

IN THE  
**Supreme Court of the United States**

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ELOUISE PEPION COBELL, *et al.*,

*Petitioners,*

v.

DIRK KEMPTHORNE, SECRETARY,  
DEPARTMENT OF THE INTERIOR, *et al.*,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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DAVID C. SMITH  
ADAM H. CHARNES  
KILPATRICK STOCKTON LLP  
1001 West Fourth Street  
Winston-Salem, NC 27101  
(336) 607-7300

DENNIS M. GINGOLD  
*Counsel of Record*  
607 14th Street, N.W.  
9th Floor  
Washington, DC 20005  
(202) 824-1448

*Of Counsel:*  
JOHN ECHOHAWK  
NATIVE AMERICAN RIGHTS  
FUND  
1506 Broadway  
Boulder, CO 80302

ELLIOTT LEVITAS  
KILPATRICK STOCKTON LLP  
607 14th Street, N.W.  
Suite 900  
Washington, DC 20005  
(202) 508-5800

*Counsel for Petitioners*

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## QUESTIONS PRESENTED

1. Whether, contrary to the principles recently re-affirmed in *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006), the Court of Appeals failed properly to accord deference to the factual findings made by the District Court in granting Petitioners' motion for injunctive relief.

2. Whether the Court of Appeals erred when it held that an injunction should issue only when the movant "would *necessarily* suffer harm" without the injunction, when this Court and other circuits have required the movant to show only a *likelihood* that harm would result in the absence of an injunction.

3. Whether, contrary to decisions of this Court and other circuits, the Court of Appeals erred in holding that the District Court was required to defer to Respondents' decisions with respect to if, how, and when to comply with their unconditional fiduciary obligations.

**PARTIES TO THE PROCEEDINGS**

The following were the parties to the proceedings before the United States Court of Appeals for the District of Columbia Circuit:

1. Elouise Pepion Cobell
2. Penny Cleghorn
3. Thomas Maulson
4. Earl Oldperson
5. James Louis LaRose
6. Members of a class defined by the District Court to include all past and present Indians (including all original allottees, their heirs, and individual Indian successors-in-interest, including executors and personal representatives) on whose behalf, as Trust beneficiaries, Trust accounts are, have been, should be, or should have been established and maintained by the United States government to hold revenues generated by the Individual Indian Trust
7. Dirk Kempthorne, Secretary, Department of the Interior, in his official capacity
8. The Assistant Secretary of the Department of the Interior for Indian Affairs (currently vacant), in his or her official capacity
9. Henry M. Paulson, Secretary, Department of the Treasury, in his official capacity

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## PETITION FOR A WRIT OF CERTIORARI

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Elouise Pepion Cobell, *et al.*, a certified class consisting of approximately 500,000 Indian beneficiaries of the Individual Indian Trust, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App., *infra*, at 1a-35a) is reported at 455 F.3d 301. The opinion of the District Court granting Petitioners' motion for an injunction (App., *infra*, at 36a-280a) is reported at 394 F. Supp. 2d 164 (D.D.C. 2005).

### JURISDICTION

The Court of Appeals entered its judgment on July 11, 2006. Petitioners' petition for rehearing and rehearing *en banc* was denied on September 26, 2006 (App., *infra*, at 281a-284a). Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

The American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (1994) (codified as amended in scattered sections of 25 U.S.C.), the Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 461, *et seq.*), and the General Allotment Act, ch. 119, 24 Stat. 388 (1887), are reproduced in the appendix to this petition (App., *infra*, at 283a-320a).

### STATEMENT

Petitioners are a class of American Indians whose land and related natural resources have been held in trust by Respondents for almost 120 years. This litigation was filed in order to obtain

a remedy for the longstanding, “deplorable”<sup>1</sup> mismanagement of those Trust assets by Respondents. This petition relates to one discrete aspect of that extensive litigation—Petitioners’ and the District Court’s efforts to preserve and ensure the integrity of irreplaceable Individual Indian Trust data (“IITD”) that Respondents create and maintain exclusively for the benefit of the plaintiff class. The District Court and the Court of Appeals have found that the continuing corruption and loss of electronic records would make impossible the accounting of Petitioners’ Trust funds ordered by those courts and thereby exacerbate Respondents’ breaches of their fiduciary duties.

**1. *Background of the Individual Indian Trust.*** Almost 120 years ago, in accordance with provisions of the General Allotment Act, ch. 119, 24 Stat. 388 (1887), the United States government established the Individual Indian Trust (“Trust”), allotting to individual Indians land that previously had been set aside for tribes pursuant to treaty and statute. Under the General Allotment Act, the lands allotted to individual Indians would be held in trust by the United States government for twenty-five years or more, during which time an individual Trust account would be created for each Indian with a beneficial interest in such Trust land. Beneficial interest in the land was vested in each individual Indian at the time of allotment. Initially, it was expected that the government would manage such lands for the benefit of the Individual Indian Trust beneficiaries until the expiration of the Trust period, at which time each Indian Trust beneficiary would receive a fee patent. The Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 461, *et seq.*), ended the allotment practice but extended indefinitely the vested beneficial interests and the Trust period.

Under the General Allotment Act and the Indian Reorganization Act, the United States at one time held about 54 million acres of land and other natural resources in Trust

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<sup>1</sup> *Cobell v. Kempthorne*, 455 F.3d 317, 333 (D.C. Cir. 2006).

solely for the benefit of individual Indian beneficiaries, the Petitioners here. The United States has exercised complete control over such lands since the inception of the Trust. The bulk of the fiduciary responsibility is delegated to the Secretary of the Interior; certain functions are delegated to the Secretary of the Treasury.

It is undisputed that the government has badly mismanaged the Trust. Indeed, more than 40 million acres have vanished.<sup>2</sup> Today, Respondents continue to exercise control over approximately 11 million acres of Trust land as well as the income generated therefrom. Such lands and their natural resources are the *corpus* of the Trust. In 1915, the Trust *corpus* was valued at \$1 billion.<sup>3</sup>

Congress has long been aware of Respondents' gross mismanagement and their failure to give Petitioners an accounting of their Trust assets. On October 25, 1994, Congress enacted the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (1994) (codified as amended in scattered sections of 25 U.S.C.) ("Trust Reform Act"), which reconfirmed and codified certain of Respondents' unconditional Trust duties, including explicit accounting duties.

