. As this Court has observed, any plaintiff seeking recovery from the United States must show *both* "a waiver of sovereign immunity" and a "source of substantive law" applicable to the United States that "provides an avenue for relief." *Meyer*, 510 U.S. at 484; see also *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 244-245 (D.C. Cir. 1981) (R.B. Ginsburg, J.) (affirming dismissal of action founded on Section 702 because, notwithstanding the waiver of immunity, the substantive source of law relied upon (the Sherman Act) did not apply to the United States). Whether or not immunity has been waived, equitable and common-law doctrines are not by themselves sources of law that can provide a basis for monetary relief against the United States. To the contrary, those sources of law are constitutionally incapable of creating any right to money from the Treasury, except as Congress by statute expressly provides. See pp. 16-23, *supra*.

The 1976 amendment to the APA does not so provide. Section 702 does not by its terms authorize federal courts to create substantive rights to money from the Treasury whenever the rights are equitable. Nor does it track the language of existing liability-creating statutes, see pp. 20-21, *supra*, which could easily have been adapted to such an

end.[14] Instead, the 1976 amendment states only that certain suits seeking "judicial review" of "agency action" shall not be dismissed on the ground that they are "against the United States." 5 U.S.C. 702. That formulation hardly seems calculated to license courts to create any new money-payment obligations against the Treasury, "equitable" or not. To the contrary, it echoes other statutes that permit direct suit against the government in order to allow judicial review of agency action, none of which has ever been construed as creating a substantive right to Treasury funds. See, *e.g.*, 28 U.S.C. 2344 (action seeking judicial review of agency orders "shall be against the United States"). That Congress did not expressly state an intent to create new money-payment obligations in this context "is most eloquent, for such reticence while contemplating an important and controversial"—and potentially costly—"change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979). "At the very least, one would expect some hint of a purpose to work such a change * * *." Here, however, "there is none." *Id.* at 267.

In any event, Section 702 is not merely silent. The waiver of immunity added to Section 702 by the 1976 amendment includes the qualification that "[n]othing herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. The longstanding rule that only Congress may establish a

[14] Thus, if Congress had intended courts to create new money-payment rights in "equity" as a matter of federal common law, it could have echoed the language of the FTCA, declaring that "[t]he United States shall be liable to [equitable] claims"—or claims seeking equitable relief—"in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674; or borrowed from the Tucker Act, giving federal courts jurisdiction over monetary claims "founded upon [equity]," 28 U.S.C. 1491; or followed the model of the sue-and-be-sued clause, stating that federal agencies can "sue and be sued" with respect to all "equitable actions" or "equitable relief." Yet it did none of these things.

right to public funds held by the Treasury—and must do so through the express terms of a money-mandating statute—is precisely such a "limitation[] on judicial review" and a "legal * * * ground" for "dismissing [the] action or deny[ing] [monetary] relief." See Report of the Committee on Judicial Review in Support of Recommendation No. 9, in 1 *Recommendations and Reports of the Administrative Conference of the United States* 226 (Jan. 8, 1968-June 30, 1970) (*Administrative Conference Report*) (even "[w]here Congress has not expressly or impliedly precluded specific relief, injunctive relief nevertheless will be denied" if other principles so require); *Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 136 (1970) (*1970 Sovereign Immunity Hearing*) (same). Indeed, as then-Judge Ginsburg pointed out in *Sea-Land*, 659 F.2d at 245, the fact that the substantive law relied upon "does not expose United States instrumentalities to liability, whether equitable or legal in character," is undeniably "such a ground" for dismissal.

For that reason, the Ninth Circuit's observation that neither *Bowen* nor the APA expressly requires "that the specific relief requested be statutorily granted," Pet. App. 8a, and the Second Circuit's similar assertion in *Aetna*, 71 F.3d at 479, are wide of the mark. The decision in *Bowen* had no reason to address whether Section 702 licenses courts to create money-payment mandates based on "equity," because that question was not before it; the money-payment mandate asserted in that case was statutory in nature. Nor does it matter that Section 702 does not explicitly mention the rule that payment obligations against the Treasury arise only as Congress by law directs. That rule is mandated by the Appropriations Clause of the Constitution, and Section 702 does not itself create an entitlement to public money. In any event, the terms of statutes waiving sovereign immunity "must be construed strictly in favor of the sovereign."

