No. 12-355

IN THE

Supreme Court of the United States

CAROL EVE GOOD BEAR, CHARLES COLOMBE, AND MARY AURELIA JOHNS,

Petitioners,

v.

ELOUISE PEPION COBELL, et al., individually and on behalf of a class of Individual Indian Trust beneficiaries,

Plaintiffs-Respondents,

and

KENNETH LEE SALAZAR, Secretary of the Interior, *et al.*,

Defendants-Respondents.

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

BRIEF IN OPPOSITION FOR PLAINTIFFS-RESPONDENTS

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QUESTIONS PRESENTED

1. Did the court of appeals err when it concluded that a class of Indian trust beneficiaries suing the United States for breach of fiduciary duties satisfied the minimal due process requirements of commonality, where Congress enacted legislation authorizing the district court to certify the class notwithstanding the procedural requirements of Rule 23 of the Federal Rules of Civil Procedure?

2. Did the court of appeals err when it concluded that a second, separate class of Indian trust beneficiaries satisfied the criteria for class certification under Rule 23(b)(1)(A) and Rule 23(b)(2) where the class sought declaratory and injunctive relief to compel a full historical accounting of trust assets and where individual lawsuits by class members would create a risk of inconsistent adjudications of the government's unitary fiduciary duties to class members?

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COUNTERSTATEMENT

This landmark class settlement arises out of a painful period in American history. Over a century ago, the United States, in an effort to destroy tribal governments and forcibly assimilate Indians into American society, seized tribal land and divided it into allotments. The government then held those allotments in trust for the benefit of individual Indians. Income derived from the government's sale and lease of those lands was to be comingled, held in the Individual Indian Money Trust ("IIM Trust" or the "Trust"), invested in common, and ultimately disbursed to individual Indian beneficiaries of the IIM Trust. Sadly, the government has mismanaged the IIM Trust since its inception.

Plaintiffs brought this class action in 1996 to redress this injustice by compelling the United States to conduct a full historical accounting of all IIM Trust funds, to correct and restate IIM account balances, to fix broken Trust management systems, and to undertake other Trust reform measures to ensure prudent Trust management. This case has now lasted for more than sixteen years, involving over 3,900 docket entries, 250 days of hearings and trials, fourteen appeals—including ten interlocutory appeals—to the court of appeals, and over 80 published opinions of the district court and court of appeals. In December 2009, the parties reached an unprecedented $3.4 billion settlement, approved by all three branches of the government, which includes $1.9 billion in furtherance of Trust reform and $1.5 billion in direct payments to class members. Given the unique nature of the IIM Trust, the unique status of individual Indian trust beneficiaries, and the legislation approving this settlement, there is no other case like this one and there likely never will be.

Petitioners objected to the settlement in the district court. The district court rejected their arguments and approved the settlement. The court of appeals affirmed in a one-page, per curiam order, describing various arguments in Petitioners' briefs as "utterly without merit," "contrary to all precedent and to common sense," and based on a "blatant mischaracterization" of the record. (Pet. App. 2a.)

Petitioners now ask this Court to review the unpublished order of the court of appeals rejecting their arguments. Petitioners do not contend that the court of appeals' decision creates a circuit split, conflicts with precedent from this Court, or satisfies any other criteria for certiorari in Rule 10. Rather, Petitioners seek error-correction, asserting that the court of appeals erred when it held, based on the unique facts in this case, that this historic class settlement satisfied the requirements for class certification. Petitioners' arguments are incorrect and are refuted by record evidence and the findings of the district court, but in any event those fact-bound, case-specific issues do not warrant review by this Court.

I. HISTORY OF THE INDIVIDUAL INDIAN MONEY TRUST

In the late nineteenth century, the federal government adopted a policy of assimilation for Indians. In furtherance of that policy, the government seized tribal reservation land and, in part, divided it into parcels allotted to individual Indians. *See Cobell v. Norton* (*Cobell VI*), 240 F.3d 1081, 1087 (D.C. Cir. 2001); General Allotment Act of 1887, ch. 119, 24 Stat. 388. The United States retained legal title to the allotted lands and, as trustee for individual Indians, exercised complete control over those lands and

their resources, including oil, natural gas, coal and timber. *Cobell VI*, 240 F.3d at 1087. Individual Indian beneficiaries could not sell or lease their land. *Id.*

Despite the government's common law and statutory fiduciary obligations and duties as trustee, the history of the IIM Trust is replete with the loss, dissipation, theft, waste, and wrongful withholding of Trust funds. Misappropriation of IIM Trust assets was recognized as early as 1914, and has continued into modern times. *See, e.g.*, Bureau of Mun. 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) ("The Government itself owes millions of dollars for Indian moneys which it has converted to its own use."); *Cobell VI*, 240 F.3d at 1089 ("The General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of the IIM trust accounts over the past twenty years."). Further compounding these problems, the full scope of the government's mismanagement remained hidden from individual Indian beneficiaries because, as a matter of policy, they were not provided with statements of account and "[n]o real accounting, historical or otherwise, has ever been done of the IIM trust." *Cobell v. Kempthorne* (*Cobell XX*), 532 F. Supp. 2d 37, 43 (D.D.C. 2008).