***2. The Litigation by Individual Indian Trust Beneficiaries.*** This action in equity was filed in 1996 on behalf of a class of approximately 500,000 Individual Indian Trust beneficiaries, seeking an accounting of Trust funds, the correction and restatement of Trust accounts, and the reform and rehabilitation of the broken Trust management and accounting systems. The District Court bifurcated the case for trial: Phase I on "fixing the system," *i.e.*, rehabilitating the Trust

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<sup>2</sup> See Bert Edwards Dep. Tr. at 276-77 (Dec. 18, 2002).

<sup>3</sup> See Bureau of Municipal Research, 63rd Cong., Report to the Joint Commission to Investigate Indian Affairs: Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs 2 (Comm. Print 1915) ("Joint Commission Report").

management and accounting systems, and Phase II regarding the accounting and correction of the Trust accounts. The District Court issued a fifty-six page opinion in December 1999 in connection with Phase I, declaring the Interior Respondents to be in breach of four specified Trust duties and Treasury to be in breach of one such duty, tailoring its declaratory judgment narrowly to specific language in the Trust Reform Act, and ordering that Respondents account for all Trust funds since the inception of the Trust. *See Cobell v. Babbitt*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999) (“*Cobell V*”). No date has been set for Phase II.

The Court of Appeals unanimously affirmed the District Court, holding that the United States owes “longstanding and substantial Trust obligations to Indians, particularly to IIM trust beneficiaries, not the least of which is the duty to account.” *See Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (“*Cobell VI*”). The *Cobell VI* court explained that “such an accounting must be of all money . . . held in trust for the benefit of plaintiffs, without regard to when the funds were deposited” and that the Secretary may not “claim[] the role of administrator, . . . [to] absolve the government of its enforceable obligations to the IIM trust beneficiaries.” *Id.* at 1103-04 (quotations and citations omitted). Specifically, the *Cobell VI* court opined that “the Secretary is obligated to act as a fiduciary . . . under the more stringent standards demanded of a fiduciary.” *Id.* at 1104.

Nonetheless, twelve years after enactment of the Trust Reform Act and nearly seven years after the District Court found that Respondents had breached their fiduciary duties and ordered an accounting, there has been no vindication of Petitioners’ rights. Today, no one knows how much Trust revenue has been generated from the sale or lease of Trust assets. No one knows how much Trust revenue should be on deposit and held in Trust accounts at agent banks and at Treasury. No one knows how much interest has been earned or otherwise has accrued on deposited Trust revenue or securities purchased with Trust funds.



And no one knows how much Trust revenue should have been paid to each Trust beneficiary. No one can ever know unless whatever remains of the integrity of Petitioners' Trust records is protected and preserved.

**3. Previous Computer Internet Disconnection Proceedings.** For more than ten years, Petitioners and the District Court have attempted without success to protect electronic Trust records, Trust funds, and other Trust assets from non-compensable waste. Repeatedly, the District Court has found that Petitioners suffer irreparable harm because Respondents operate information technology ("IT") systems that can neither detect nor prevent unlawful access to Trust records. Specifically, the District Court found that it is impossible for Respondents even to know about, much less prevent, successful hacking. As a result, the harm suffered by Petitioners can never be cured. Respondents have not challenged these findings.

Undisputed evidence demonstrates that throughout the history of the Trust, the government's recordkeeping and accounting practices have been appalling. Since 1999 the District Court consistently has found, and Respondents candidly have admitted, that the government as "trustee . . . cannot say how much money is or should be in the trust" or provide proof that it has acted properly with Petitioners' Trust funds. *Cobell V*, 91 F. Supp. 2d at 6.

In November 2001, then-Special Master Alan Balaran filed a "Report on IT Security" that included the following uncontested findings:

- The Department of Interior had known about pervasive IT security deficiencies for more than a decade.
- "The system is in its current state of disrepair because protecting trust funds is not now, and has

never been, a ‘priority’ deserving adequate resources.”

- “Interior—in derogation of court order, common-law, and statutory and regulatory directives—has demonstrated a pattern of neglect that has threatened, and continues to threaten, the integrity of trust data upon which Indian beneficiaries depend.”<sup>4</sup>

The response to the Report was swift. On December 5, 2001, the District Court entered a TRO ordering Interior to “immediately disconnect from the Internet” all IT systems “hous[ing] or access[ing] individual Indian trust data.” Subsequently, in a trial unrelated to compliance with the TRO, the District Court found “there is simply no possible way for the Secretary to provide plaintiffs with . . . an accurate accounting if the data upon which she relies to do so is subject to unauthorized manipulation.” *Cobell v. Norton*, 226 F. Supp. 2d 1, 129 (D.D.C. 2002). Respondents did not challenge that finding.

On December 17, 2001, Respondents asked for, and the District Court granted, a Consent Order mandating continued disconnection from the Internet until such time as Respondents had “provid[ed] adequate security for Individual Indian Trust Data” and authorizing the master to “verify compliance with this Consent Order . . . .” Consent Order at 7-8 (Dkt. No. 1063) (C.A. App. at 1170-71). In support of their request for the Consent Order, Respondents stipulated that “significant deficiencies [exist] in the security of information technology systems protecting individual Indian trust data” that require “*immediate* attention.” *Id.* at 4 (C.A. App. at 1167) (emphasis added).

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<sup>4</sup> IT Security Report at 17-154 (Court of Appeals Appendix (“C.A. App.”) at 4941-5078). The Report was adopted by the District Court without objection on January 15, 2002. *Cobell v. Norton*, 205 F.R.D. 52, 54 (D.D.C. 2002).

Thereafter, certain IT systems were provisionally reconnected based upon representations made by Respondents that such systems were secure and on Respondents' explicit agreement that such systems again would be disconnected if they were found to be insecure. *See* Letter from Special Master to Counsel ¶¶ 4-5 (Feb. 16, 2002). In fact, they were subsequently found to be insecure.

In July 2003, the District Court entered a preliminary injunction that allowed provisionally reconnected IT systems to remain reconnected, provided that Respondents certified that (a) such systems were secure, (b) they did not house or provide access to IITD, or (c) such reconnected systems were necessary for the preservation of life or health, or protection against fires. The District Court found that Respondents' insecure systems "provide[] an opportunity for undetectable, unauthorized persons to access or destroy individual trust data via an Internet connection." *Cobell v. Norton*, 274 F. Supp. 2d 111, 129 (D.D.C. 2003). It explained that the risk is "imminent" and "irreparable" because undetectable alteration and destruction "render[] this [a] harm for which money damages are manifestly inadequate." *Id.* at 130.