Nordic Village, 503 U.S. at 34 (internal quotation marks omitted); see *Sherwood*, 312 U.S. at 590. By interpreting Section 702 as licensing courts to create new money-payment obligations that Congress itself has not by statute recognized, the Ninth Circuit ignored those bedrock principles.

2. The legislative history of the 1976 amendment confirms that Congress had no intent to license the judiciary to create or impose new common-law or equitable rights to funds in the Treasury. The Senate Report, under the heading of "Cost," makes this clear. It notes:

> The committee does not believe that enactment of [the proposed waiver of immunity in Section 702], which is procedural in nature and clarifies the jurisdiction of Federal courts while marginally expanding it, will require additional appropriation of funds to either the judiciary or the agencies.

S. Rep. No. 996, 94th Cong., 2d Sess. 19 (1976). That language cannot be squared with the Ninth Circuit's construction of Section 702. If Congress in fact had intended to open the Treasury to new substantive bases for monetary awards whenever the cause of action or relief is considered "equitable," the assertions that the amendment is "procedural in nature" and that "additional appropriation[s] of funds" are not necessary would both be wrong.

Nor can the Ninth Circuit's interpretation of the 1976 amendment be reconciled with the representations of its drafter, the Administrative Conference of the United States. Nowhere did the representatives of that body suggest that the amendment would give rise to new "equitable" rights to funds in the Treasury, or create new money-payment obligations where before there were none. To the contrary, the representatives of that body repeatedly assured Congress that "[t]he monetary liability of the United States is left totally unchanged." *1970 Sovereign Immunity Hearing*,

supra, at 50 (comments of Prof. Cramton); see also *id.* at 14 (legislation "carefully drawn to avoid exposing the Government to increased monetary liability") (comments of Ashley Sellers, Chairman of the Judicial Review Committee of the Administrative Conference).[15] Indeed, the Administrative Conference represented that, in contrast to a sue-and-be-sued clause, the waiver of immunity in Section 702 would not "affect the longstanding immunity of the United States from garnishment process," because (among other things) such actions are barred as seeking "monetary relief." *Administrative Conference Report*, *supra*, at 224 (citing *FHA* v. *Burr*, 309 U.S. 242 (1940)); *1970 Sovereign Immunity Hearing*, *supra*, at 134 (same). That representation is contrary to the Ninth Circuit's reading of Section 702. Under the Ninth Circuit's approach, such a garnishment or attachment action would be permitted to proceed, so long as it is "equitable" in nature. See also pp. 45-46, *infra*.

E. Federal Common Law Does Not Give Rise To Either A Substantive Right To Money From The Treasury Or A Cause Of Action To Enforce It

The Ninth Circuit also erred to the extent it purported to find a substantive right to public funds in this Court's cases. For decades "nothing [has been] more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation," and "cannot acquire a lien on public buildings" or government funds. *Munsey Trust*, 332 U.S. at 241; see *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 471 (1910) (government property "intended for * * * public use" cannot be "seized or encumbered under state lien laws" so as "to answer the claims of a private person"); *Equitable Sur.*

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[15] See also *id.* at 238 ("[T]he liability of the United States in damages is totally unaffected.") (Prof. Cramton); *id.* at 2 ("The bill does not apply to monetary damages and will not open the United States to any further liability for such damages.") (Sen. Kennedy).

Co. v. *McMillan*, 234 U.S. 448, 455 (1914) (liens otherwise permissible on private property are not "permissible in the case of a Government work"); *J.W. Bateson Co.* v. *United States*, 434 U.S. 586, 589 (1978) (liens "cannot attach to Government property" (internal quotation marks omitted)); *F.D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 122 (1974) (because "a lien cannot attach to Government property, * * * suppliers on Government projects are deprived of their usual security interest").