II. THE TRUST REFORM ACT

A century of complaints by Indians, and "many years of congressional frustration over Interior's handling of the IIM trust," *id.* at 41, led to passage of the American

Indian Trust Fund Management Reform Act of 1994 ("Trust Reform Act"), Pub. L. No. 103-412, 108 Stat. 4239. It confirmed and codified the government's pre-existing fiduciary duties, including the duty to provide a full accounting to IIM Trust beneficiaries. *Cobell VI*, 240 F.3d at 1090.

Plaintiffs brought this class action in 1996, after the government failed to begin the accounting mandated by the Trust Reform Act and required by the government's pre-existing fiduciary duties. In 1999, the district court found the Interior and Treasury Departments in violation of the Trust Reform Act and held them in breach of their trust duties to Plaintiffs. *Cobell v. Babbitt* (*Cobell V*), 91 F. Supp. 2d 1, 58 (D.D.C. 1999). The district court granted declaratory relief, ordered the Interior and Treasury Secretaries as trustee-delegates "to provide plaintiffs an accurate accounting of all money in the IIM trust," and established a plan for compliance. *Id.* The D.C. Circuit affirmed. *Cobell VI*, 240 F.3d at 1110.

III. SCOPE OF THE TRUST ACCOUNTING

In addition to reform of the government's broken Trust management system, the central issue in this action has been the scope of the accounting applicable to the IIM Trust. In 2008, the district court held that it is "clear that . . . the required accounting is an impossible task" and that "the Department of the Interior has not—and cannot—remedy the breach of its fiduciary duty to account for the IIM trust." *Cobell XX*, 532 F. Supp. 2d at 39, 103. On interlocutory appeal, the D.C. Circuit rejected the district court's finding of legal impossibility, holding that Interior must provide an accounting. *Cobell v. Salazar*

(*Cobell XXII*), 573 F.3d 808, 812-13 (D.C. Cir. 2009). However, the D.C. Circuit denied Plaintiffs a full historical accounting, and instead concluded that the government must undertake only "the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate." *Id.* at 813. The court also instructed that, during such an accounting, Interior need only "concentrate on picking the low-hanging fruit." *Id.* at 815. Under this holding, class members were no longer guaranteed to receive an accounting—even if they prevailed in this litigation—because Congress could decline to appropriate sufficient (or any) funds, or the Interior Secretary could deprioritize the accounting.

IV. THE SETTLEMENT AGREEMENT AND THE CLAIMS RESOLUTION ACT OF 2010

After *Cobell XXII*, the parties were under increasing pressure to find a solution to this protracted and costly litigation. The D.C. Circuit even acknowledged that "our precedents do not clearly point to any exit from this complicated legal morass." *Id.* at 812. In recognition of this need to find a solution, the parties spent five months in contentious and intensive negotiations, culminating in the execution of a Settlement Agreement on December 7, 2009. The Settlement Agreement was contingent upon congressional enactment of authorizing legislation and appropriations, and the district court's approval.

The amended complaint filed pursuant to the Settlement Agreement created two classes. The Historical Accounting Class consists of class members who seek injunctive and declaratory relief, including an accounting and necessary Trust reform. (App. 441-43,

709.)[1] Under the settlement, each member of the Historical Accounting Class receives a payment of $1,000, totaling approximately $337 million. This payment is in lieu of a complete historical accounting; it is not compensation for accounting errors, mismanagement, or any other errors. The Historical Accounting Class is certified under Rule 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure. Historical Accounting Class members are not permitted to opt out. (App. 718.)

The Trust Administration Class consists of class members with claims against the government for mismanagement of their IIM Trust assets. (App. 713.) The settlement provides that these class members will receive a baseline payment of approximately $800, plus an additional amount calculated from the ten highest-revenue years in each class member's IIM account. The Trust Administration Class payments total approximately $1.1 billion. The class is certified under the Claims Resolution Act of 2010, described below, and alternatively under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Trust Administration Class members may opt out. (App. 718-19.)