In March 2004, the District Court found that Respondents' certifications were inconsistent and defective and "that the continued connection to the Internet of any IT system that houses or accesses individual Indian trust data constitutes further and continuing irreparable injury to Plaintiffs." It therefore entered a new preliminary injunction that superseded the July 2003 injunction. *Cobell v. Norton*, 310 F. Supp. 2d 77, 95-96 (D.D.C. 2004). On appeal, the Court of Appeals affirmed the District Court's jurisdiction and concurred in its finding of irreparable harm:

"Interior's present obligation to administer the trust presents sufficient grounds for finding that Plaintiffs will be irreparably injured." We further hold that the district court's jurisdiction properly extends to security

of Interior's information technology systems ("IT") housing or accessing IITD, because the Secretary, as a fiduciary, is required to maintain and preserve IITD.

*Cobell v. Norton*, 391 F.3d 251, 253-54 (D.C. Cir. 2004) ("*Cobell XII*") (citation omitted). Nonetheless, the Court of Appeals vacated the injunctive relief, holding that it was clear error for the District Court to resolve disputed material facts and issue a preliminary injunction without first holding an evidentiary hearing. *Id.* at 260. The Court of Appeals remanded the case to the District Court with instructions to hold an evidentiary hearing regarding the current "state of Interior's IT systems security." *Id.* at 261.

**4. *The District Court's Most Recent Computer Internet Disconnection Order.*** On May 2, 2005, faithful to the *Cobell XII* remand instructions, the District Court commenced a three-month evidentiary hearing. Respondents declined to dispute the material facts offered by Petitioners at the hearing. At the conclusion of the hearing, the District Court issued a 115 page memorandum opinion and granted its third IT security preliminary injunction. App., *infra*, at 36a-280a.

Again, the District Court found the harm to Petitioners irreparable as Respondents' IT systems continued to be at "significant risk of unauthorized access." *Id.* at 268a-269a. The District Court explained that "[t]he sheer volume of unauthorized access attempts, numbering in the hundreds of millions, combined with Interior's failure to deploy throughout its IT environment certain security features that allow unauthorized access to be tracked and documented, show that the risk of unauthorized access is substantial." *Id.* at 269a. Indeed, the District Court found "[t]here is no question that these problems, in the aggregate, demonstrate that the confidentiality, integrity, and availability of IITD on Interior's IT systems are presently at substantial and imminent risk of compromise." *Id.* at 271a. It explained that a malicious hacker's "ability to disable or delete what are called 'audit logs' or 'audit

trails’ . . . to ‘remove the traces’ of operations or transactions that he or she performs on a system,” *id.* at 128a, constitutes, imminent and irreparable injury “of the most basic and destructive sort.” *Id.* at 274a.

Regarding the harm to Petitioners, the District Court found:

Each of the plaintiffs’ rights in the IIM trust, including their right to an accounting, depends fundamentally upon the existence and accuracy of Trust documents and records in Interior’s custody. Indeed, Interior’s ability to carry out the day-to-day tasks of Trust management similarly depends on the proper preservation and maintenance of IITD. Corruption or loss of those documents and records, many of which are irreplaceable, thus constitutes irreparable injury of the most basic and destructive sort to the plaintiffs’ interests in this litigation. Moreover, . . . many of the Indian beneficiaries depend on their IIM trust income for the basic staples of life. Without complete and accurate IITD, Interior’s ability to calculate and process trust payments is jeopardized. The plaintiffs’ evidence demonstrates that the current state of IT security at Interior places IITD at imminent risk of corruption or loss; thus irreparable injury to the plaintiffs has also been established.

*Id.* at 274a-275a.

**5. *The Court of Appeals’ Ruling.*** The Court of Appeals vacated the District Court’s order. *Id.* at 1a-35a. Although the Court of Appeals selectively summarized the District Court’s “extensive findings of fact,” which it noted “Interior does not challenge,” *id.* at 14a, the Court disagreed with the District Court’s resolution of the injunction factors—without according the District Court any deference. First, the Court of Appeals was “unconvinced the class members demonstrated that they would necessarily suffer harm without this injunction.”

*Id.* at 30a. Although conceding that “the evidence of flaws in Interior’s IT security is extensive,” the Court of Appeals disregarded that evidence and found (incorrectly) “no evidence showing that anyone has already altered IITD by taking advantage of Interior’s security flaws, nor that such actions are imminent.” *Id.* Second, even though Respondents never introduced any evidence of harm that disconnection from the Internet would cause them, the Court of Appeals found that “the injunction would cause significant hardship to Interior.” *Id.* at 32a. Third, the Court of Appeals was “dubious that the public interest would benefit from an injunction.” *Id.* at 33a. Finding that the “harm Interior would immediately face upon complying with the disconnection order outweighs the class members’ need for an injunction,” *id.* at 34a, the Court of Appeals vacated the injunction.

#### **REASONS FOR GRANTING THE PETITION**

The Court of Appeals’ decision is fundamentally flawed in three important respects that warrant intervention by this Court. *First*, that Court failed to accord the District Court deference that it is due under settled law, setting aside unchallenged findings and disregarding its careful balancing of the equities and hardships. As this Court recently reaffirmed in *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006) (*per curiam*), it is “necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court.” *Id.* at 7. Given the importance of this case—to Petitioners, to the administration of justice, and to the United States’ long-standing, unconditional fiduciary obligation to Individual Indian Trust beneficiaries—the Court should grant this petition, vacate the judgment below, and remand for reconsideration in light of *Purcell*.

*Second*, the standard for an injunction applied by the Court of Appeals is in conflict with decisions of this Court and other circuits. This Court and other circuits repeatedly have held that an injunction may issue upon finding a *likelihood* that the movant will suffer irreparable injury. The Court of Appeals

below, by contrast, held that an injunction could issue only upon proof that petitioners “would *necessarily* suffer harm without [the] injunction.”

*Third*, the Court of Appeals has violated a century of trust law by according unfettered discretion to Respondents under the Administrative Procedure Act to determine if, how, and when to cure their egregious breaches of fiduciary duty. This holding conflicts with decisions of this Court and creates a circuit split.