1. The decisions of this Court upon which the Ninth Circuit and respondent rely for the contrary proposition, *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132 (1962); *Prairie State Bank* v. *United States*, 164 U.S. 227 (1896); and *Henningsen* v. *United States Fidelity & Guar. Co.*, 208 U.S. 404 (1908), do not support that view. None of those cases purported to overrule *Munsey* and its predecessors. Nor did any of them abrogate the Appropriations Clause by constructing payment obligations against the Treasury from common law or equity alone. In fact, none of the cases even involved a claim *against the government*. Instead, they all involved contests between private parties over funds as to which the United States had disclaimed any ownership, and had transferred out of the Treasury.

In *Prairie State Bank*, for example, this Court was asked to determine which of two non-government parties, a bank or a surety, had a superior right to certain funds. See 164 U.S. at 227 ("The real contestants in the controversy below were the Prairie State National Bank and Charles A. Hitchcock * * *."). The government had disclaimed any interest in the funds, and had placed them into the registry of the Court of Claims by way of interpleader. See *id.* at 228 (The "Secretary of the Treasury [had] transmitted the [funds] to the Court of Claims under § 1063, Rev. Stat.").[16]

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[16] As Judge Nott of the Court of Claims explained, *Prairie State Bank* "involve[d] no question of liability on the part of the Government [and

In the course of resolving the dispute between the bank and the surety, the Court in *Prairie State Bank* did apply an equitable doctrine (subrogation) to determine that the surety had a superior claim to the funds. *Id.* at 231-240. But the decision nowhere held that common law or equity can give a private party a right to public funds in the Treasury *vis-à-vis* the government itself. To the contrary, at the same time it concluded that the bank's claim was inferior to the surety's, the Court carefully cabined its holding, declaring that the bank's rights "were subordinate to those of the United States and of the sureties." *Id.* at 240; see *Pearlman*, 371 U.S. at 143 (Clark, J., concurring) ("In neither [*Prairie State Bank* nor *Henningsen*] did the Court find that laborers and materialmen had any right against the United States.").

Nor does *Pearlman* or *Henningsen* support the Ninth Circuit's view. Those cases, like *Prairie State Bank*, involved contests among non-governmental parties—banks, contractors, and sureties.[17] In neither case did the United States have an interest in the funds, since it had voluntarily relinquished them to one of the parties, and in neither case

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instead] relate[d] simply to the distribution of the fund * * * the Government * * * brought into court by bill of interpleader." *Hitchcock* v. *United States*, 27 Ct. Cl. 185, 211 (1892) (Nott, J. dissenting). The majority agreed. *Id.* at 201 ("[C]laimants * * * Prairie State National Bank and Charles A. Hitchcock * * * seek to recover the amount admitted by [the United States] to be due to one or the other.").

[17] In *Pearlman*, the dispute was between a contractor in bankruptcy and the surety that had paid the contractor's debts when it defaulted. 371 U.S. at 133 ("This is a dispute between the trustee in bankruptcy of a government contractor and the contractor's payment bond surety over which has the superior right and title to a fund * * *."). In *Henningsen*, the dispute was between a surety that had guaranteed payment by a defaulting federal contractor, and a bank that had loaned the contractor money. See 208 U.S. at 410 (question presented is whether "the equity" of the surety is "superior to that of one who simply loaned money to the contractor to be by him used as he saw fit").

was the government a party.[18] Thus, even though *Pearlman* and *Henningsen*, like *Prairie State Bank*, resolved disputes among private parties through equitable principles, neither case held that claimants have substantive "equitable rights" to government funds as against the government itself.[19]

For that reason, the Court of Claims rejected the contention that *Pearlman*, *Prairie State Bank*, and *Henningsen* give subcontractors rights to government funds. As it explained:

> [I]n all the cases touching on this issue the rights of the various parties have been defined in situations in which the issue is one of priority between competing [private] interests in the fund * * *. None have involved a plaintiff-subcontractor directly asserting a claim to money held by the Government. The subcontractors do possess equitable rights to the retained funds vis-à-vis other claimants to the money, but their rights * * * do not necessarily include or imply a right in the subcontractor itself to sue the Government.