**I. THE COURT OF APPEALS’ DECISION CONFLICTS WITH DECISIONS OF THIS COURT IN FAILING TO ACCORD DUE DEFERENCE TO FINDINGS OF THE DISTRICT COURT IN GRANTING THE INJUNCTION.**

The District Court, in considering Petitioners’ request for injunctive relief, applied traditional equitable criteria—whether the Petitioners demonstrated (1) a substantial likelihood of success on the merits; (2) that they would suffer irreparable harm without injunctive relief; (3) that an injunction would not irreparably harm Respondents; and (4) that issuance of the injunction was in the public interest. App., *infra*, at 272a. In reviewing whether a District Court properly granted injunctive relief, a Court of Appeals must determine “whether the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion.” *See, e.g., Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664 (2004); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). Therefore, while a District Court’s legal rulings are reviewed *de novo*, the decision to ultimately grant injunctive relief lies within the sound discretion of the District Court. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1219 (2006). This is true not only in reviewing the District Court’s determination of whether a plaintiff will suffer irreparable harm if an injunction is not entered, *see Doran*, 422 U.S. at 932, but also in reviewing the District Court’s balancing of that harm against the injury to

the defendant and the public at large in the event an injunction is granted. *See Bhd. of Locomotive Eng'rs v. Mo.-Kan.-Tex. R. Co.*, 363 U.S. 528, 535 (1960). Even if the appellate court disagrees with the District Court's conclusion, where the decision to grant or deny injunctive relief is supported by record evidence, that decision must be affirmed. *See Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207, 1218 (1972) (Burger, C.J., in chambers). Accordingly, as this Court recently reiterated, it is incumbent upon the Court of Appeals "as a procedural matter . . . to give deference to the discretion of the District Court" in reviewing an order granting or denying a preliminary injunction. *Purcell*, 127 S. Ct. at 7. Failure of the Court of Appeals to accord the District Court such deference constitutes reversible error. *Id.* at 8.

In *Purcell*, the plaintiffs sought to enjoin Arizona procedures requiring that voters provide identification prior to voting. The District Court denied the injunction, but a two-judge motions panel of the Ninth Circuit reversed the District Court and enjoined the identification procedures. This Court summarily vacated the injunction, explaining that the Court of Appeals "owed deference" to the discretion of the District Court. *Id.* at 7. Where there was "no indication that it did so," the decision of the Court of Appeals to disregard the conclusion of the District Court was error. *Id.*

As in *Purcell*, there is no indication that the Court of Appeals below accorded any deference to the findings of the District Court in reversing the preliminary injunction. The Court of Appeals never stated the District Court had abused its discretion in entering the preliminary injunction. Rather, it independently evaluated the harm to the Petitioners and independently balanced the equities before concluding that injunctive relief was improvident. It did so despite the District Court's findings being uncontested. The order considered here—concerning both the existence and integrity of Trust assets upon which Indian



beneficiaries depend for the basic necessities of life—is at least of equal importance to the issue in *Purcell*. Because the Court of Appeals did not have the benefit of *Purcell* when issuing its decision, this Court should vacate and remand for reconsideration in light of *Purcell*.

The Court of Appeals focused on two of the requisite elements for injunctive relief—harm to the Petitioners and harm to Interior. In each instance the Court of Appeals ignored the District Court’s extensive factual findings.

**A. The Court Of Appeals Failed To Defer To The District Court’s Findings That Petitioners Would Suffer Irreparable Harm Absent An Injunction.**

The Court of Appeals stated it was “unconvinced the class members demonstrated that they would necessarily suffer harm” if a preliminary injunction was not issued. App., *infra*, at 30a. Conceding that vulnerabilities in IT security at Interior were “extensive,” and that concerns over safety of Trust data were “quite plausible,” the Court ignored the District Court’s findings that critical Trust records were insecure, conditions that would “prevent the class members from receiving the accounting to which they are entitled.” *Id.* Conspicuously, the Court of Appeals never discussed how the District Court supposedly abused its discretion in reaching a contrary conclusion.

The District Court recognized the fiduciary duty Respondents owed to the Indian beneficiaries given Respondents’ complete control over Individual Indian Trust assets.<sup>5</sup> *Id.* at 279a. In light of that Trust duty, the District Court carefully considered the impact of systemic and severe IT security deficiencies on the integrity of Trust data, Trust funds,

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<sup>5</sup> The application of trust law principles and concomitant fiduciary duties where, as here, the government exercises management control of Indian trust assets was recognized by this Court in *United States v. Mitchell*, 463 U.S. 206, 223-26 (1983) (“*Mitchell II*”), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474-76 (2003).

and other assets as well as the effect of unreliable Trust data both on the viability of Petitioners' accounting remedy and the health and welfare of the individual Indian beneficiaries in reaching its determination that the harm to Petitioners would be irreparable. The District Court found that there was "no question" vulnerabilities in IT security at Interior demonstrated "that the confidentiality, integrity and availability of IITD on Interior's IT systems are presently at substantial and imminent risk of compromise." *Id.* at 271a.

This conclusion by the District Court was well founded in the record. For example, during the hearing, "every Interior IT professional who was asked confirmed there were serious, systemic problems with Interior's IT security program." *Id.* at 277a. Results of penetration testing performed by Office of Inspector General ("OIG") security consultants immediately prior to and during the evidentiary hearing concluded that Interior's IT systems were "at a high risk of unauthorized access from the Internet" and "at a significant risk of system compromise or access to unauthorized data. . . ." *Id.* at 124a, 139a (internal quotations omitted). Hackers gained "administrator privileges" which allowed them, without detection, to alter and delete data. *Id.* at 128a, 139a, 146a-159a.

Unfortunately, as the District Court found, in most cases unauthorized access to and alteration of Trust data would never be identified or corrected. *Id.* at 128a. In that regard, the Court of Appeals' mistaken criticism of the District Court's order on the ground there existed "no evidence showing that anyone has already altered IITD by taking advantage of Interior's security flaws," *id.* at 30a, misses the point. Given Interior's inability to detect and correct malicious alteration of Trust data and the misappropriation of Trust assets, such evidence of altered IITD in most cases is unavailable. In any event, the Court of Appeals' conclusion is wrong. For example, in the early 1990s, outside auditors for Interior identified hundreds of thousands of dollars of Trust assets wrongfully forwarded to payees seeking to steal

Trust assets.<sup>6</sup> In 2003, the OIG investigated nine instances of “fraud or mishandling” of Trust funds through the Internet over a two-year period.<sup>7</sup> In December 2004, a BLM employee was identified obtaining improper access to Interior’s computer systems and causing fraudulent Trust distribution checks to be issued on fictitious oil and gas leases.<sup>8</sup> Even Respondents’ counsel was forced to concede that fraud resulting in “substantial loss” had been perpetrated against Petitioners on at least two occasions in 2004 by Interior employees gaining unauthorized access to electronic Trust records.<sup>9</sup>

Moreover, the District Court considered the effect degradation of Trust data would have on Petitioners. That impact is two-fold. First, as the Court of Appeals had previously noted, adequate computer systems are essential to the accounting of Trust funds ordered by the courts below. *Cobell VI*, 240 F.3d at 1106. In addition, Respondents have “current and prospective trust management duties that necessitate maintaining secure IT systems in order to render accurate accountings now and in the future.” *Cobell XII*, 391 F.3d at 256-57. Accordingly, an accounting “depends fundamentally upon the existence and accuracy of Trust documents and records in Interior’s custody.” App., *infra*, at 274a. Where those Trust records are subject to unauthorized manipulation, the accounting remedy is impossible. *Cobell XII*, 391 F.3d at 256-57. Consequently, in suggesting that the accounting could be completed despite the “extensive” vulnerabilities in Interior’s IT systems, App., *infra*, at 30a, the Court of Appeals not only failed to defer to well supported findings of the District Court, it disregarded its own prior, binding decisions in *Cobell VI* and *Cobell XII*, holding expressly to the contrary.

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<sup>6</sup> See Pls.’ Ex. 245 (C.A. App. at 9301-13).

<sup>7</sup> See Pls.’ Ex. 246 (C.A. App. at 9358).

<sup>8</sup> See Pls.’ Ex. 61 (C.A. App. at 7342).

<sup>9</sup> See D.C. Circuit Oral Argument Tr. 17-18 (July 11, 2006).

Second, because IT systems are the cornerstone of the Trust, Respondents' ability to discharge their ongoing Trust management duties is dependent on the integrity of electronic Trust records. *Id.* at 273a. The beneficiaries of the Individual Indian Trust are among the most vulnerable citizens of our country. "[M]any of the Indian beneficiaries depend on their IIM trust income for the basic staples of life." *Id.* at 274a. The corruption of Trust records therefore impacts the survival of many of the Trust beneficiaries. *Id.* In reaching this conclusion, the District Court merely reiterated what the Court of Appeals previously found: that Petitioners "rely upon their IIM trust accounts for their financial well being," and interference with timely receipt of Trust payments "could cause irreparable harm" to their interests as beneficiaries. *Cobell VI*, 240 F.3d at 1097. In *Doran*, this Court affirmed a preliminary injunction in favor of topless bars enjoining enforcement of a town ordinance prohibiting topless dancing, finding the "substantial loss of business" they would suffer was irreparable and justified interim relief. 422 U.S. at 932. The injury here is potentially catastrophic and thus at least as great as the loss this Court considered in *Doran*. However, absent from the Court of Appeals' decision is any discussion of the irreparable impact this injury would have on the lives and health of Petitioners.

Accordingly, the District Court was well within its discretion in finding "irreparable injury of the most basic and destructive sort to the [Petitioners'] interests in this litigation." App., *infra*, at 274a. The Court of Appeals was required, by the decisions of this Court, to defer to that finding. Instead, it ignored record evidence and overturned the finding, never explaining how it represented an abuse of discretion.

**B. The Court Of Appeals Failed To Defer To The District Court's Findings In Balancing The Harm To Petitioners Against The Harm To Interior.**

Although the Court of Appeals accepted Respondents' appellate argument that the injunction "would cause significant

hardship to Interior,” App., *infra*, at 32a, at the evidentiary hearing Respondents introduced no evidence that disconnection from the Internet would harm them. This Court was presented with a similar failure of the government to satisfy its evidentiary burden in defending a preliminary injunction in *O Centro Espirita*, 126 S. Ct. at 1211. In that case, the government argued that an order preliminarily enjoining enforcement of the Controlled Substances Act against plaintiffs was inconsistent with the United Nations Convention on Psychotropic Substances. However, the government introduced no evidence at the preliminary injunction hearing addressing the international consequences of granting an exemption for religious use. Accordingly, this Court held that injunctive relief against the government was not an abuse of discretion. *Id.* at 1225.

Here, despite Respondents’ evidentiary failure, the District Court independently made an assessment of potential harm to the government in the event an injunction issued. It recognized that certain of Interior’s operations could be temporarily disrupted. App., *infra*, at 275a. It further considered testimony from witnesses regarding the effects of the 2001 consent disconnection who noted: “It was hard.” *Id.* However, those considerations, in the District Court’s view, were outweighed by the effect continued degradation of Trust data would have on Petitioners. *Id.* at 276a. Nevertheless, to alleviate the material impact on Interior and the public, it excluded from its Internet disconnection order each system that Respondents indicated was essential for the protection of life, health, property, and national security, and it provided for prompt reconnection to the Internet of other secure systems. *Id.*

The Court of Appeals, however, once again disregarded the District Court’s findings and independently concluded that the injunction “would cause significant hardship to Interior.” *Id.* at 32a. In doing so it accused the District Court of “gloss[ing] over the immensity of the disruption that would occur to Interior’s operations,” and chastised it for failing to “address

the specific ways in which its order would interfere with Interior's operations." *Id.* at 31a-33a. However, Respondents introduced no testimony at the evidentiary hearing which would enable such a finding to be made. Moreover, the Court of Appeals cited no evidence introduced at the evidentiary hearing to support this conclusion. Instead it relied on two affidavits submitted by Respondents *on appeal* describing the alleged impact of the disconnection order which were in irreconcilable conflict with evidence admitted in the evidentiary hearing. *Id.* Respondents provided no explanation why they chose not to introduce such evidence at the hearing, and the Court of Appeals failed to explain how the District Court could consider evidence that was not before it. In allowing consideration of affidavit testimony at the appellate level, the Court of Appeals contravened a fundamental precept of appellate procedure that it is the role of the District Court to consider the evidence and not the Court of Appeals. *See Russell v. Southard*, 53 U.S. 139, 158 (1851); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 258 (1944) (Roberts, J. dissenting); *Carter v. George Washington Univ.*, 387 F.3d 872, 877 (D.C. Cir. 2004).

Indeed, not only is the Court of Appeals' finding of undue hardship based on no evidence of record, its conclusions are contradicted by the record evidence. The scope of the injunction is largely identical to the Consent Order entered in December 2001 and the March 2004 preliminary injunction. The Court of Appeals never explained how the relief to which Respondents consented five years earlier became unduly harmful. Moreover, undisputed testimony at the hearing established that, while the 2001 disconnection order temporarily inconvenienced Interior, it successfully adjusted its operations to accommodate that inconvenience.