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[18] In *Pearlman*, "the fund was turned over to the bankrupt's trustee." 371 U.S. at 134. In *Henningsen*, the government—by agreement of the parties—paid the money over to the bank claimant, "with a stipulation that if it should be finally determined that the Guaranty Company was entitled to receive it then the bank should pay it to the Guaranty Company." 208 U.S. at 405.

[19] The Ninth Circuit's reliance on cases involving the Postal Service's sue-and-be-sued clause, 39 U.S.C. 401(1), is likewise misplaced. See Pet. App. 8a (citing *Wright* v. *United States Postal Serv.*, 29 F.3d 1426 (9th Cir. 1994); *Kennedy Elec. Co.* v. *United States Postal Serv.*, 508 F.2d 954 (10th Cir. 1974); *Active Fire Sprinkler Corp.* v. *United States Postal Serv.*, 811 F.2d 747 (2d Cir. 1987)). As discussed above, the sue-and-be-sued clause there evinced Congress's intent to "launch[] [the Postal Service] into the commercial world," making its amenability to suit and "liability" largely "the same as that of any other business." See p. 21, *supra* (quoting *Franchise Tax Board*, 467 U.S. at 520); see also note 6, *supra*. Section 702 has no such purpose.

United States Fidelity & Guar. Co. v. *United States*, 475 F.2d 1377, 1382 (1973); accord, *United Elec. Corp.* v. *United States*, 647 F.2d 1082, 1086 (Ct. Cl.), cert. denied, 454 U.S. 863 (1981). The same reasoning applies here.[20]

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[20] Nor can the Ninth Circuit's decision be supported by the subrogation decisions of the Federal Circuit, the Court of Federal Claims, or their predecessors. See Br. in Opp. at 16 n.18. Those decisions nowhere hold that "equitable rights" to Treasury funds may be asserted in the absence of statutory authorization. Instead, they assert (mistakenly) that the Tucker Act recognizes subrogation as a money-mandating cause of action. According to those courts, subrogation permits a surety that cures a contractor's default to stand in the shoes of and to assert all the rights of the contractor, perhaps including the contractor's privity of contract with the United States and thus the right to sue the United States on contract under the Tucker Act. See *United States Fidelity & Guar. Co.*, 475 F.2d at 1382 ("[T]he surety was entitled to the benefit of *all* the rights * * * of the contractor whose debts it paid. The surety then is subrogated to the rights of the contractor who could sue the Government since it was in privity of contract with the United States."). That reasoning is inapplicable to subcontractors, which have no such relationship with the government. *Balboa Ins. Co.* v. *United States*, 775 F.2d 1158, 1161 (Fed. Cir. 1985) ("In contrast to a subcontractor, which has no obligations running directly to or from the Government, a surety, as bondholder, is as much a party to the Government contract as the contractor.").

Besides, the reasoning of those decisions is incorrect. A subrogation claim cannot be characterized as a "contract" claim under the Tucker Act. "The right of subrogation is not founded on contract. It is a creature of equity; [it] is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties." *Pearlman*, 371 U.S. at 136 n.12 (internal quotation marks omitted). Moreover, those decisions effectively set the doctrine of subrogation on its head. A surety is not subrogated to the rights of the defaulting party; it is subrogated to and "entitled to all the rights of the person [it] paid." *Pearlman*, 371 U.S. at 137 (footnote omitted). Thus, the surety does not step into the shoes of the contractor with respect to its rights against the United States. It steps into the shoes of the United States with respect to the government's rights against the contractor. The one exception is where the surety, rather than paying a defaulting contractor's debt to the United States, enters into a takeover agreement with the government. In such a case, the surety, by express agreement with the government, is substituted for the contractor and enters into privity of contract with the United States. In that event, a predicate for Tucker Act jurisdiction—an express contract—is readily apparent. See

2. Even if we assume, *arguendo*, that this Court could recognize a substantive right to obtain funds from the federal Treasury through an equitable lien, there is no reason for it to do so. At the very least, the Appropriations Clause and separation of powers principles counsel restraint. That restraint is especially warranted in light of the absence of any evidence that Congress intended the 1976 amendment to the APA to become a license for the creation of new rights to obtain money from the federal Treasury. See pp. 20-23, 31-36, *supra*.