In sum, the balancing of "competing claims of irreparable hardship is . . . the traditional function of the equity court, the exercise of which is reviewable only for abuse of discretion." *Bhd. of Locomotive Eng'rs*, 363 U.S. at 535. The findings of

the District Court in balancing those competing interests were well supported by the evidence. As in *Purcell*, the Court of Appeals' refusal to defer to such findings warrants reversal.

**II. THE COURT OF APPEALS' DECISION CONFLICTS WITH OPINIONS OF THIS COURT AND OTHER CIRCUITS IN REQUIRING THAT MOVANTS ESTABLISH THAT HARM WOULD "NECESSARILY" OCCUR TO OBTAIN INJUNCTIVE RELIEF.**

**A. The Standard Applied By The Court Of Appeals Conflicts With Decisions Of This Court And Other Circuits.**

The Court of Appeals applied the wrong standard in assessing whether Petitioners would suffer irreparable harm should injunctive relief not be ordered. A preliminary injunction was not proper, according to the Court, because the Petitioners had not established that they would "necessarily" suffer harm. App., *infra*, at 30a. In other words, as Petitioners had allegedly failed to prove *with certainty* that future unauthorized access and alteration of Trust data would occur, an injunction was improper. In so holding, the Court of Appeals applied a legal standard that has been rejected by this Court and every circuit to consider the issue.

Where as here a plaintiff seeks to enjoin a continuing wrong, he need not prove future harm with certainty. While the plaintiff must show something more than "the mere possibility" of injury, "[t]he necessary determination is that there exists some cognizable danger of recurrent violation." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). The plaintiff must "demonstrate a significant threat of injury" or "a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969); *see also O'Shea v. Littleton*, 414 U.S. 488, 502 (1974) (holding a preliminary injunction requires a showing of a "likelihood of

substantial and immediate irreparable injury”). Consistent with decisions of this Court, every other circuit considering the issue has rejected a requirement that a plaintiff show an injury “necessarily” will occur to be entitled to injunctive relief.<sup>10</sup> This Court should grant certiorari to address this conflict.

### **B. The Evidence Established Irreparable Harm In Accordance With This Court’s Precedent.**

The District Court found that Petitioners established much more than the requisite significant and imminent threat of irreparable harm, justifying injunctive relief; the potentially catastrophic impact of Petitioners’ harm was also established. For almost a century, Respondents have breached their fiduciary duty to Petitioners by failing to safeguard Trust assets. As early as 1915, Congress reported that “[t]he Government itself owes many millions of dollars for Indian moneys which it has converted to its own use,” and that the trustees did “not know what is the present condition of the Indian funds in their keeping.”<sup>11</sup> However, the problem was never addressed, causing a Senate Select Committee on Indian Affairs to report, in 1989, that there existed “fraud, corruption and mismanagement pervading the institutions that are supposed to serve American Indians,”<sup>12</sup> and a House Committee to report in 1992 that Respondents had ignored many congressional directives aimed at encouraging Interior to correct Trust management practices.<sup>13</sup>

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<sup>10</sup> See *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990) (holding “a strong threat” of irreparable injury is sufficient to warrant injunctive relief); *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986) (holding “plaintiff need only show a significant threat of injury”); *Bath Indus., Inc. v. Blot*, 427 F.2d 97, 111 (7th Cir. 1970) (“it is not necessary that the trial court find the certainty of a wrong, a likelihood is sufficient.”).

<sup>11</sup> Joint Commission Report, *supra*, at 2.

<sup>12</sup> *A Report of the Special Committee on Investigations of the Select Committee on Indian Affairs*, S. Rep. No. 101-216, at 4-5 (1989).

<sup>13</sup> *Misplaced Trust: The Bureau of Indian Affairs’ Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102-499, at 2-5 (1992).



As explained *supra*, at 15-16, Respondents' protection of Petitioners' Trust assets fared no better with the use of computerized data. Accordingly, at the time of the evidentiary hearing, the District Court had before it a 90-year history of theft and loss of Individual Indian Trust assets, the destruction of Trust records, and a trustee doing little or nothing to prevent it.

During 2005 through the conclusion of the hearing in August, there had been over 350 million *known* attempts to break into Interior's IT systems. App., *infra*, at 265a. Systemic security problems allowed unauthorized penetration of Interior's IT systems. *Id.* at 268a. Moderately skilled hackers could remain undetected within the IT systems for months. *Id.* at 132a, 142a, 149a. Trust data could be manipulated unlawfully and Trust funds and other assets misappropriated without detection. In considering this evidence, the District Court was forced to conclude that Respondents' IT security is "disorganized and broken," there was a "significant" and "substantial" risk of unauthorized access, and the "problems, in the aggregate, demonstrate that the confidentiality, integrity and availability of IITD on Interior's IT systems are presently at substantial and imminent risk of compromise." *Id.* at 271a.

As the District Court found, Petitioners established far more than a "mere possibility" of future harm. In light of the history of pervasive fraud and corruption inherent in the management of Petitioners' Trust assets and the failure of Respondents to implement basic IT security controls, the imminent and potentially catastrophic threat of continuing fraud is indisputable. The District Court properly ordered injunctive relief where Petitioners' Trust data was "presently at substantial and imminent risk of compromise."

### **III. THE COURT OF APPEALS' GRANT OF DEFERENCE TO RESPONDENTS IN CORRECTING THEIR FIDUCIARY BREACH IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.**

The Court of Appeals held that Respondents were entitled to substantial deference and may determine for themselves if, how, and when to end their continuing breaches of unconditional fiduciary duties. Respondents, however, have no discretion to violate the law or breach trust duties. The Court of Appeals' grant of deference, therefore, fatally undermines Respondents' fiduciary obligations. That holding is inconsistent with this Court's trust decisions and creates a conflict with other circuits. This Court should grant certiorari to correct the Court of Appeals' erroneous application of deference principles.