Further, the "special factors" that "counsel[] hesitation" with respect to the creation of constitutional causes of action, *Meyer*, 510 U.S. at 486 (internal quotation marks omitted), counsel hesitation here. Congress has legislatively addressed the protection of subcontractors through the Miller Act, and courts should not second-guess that legislative judgment by filling perceived statutory gaps with purported common-law or equitable rights. Moreover, establishing such enforceable rights "would * * * creat[e] a potentially enormous financial burden for the Federal Government." *Ibid.* The better course is to "leave it to Congress to weigh the implications of such a significant expansion of Government liability." *Ibid.*

II. THE WAIVER OF IMMUNITY IN SECTION 702 DOES NOT APPLY BECAUSE EQUITABLE LIEN CLAIMS ARE NOT SUITS FOR "JUDICIAL REVIEW" OF "AGENCY ACTION" WITHIN THE MEANING OF SECTION 702

A. To sue the United States, a plaintiff must show not only that there has been a waiver of immunity, but also that the waiver extends to the cause of action asserted. Cf. *Lane*

Ransom v. *United States*, 17 Cl. Ct. 263, 267 (1989) ("[I]t is well established that a surety who takes over a project for a defaulted contractor can seek to recover its cost from the remaining contract funds."), aff'd, 900 F.2d 242 (Fed. Cir. 1990).

v. *Peña*, 518 U.S. 187, 197 (1996) ("[W]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived."). The 1976 amendment to the APA does not waive the United States' immunity to actions for "equitable liens" or any other similar cause of action. Instead, the waiver is limited to the traditional forms of action that seek "judicial review" of "agency action."

That conclusion flows from the structure of Section 702 itself. When Congress partially waived the government's immunity in 1976, it did not do so by enacting an entirely new provision of the United States Code. Instead, it inserted a waiver of immunity into the APA, and into Section 702 in particular. By so doing, Congress ensured that the waiver would be confined to the causes of action that Section 702 itself recognizes and codifies—namely the suits through which a "person suffering legal wrong" or "adversely affected or aggrieved" because of "agency action" has traditionally obtained "judicial review thereof," 5 U.S.C. 702 (1970). See *Gade* v. *National Solid Wastes Mgmt Ass'n*, 505 U.S. 88, 97 (1992) (statutory construction must account for the "structure" of the statute); *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 645 (1990) (Court must "giv[e] effect to the meaning and placement of the words chosen by Congress.").

That Congress intended to limit Section 702's waiver of immunity in that fashion could not be clearer. The House Report declared that, by placing the waiver of immunity in Section 702, Congress intended to limit its scope.[21] The Department of Justice, speaking through then Assistant Attorney General Scalia, conditioned its support for the 1976

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[21] See H. Rep. No. 1656, 94th Cong., 2d Sess. at 11 (1976) ("Since the Amendment is to be added to 5 U.S.C. section 702, it will be applicable only to functions falling within the definition of 'agency' in 5 U.S.C. section 701.").

amendment on a similar understanding.[22] And the authors of the amendment so understood it as well. "Because the amendment is to be added to 5 U.S.C. § 702 (a provision of the Administrative Procedure Act entitled right of review)," the Chairman of the ABA's Administrative Law Section explained, "it will be applicable only when that provision is applicable." *1970 Sovereign Immunity Hearing*, *supra*, at 59 (statement of Dan M. Byrd, Jr.). Professor Kenneth Culp Davis echoed that view: "Because the amendment is to be added to 5 U.S.C. §§ 702 and 703 * * * it will be applicable only when those provisions are applicable." *Id.* at 222; see also *id.* at 238 ("The proposal is an amendment to the Administrative Procedure Act and that has several important consequences. First, it is applicable only to agencies. It is applicable only to administrative conduct and conduct of the individual that is contemplated for judicial review by the APA * * *.") (Prof. Cramton).