#### **A. The Exercise Of Discretion By Respondents Is Limited By Trust Law.**

There exists a "distinctive obligation of trust incumbent upon the Government" in its dealings with Indians, a class this Court has characterized as a "dependent and sometimes exploited people." *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). The government has charged itself with "moral obligations of the highest responsibility and trust." *Id.* at 297. Accordingly, the Federal government has "an overriding duty . . . to deal fairly with Indians . . ." <sup>14</sup> *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

However, the limitations on Respondents' authority are more substantial here than in the typical Indian case, for they have assumed and exercised the substantive trust responsibility

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<sup>14</sup> The limits on the Secretary's discretion include the obligation to construe Interior's statutory obligations "liberally in favor of the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Should such responsibilities toward Indians be ambiguous, they must be "interpreted to their benefit." *Id.*

of holding, investing, and managing Petitioners' property, giving rise to the highest fiduciary obligations. *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993); *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987). The Trust was created over a hundred years ago. Trust land and the revenue derived therefrom are the property of Petitioners. Petitioners, while sole beneficial owners of Trust land, have no right to sell, lease, or encumber their Trust property without the consent of the Federal government. *Cobell VI*, 240 F.3d at 1088. The government alone creates and maintains ownership, transaction, and all other Trust records for the benefit of Petitioners. The government leases and manages the Trust property and collects royalties and other income which it must invest and pay to Petitioners. *Id.* As this Court has explained, where the government exercises "control or supervision over [Indian assets], a fiduciary relationship normally exists," *Mitchell II*, 463 U.S. at 225, and common law trust principles apply. See *White Mountain Apache Tribe*, 537 U.S. at 475. Accordingly, the government's conduct must "be judged by the most exacting fiduciary standards." *Seminole Nation*, 316 U.S. at 297.

The Trust Reform Act recognized that the Trust responsibilities owed to Petitioners are broad and enforceable and that they pre-date the 1994 enactment. *Cobell VI*, 240 F.3d at 1090. A critical aspect of Respondents' responsibility is the duty "to use reasonable care and skill to preserve trust property." *White Mountain Apache Tribe*, 537 U.S. at 475. Accordingly, an integral part of Interior's accounting responsibility is the fiduciary duty to protect the integrity of electronic Trust records and other Trust assets. That duty is unconditional and not subject to the Secretary's discretion.

**B. The Court Of Appeals Has Provided Inconsistent Guidance In Analyzing The Discretion To Be Accorded Respondents In Light Of Their Fiduciary Duties Owed To Petitioners.**

The Court of Appeals, while noting general fiduciary duties owed by the Federal government to Indians, *see App., infra*, at 6a, effectively vitiated any enforceable trust duties when it held that Respondents retained discretionary authority with which the District Court could not interfere. *Id.* at 10a-11a. Despite recognizing deplorable breaches of fiduciary duties, the Court of Appeals concluded that the District Court still owed “substantial deference” to Respondents in complying with their statutory mandate. *Id.* at 11a. Thus, the District Court could not require Respondents to comply with trust law or otherwise “follow a detailed plan of action” to ensure the discharge of their trust duties. *Id.* at 13a. Nor could it order “programmatic supervision” of Respondents where, as here, their systemic breaches of trust irreparably harm Petitioners. *Id.* at 34a-35a. The Court of Appeals suggested that the District Court may not enjoin breaches of trust but must passively “allow Interior to exercise its discretion and utilize its expertise” in satisfying its fiduciary obligations. *Id.* at 13a.

The decision below was the culmination of a series of opinions over a six year period by the Court of Appeals in which it provided conflicting guidance regarding the deference to be accorded Respondents. Thus, while the Courts in *Cobell VI* and *Cobell XII* correctly described this action as principally a trust case, *see Cobell VI*, 240 F.3d at 1095, 1101, 1109; *Cobell XII*, 391 F.3d at 253-54, 256-58, *Cobell XVII* and the decision below stated Petitioners’ “core claim is under the APA” and relied on classic APA cases in holding that the District Court must defer to the Respondents’ discretion. *App., infra*, at 11a-12a; *Cobell v. Norton*, 428 F.3d 1070, 1074-1076 (D.C. Cir. 2005) (“*Cobell XVII*”). Similarly, in *Cobell VI*, the Court held Respondents were not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),

in their exercise of trust duties, *Cobell VI*, 240 F.3d at 1101, but in *Cobell XVII* and in the opinion below the Court took the opposite position, holding the District Court owed “substantial deference” to Respondents notwithstanding their failure to discharge their trust duties. App., *infra*, at 11a; *Cobell XVII*, 428 F.3d at 1076. Moreover, while the Court in *Cobell VI* and *Cobell XII* held the District Court retained “substantial latitude . . . to fashion an equitable remedy” given Respondents’ egregious breach of fiduciary duty, *Cobell XII*, 391 F.3d at 257-58; *Cobell VI*, 240 F.3d at 1099, 1109, the same Court chided the District Court for failing to defer to Respondents and acting like “a private-law chancellor to exercise its discretion.” *Cobell XVII*, 428 F.3d at 1077. Finally, while in *Cobell VI* Respondents’ refusal to discharge their fiduciary duties could not be justified due to either a “lack of sufficient funds nor administrative complexity,” 240 F.3d at 1097, in the decision below the Court held the District Court must defer to the discretion of Respondents due to “allocation of scarce resources” and subject-matter expertise.<sup>15</sup> App., *infra*, at 11a.

Since the decision in *Cobell VI* in 2001, the Court of Appeals has failed to provide consistent guidance with respect to the deference, if any, the District Court owes to Respondents. The confusion generated by conflicting decisions of the Court of Appeals has had no small impact on the course of this eleven-year litigation. Petitioners asked the Court of Appeals to reconcile these inconsistencies in requesting review *en banc*. The Court of Appeals declined to do so—leaving that task to this Court.

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<sup>15</sup> Faced with these conflicting statements, the Court instructed the District Court that what law applied would vary with the “specific question at hand.” App., *infra*, at 12a.

**C. The Administrative Deference Created By The Court Of Appeals Is Inconsistent With Decisions Of This Court And Is In Conflict With Decisions In Other Circuits.**

The Court of Appeals' requirement that the District Court accord Respondents "substantial deference" and "must allow Interior to exercise its discretion and utilize its expertise in complying with broad statutory mandates," App., *infra*, at 13a, is inconsistent with this Court's decisions recognizing the strict fiduciary duties owed by Respondents to Petitioners, and creates a conflict with the decisions of other circuits.

In placing such severe limitations on the inherent equitable authority of the District Court, the Court of Appeals for the first time since establishment of the Trust conferred on Respondents traditional administrative discretion, unrestricted by their strict fiduciary duties as trustee-delegates and managers of Petitioners' trust assets. However, even under the APA, such broad administrative discretion is appropriate only when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (2000); *see Heckler v. Chaney*, 470 U.S. 821, 828-30 (1985). Where, as here, specific action is not discretionary but rather legally required, the agency retains no discretion and, indeed, the court must compel it to take action. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-65 (2004) ("The only agency action that can be compelled under the APA is action legally *required*."); 5 U.S.C. § 706(1) ("The reviewing court shall . . . compel agency action unlawfully withheld").