Here, neither the Ninth Circuit nor respondent attempted to explain how assertion of an "equitable lien" claim is a suit for "judicial review." Nor did they identify the "agency action" being subjected to that "review." Those omissions cannot be reconciled with the requirements of Section 702. As this Court has explained, any plaintiff "claiming a right to sue [under Section 702] must identify some 'agency action' that affects him in the specified fashion"; and "it is judicial review 'thereof' to which he is entitled." *Lujan* v. *Defenders of Wildlife*, 497 U.S. 871, 882 (1990).[23]

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[22] *Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 105 (1976) ("[I]t is also an important factor in our support for the bill that the waiver of immunity, since it is made via section 702, will only apply to claims relating to improper official action; and will be subject to the other limitations of the Administrative Procedure Act * * * .").

[23] It is possible that the Ninth Circuit believed that the waiver of immunity in Section 702 is free floating and extends beyond suits for "judicial review" of "agency action." See *Presbyterian Church* v. *United*

B. Neither a suit for an equitable lien, nor any other cause of action typically litigated between private parties, qualifies as an action for "judicial review." To the contrary, that phrase is by definition reserved for the forms of action traditionally used to challenge governmental conduct. See *Black's Law Dictionary* 762 (5th ed. 1979) (defining "Judicial review" as a "[f]orm of appeal from an administrative body to the courts for review of either the findings of fact, or of law, or both"); *Committee of Blind Vendors* v. *District of Columbia*, 28 F.3d 130, 134 (D.C. Cir. 1994) (APA does not apply to "common-law causes of action" because it affords review of "agency action," and "no agency proceeding took place for the court to review").[24]

States, 870 F.2d 518, 525 (9th Cir. 1989) ("[T]he 1976 amendment to § 702 waives sovereign immunity in all actions seeking relief from official misconduct except for money damages" and is not limited to "actions challenging 'agency action' as technically defined in § 551(13)."). Any such holding, however, would be inconsistent with the text and history of the waiver of immunity in Section 702, and with this Court's decision in *Lujan*, 497 U.S. at 882.

[24] The remaining language of Section 702 leaves little doubt that it permits only those forms of judicial review that preceded its enactment. Before Section 702 was enacted in 1946, judicial review was obtained through statutory judicial review, which is captured by the APA's phrase "adversely affected or aggrieved within the meaning of a relevant statute," see, *e.g.*, *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 472, 476 (1940), and so-called non-statutory judicial review in the form of suit against a government officer alleging *ultra-vires* conduct, which is captured by the phrase "suffering legal injury," see, *e.g.*, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1940). Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387, 394-395 (1970); W. Gellhorn & C. Byse, *Administrative Law* 113-114 (1970); *Attorney General's Manual on the Administrative Procedure Act* 96 (photo. reprint 1979) (1947). Indeed, 5 U.S.C. 703 clearly specifies that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter * * * or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." 5 U.S.C. 703. As the Attorney General's nearly contemporaneous manual explains, "[i]n

That was also the understanding of the drafters of the 1976 amendment, who expected non-"review" tort and other such actions to be excluded from Section 702's waiver of immunity. As the Administrative Conference twice explained, "the purpose of the Committee's recommendation is to provide nonstatutory review in some situations in which the doctrine of sovereign immunity now stands in the way. The creation of new substantive damage claims is not within the sphere of our concern; only a latitudinarian view of 'judicial review' would consider monetary relief against the United States, primarily designed to compensate for harms done, as part of judicial review of administrative action, which is the subject of § 10 of the APA." *1970 Sovereign Immunity Hearing, supra*, at 139; *Administrative Conference Report, supra*, at 229.

It also was for that reason that the drafters of the 1976 amendment understood that actions for garnishment or attachment, even if equitable, would continue to be barred. Such suits not only seek "monetary relief," but also do "not involve a claim that 'an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority'" within the meaning of Section 702. *1970 Sovereign Immunity Hearing, supra*, at 134; *Administrative Conference Report, supra*, at 224. Precisely the same is true with respect to actions for an "equitable lien."

C. The Ninth Circuit erred not only by failing to examine whether a common-law "equitable lien" action is a claim for "judicial review," but also by failing to identify the "agency action" being subjected to review. See *Lujan*, 497 U.S. at 882. Once one identifies that "action"—even assuming *arguendo* that it constitutes "agency action" under 5 U.S.C.

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the absence of any special statutory review proceedings, other forms of action, as heretofore found by the courts to be appropriate in particular situations, will be used." *Attorney General's Manual, supra*, at 97.