Respondents' compliance with their strict fiduciary duties to Petitioners is not discretionary but one required by law. Under the common law—which this Court has applied to govern and inform the government's statutory trust obligations to Indian trust beneficiaries, *see White Mountain Apache Tribe*, 537 U.S. at 475—the exercise of a power by a trustee is not discretionary where, as here, it "is required by the terms of the trust *or by principles of law applicable to the duties of trustees*."

Restatement (Second) of Trusts § 187 cmt. a (1959) (emphasis added). As a matter of law, all trustees operate under the “duty to the beneficiary to use reasonable care and skill to preserve the trust property.”<sup>16</sup> *Id.* § 176; *see also* G. Bogert, *The Law of Trusts and Trustees* § 582 (2d ed. 1980). Injunctive relief is available to enjoin breach of this duty. Restatement, *supra*, § 199; Bogert, *supra*, § 582. Accordingly, in *White Mountain Apache Tribe*, in which the government, as trustee, had allowed the historic Fort Apache military post to fall into disrepair, its duty to preserve that trust asset was not a matter of the government’s discretion subject to Interior’s “judgment about the scarce allocation of resources.” 537 U.S. at 475. To the contrary, as this Court explained, “elementary trust law . . . confirms that a fiduciary actually administering trust property may not allow it to fall into ruin . . .,” as one of the fiduciary’s “fundamental duties” is to “preserve and maintain trust assets.” *Id.* Similarly, in *Mitchell II*, this Court held, with respect to the Individual Indian Trust, that all elements of a common law trust are present, justifying imposition of fiduciary duties on the Government and the “fundamental” right of a beneficiary to seek redress for breach. 463 U.S. at 226-27. The Court of Appeals’ unprecedented grant of discretion to Respondents to decide if, when, and how to discharge their trust duties conflicts with *White Mountain Apache Tribe* and *Mitchell II*.

In contrast to the decision below, other circuits have limited Respondents’ discretion as trustee. In *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583 (10th Cir. 1992),

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<sup>16</sup> This Court, in requiring the Federal Government adhere to “the most exacting fiduciary standards,” *Seminole Nation*, 316 U.S. at 297, imposes requirements beyond the common law standard of “reasonableness.” *See Short v. United States*, 50 F.3d 994, 999 (Fed. Cir. 1995) (“[t]he standard of duty as trustee for Indians is not mere reasonableness, but the highest fiduciary standards.”) (quoting *Am. Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980, 990 (Ct. Cl. 1981)).

the Tenth Circuit considered oil and gas leases on Indian lands, control of which had been relegated to the Secretary. In rejecting an argument by Interior that the District Court had improperly substituted its judgment for that of the Secretary in overturning the Secretary's approval of two lease agreements, the Court noted that, given the fiduciary relationship that existed in light of the Government's pervasive role in management of Indian properties, "the Secretary's discretion to approve or disapprove leases . . . must be governed by fiduciary standards and limited by fiduciary duties." *Id.* at 589. In *Brown v. United States*, 42 Fed. Cl. 538 (1998), the Court of Federal Claims considered an allegation by members of the Salt River Pima-Maricopa Indian Reservation that Interior had mismanaged a lease, resulting in lost rental income. In rejecting the argument that such management was committed to the Secretary's discretion, the Court concluded such discretion was limited by "the more stringent standards demanded of a fiduciary."<sup>17</sup> *Id.* at 562-63.

The Respondents' unconditional duty to protect Trust records from unlawful manipulation and destruction is not a discretionary one. "It is indisputable that the Secretary has current and prospective trust management duties that necessitate maintaining secure IT systems in order to render accurate accountings now and in the future." *Cobell XII*, 391 F.3d at 256-57. However, in ordering the District Court to provide Respondents substantial deference, the Court of Appeals

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<sup>17</sup> See also *Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. 629, 643 (2006) (holding that the Government must "'consider its strict fiduciary obligation when interpreting regulations'" governing Indian oil and gas leases) (quoting *HRI, Inc. v. EPA*, 198 F.3d 1224, 1246 (10th Cir. 2000)); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring in part & dissenting in part), *adopted as majority opinion & modified en banc*, 782 F.2d 855 (10th Cir. 1986) (holding that the Secretary's "actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary.").



rendered Respondents mandatory duty to protect Trust property a fiction. The Court of Appeals failed to explain why the District Court must defer to the egregious breaches of trust described *supra*, at 8-9, 13-16.

The Court of Appeals' holding that the District Court must defer to Respondents, even with respect to decisions which are in breach of fundamental trust duties, such as the protection of critical Trust records, Trust funds, and other Trust assets, has served to irreparably prejudice Petitioners. Despite passage of seven years since the court ordered an accounting of all Trust funds, no accounting has been rendered. Likewise, despite the longstanding failure of Respondents to ensure that electronic Trust records and other Trust assets do not continue to fall into irreparable ruin and a consent order five years ago confessing the "immediate" need to protect such assets, Petitioners' Trust assets today remain at imminent risk. The Court of Appeals had previously noted the severe consequences of Respondents' failure—not only would Petitioners be denied their judicially declared right to an accounting of all funds, but it would unconscionably impact the "personal interest[] in life and health" of the Petitioners, themselves. *Cobell VI*, 240 F.3d at 1097 (internal quotation omitted). This Court should grant certiorari to correct the Court of Appeals' unprecedented grant of deference to Respondents, which is inconsistent with decisions of this Court and other circuits, and to ensure that Respondents' egregious breaches of trust do not continue.

**CONCLUSION**

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for reconsideration in light of *Purcell*. Alternatively, the petition should be granted.

Respectfully submitted,

DAVID C. SMITH  
ADAM H. CHARNES  
KILPATRICK STOCKTON LLP  
1001 West Fourth Street  
Winston-Salem, NC 27101  
(336) 607-7300

DENNIS M. GINGOLD  
*Counsel of Record*  
607 14th Street, N.W.  
9th Floor  
Washington, DC 20005  
(202) 824-1448

*Of Counsel:*  
JOHN ECHOHAWK  
NATIVE AMERICAN RIGHTS  
FUND  
1506 Broadway  
Boulder, CO 80302

ELLIOTT LEVITAS  
KILPATRICK STOCKTON LLP  
607 14th Street, N.W.  
Suite 900  
Washington, DC 20005  
(202) 508-5800

*Counsel for Petitioners*