551(13), see *Lujan*, 497 U.S. at 882—it becomes readily apparent that respondent's suit seeks money damages.

Shorn of the "equitable lien" label, respondent's lawsuit seeks relief based on the Army's "action" of failing to require Verdan to post a Miller Act bond. But if the Army's failure to require a bond is the "agency action" subject to review, money from the Treasury cannot be "specific relief," as it does not give respondent "the very thing to which" respondent "was entitled," *i.e.*, Army action to ensure that a bond from a qualified surety is posted. See pp. 24-25, *supra*. Nor can respondent prevail by characterizing this suit as a challenge to the Army's "action" of refusing to pay respondent when Verdan did not, since the Army had no obligation (or authority) to pay respondent money from the Treasury in the absence of a specific statute so providing. See pp. 16-23, *supra*.

Moreover, even if an obligation to pay could arise from a judicial decision under an "equitable lien" doctrine or otherwise, respondent's suit still falls outside Section 702's waiver of immunity. A fundamental premise of respondent's action (and the Ninth Circuit's decision) is that an "equitable lien" was levied on government funds as soon as respondent advised the Army of Verdan's failure to pay. Even if foreclosure on that lien could be "specific relief" permitted by Section 702, respondent cannot identify the waiver of immunity that allowed the placement of a lien on federal funds in the first place. Placing a lien on public funds is not "judicial review"; and it does not pass upon or review "agency action." Since no waiver of immunity permitted a lien to attach to government funds, there was no right to the funds that could be specifically enforced.

III. THE RELIEF RESPONDENT SEEKS IS IMPLIEDLY FORBIDDEN BY OTHER STATUTES

Respondent's suit is also barred by the final sentence of Section 702, which declares that nothing in that provision "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702; see, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273, 286 n.22 (1983). The "impliedly forbids" language extends to "all statutes which grant consent to suit and prescribe particular remedies." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13 (1976). As then Assistant Attorney General Scalia explained to Congress in 1976:

> Because existing statutes have been enacted against the backdrop of sovereign immunity, [Section 702's exclusion of relief where another statute 'impliedly forbids' it] will probably mean that in most if not all cases where statutory remedies already exist, these remedies will be exclusive; that is no distortion, but simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief.

Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 105 (1976). In other words, the "impliedly forbids" language bars the assertion of an APA claim for "specific relief" whenever Congress has provided the claimant with a remedy in another statute, but chosen to withhold the particular relief the claimant seeks.

The Tucker Act, 28 U.S.C. 1346(a)(2), 1491, provides for money damages awards in suits based on "express or implied contract," but largely bars "equitable relief." See *Testan*, 424 U.S. at 397-398; *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575-577 (1867); *Bonner* v. *United States*, 76 U.S. (9 Wall.) 156, 159 (1869); *United States* v. *Jones*, 131 U.S. 1, 9,

14-18 (1888); see 28 U.S.C. 1491(a)(3). Because Congress in the Tucker Act chose to withhold equitable relief in contract actions, the courts of appeals unanimously agree that a plaintiff cannot obtain "specific performance" or other equitable relief on a contract under the APA.[25] Consistent with the legislative history of the 1976 amendment, they have held that such relief is "impliedly forbid[den]" within the meaning of Section 702.[26] If the prime contractor, which is in

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[25] See, *e.g.*, *North Star Alaska* v. *United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (en banc) (per curiam) (APA does not afford district courts jurisdiction over equitable claims against the government based on contract rights, as opposed to statutory rights), on remand to panel, 14 F.3d 36 (9th Cir.), cert. denied, 512 U.S. 1220 (1994); *Zelman* v. *Gregg*, 16 F.3d 445, 448 (1st Cir. 1994) ("equitable relief cannot be obtained on contract claims against the government"); *Eagle-Picher Indus.* v. *United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) (APA's waiver of sovereign immunity "does not extend to actions founded upon a contract with the United States"); *Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 903 F.2d 445, 452 (7th Cir. 1990) (effort to obtain specific performance of promise allegedly made by an agency not within district court's jurisdiction); *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.) ("The sole remedy for an alleged breach of contract by the federal government is a claim for money damages."). In *Bowen*, this Court noted that equitable actions for monetary relief under a contract have frequently been described as seeking specific relief. 487 U.S. at 895 (quoting *Maryland Dep't of Human Resources*, 763 F.2d at 1446). The only contract suits cited in the quoted discussion, however, were between private parties, and the discussion did not suggest that such a claim for specific performance of a contract could be brought against a federal agency under the APA. *Bowen* itself, after all, involved a statutory claim, not a contract claim, and it did not discuss the "impliedly forbids" proviso in Section 702.

[26] See H.R. Rep. No. 1656, 94th Cong., 2d Sess. 11 (1976) ("limitations on the recovery of money damages contained in the Federal Tort Claims Act, the Tucker Act, or similar statutes are unaffected"); *1970 Sovereign Immunity Hearing*, *supra*, at 3 ("[I]f the Government breaches a contract, the aggrieved party cannot under this bill bring an injunction for specific performance against the United States; he is limited by law to monetary damages under the Tucker Act.") (Sen. Kennedy); *id.* at 50 ("You cannot get specific performance of a Government contract; injunctive and declaratory relief are unavailable. * * * The bill makes it entirely clear that this situation is not affected in the slightest. * * * [T]he Tucker Act is in fact

privity with the government, cannot enforce its right to payment by seeking "specific performance" under the APA, it should follow *a fortiori* that a subcontractor, which is not in privity, cannot do so either.

In addition, while the Tucker Act permits actions based on express or implied-in-fact contracts, it long has been held to bar relief based on implied-in-law contracts and unjust enrichment theories. See *Hercules, Inc.* v. *United States*, 516 U.S. 417, 423 (1996) (Tucker Act waives immunity for claims based on "contracts either express or implied in fact, and not [for] claims on contracts implied in law"); *Mitchell*, 463 U.S. at 218; *United States* v. *Minnesota Mut. Invest. Co.*, 271 U.S. 212, 217 (1926); *Sutton* v. *United States*, 256 U.S. 575, 581 (1921). Equitable lien claims like respondent's, which are not based on the terms of a contract with the government, are subject to this prohibition as well, since they, like other implied-in-law obligations, "proceed from a perception that a party *ought* to be bound rather than from a conclusion that a party has *agreed* to be bound." *Aetna Cas. & Sur. Co.* v. *United States*, 655 F.2d 1047, 1059 (Ct. Cl. 1981). Because monetary relief on such claims is barred by the Tucker Act, see *id.* at 1059-1060; *United Elec. Corp.*, 647 F.2d at 1084 & n.5 (equitable lien); see also *Fincke* v. *United States*, 675 F.2d 289, 296-297 (Ct. Cl. 1982) (quantum meruit), courts are "impliedly forbid[den]" from affording that relief under the APA.[27]

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an act consenting to suit which impliedly forbids injunctive and declaratory relief.") (Prof. Cramton); *id.* at 238 ("There is no specific performance of a contract in our federal jurisprudence, and we do not create it with this proposal.") (Prof. Cramton).

[27] To the extent the Tucker Act does not bar relief, the Miller Act does. The Miller Act, like the Tucker Act, was enacted "against the backdrop of sovereign immunity." See pp. 25-26, *supra* (Congress's motivation was to mitigate harsh consequences of the rule that subcontractors cannot enforce liens on public property). And it "consent[s]" to suit in the name of the United States on payment bonds, while excluding the recovery of money from the United States. See 40 U.S.C. 270b(a), (b); p. 26, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Consequently, the attempt to create an alternative monetary remedy against the government through the APA is "impliedly forbid[den]" within the meaning of Section 702. Indeed, it is precisely to prevent such an effort to "subvert the Miller Act," and effect a "direct raid on the [T]reasury," that the "impliedly forbids" language was inserted into Section 702. Cf. *Hardaway Co.* v. *Army Corp. of Eng'rs*, 980 F.2d 1415, 1416-1418 (11th Cir.), cert. denied, 510 U.S. 820 (1993); see also pp. 26-27 & nn. 9-10, *supra* (citing additional cases).