The settlement also allocates $1.9 billion for the Trust Land Consolidation Fund, which Interior must use to purchase highly fractionated Trust interests at market rates.[2] (App. 714.) Finally, the settlement also created

1. Citations to "App." refer to the deferred appendix in the court of appeals.

2. "Fractionated" interests resulted when allotments were continuously divided among the original beneficiaries' descendants over many generations. As the government has conceded, continuously fractionating interests contribute materially to its inability to maintain accurate IIM Trust records and prudently

the Indian Education Scholarship Fund to help Indian students "defray the cost of attendance at both post-secondary vocational schools and institutions of higher education." (App. 737.)

Because the settlement required congressional approval and appropriations, Congress enacted the Claims Resolution Act of 2010 ("CRA"), Pub. L. No. 111-291, 124 Stat. 3064, on November 30, 2010. On December 8, 2010, the President signed the CRA into law. The CRA provided that "[t]he Settlement is authorized, ratified, and confirmed." CRA § 101(c)(1). In addition, because the Trust Administration Class had not previously been certified expressly, Congress provided that "[n]ot withstanding the requirements of the Federal Rules of Civil Procedure, the court in the Litigation may certify the Trust Administration Class."[3] *Id.* § 101(d)(2)(A).

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manage the commingled Trust. *Cobell XX*, 532 F. Supp. 2d at 41; App. 670-71. This Court has recognized that "extreme fractionation of Indian lands is a serious public problem." *Hodel v. Irving*, 481 U.S. 704, 718 (1987). In *Hodel*, for example, the Court described the problems fractionation caused for the Sisseton-Wahpeton Sioux: "Forty-acre tracts on the Sisseton-Wahpeton Lake Traverse Reservation, leasing for about $1,000 annually, are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent. The average tract has 196 owners, and the average owner [has] undivided interests in 14 tracts." *Id.* at 712. Thus, consolidating fractionated interests is necessary for meaningful Trust reform and prudent Trust management.

3. Because under existing law certain Trust Administration Class claims must be brought in the Court of Federal Claims, *see* 28 U.S.C. §§ 1346, 1491, Congress also expressly conferred jurisdiction on the district court for all claims asserted in the Amended Complaint. CRA § 101(d)(1).

V. APPROVAL OF THE SETTLEMENT

Following enactment of the CRA, Plaintiffs undertook the most extensive class settlement notice process ever conducted. Plaintiffs sent direct mail notice to the known addresses of all class members; advertised the settlement extensively in local, regional, and national media including television, radio, newspapers, and magazines; and contacted businesses, non-profits, educational institutions, and others serving Indians to provide posters, flyers, DVDs, and other materials containing notice of the settlement, in English and in multiple Indian languages. (App. 676-82.) In addition, the class representatives and class counsel traveled thousands of miles through Indian Country over many months to explain the settlement to thousands of class members. The settlement garnered significant media coverage and public statements by high-ranking government officials, including the President. (App. 681.)

The settlement notice informed class members of their right to opt out of the Trust Administration Class and to submit objections to the settlement. Of the 500,000 class members in the two classes, the district court received only 92 objections, including those from Petitioners, and 1,824 opt outs, the overwhelming majority of which are from one tribe. (App. 1413, 1489.)

The district court held a fairness hearing on June 20, 2011. Two of the three petitioners appeared *pro se* at the hearing and opposed the settlement. After hearing arguments from objectors and the parties' counsel, the district court approved the settlement, finding it "fair, reasonable, and adequate." (App. 1406-18, 1490.) The court

entered its approval order on July 27, 2011, and entered final judgment on August 4, 2011. (Pet. App. 31a, 33a-48a.) Petitioners appealed.

VI. THE COURT OF APPEALS' DECISION

On appeal, Petitioners raised four issues in a cursory, seven-page argument: (1) that the settlement was "missing the adverseness between parties" required by the case-or-controversy requirement in Article III of the Constitution; (2) that the district judge should have recused himself "in light of the widespread impression that he had prejudged the matter"; (3) that the Historical Accounting Class settlement was unfair because class members with small IIM account balances received the same $1,000 payment in lieu of an accounting received by class members with large account balances and class members could not opt out; and (4) that the Trust Administration Class Settlement did not meet the commonality requirements of Rule 23(a). (Appellants' Ct. of App. Br. 14-20.)

The court of appeals affirmed in a one-page, per curiam, unpublished order. (Pet. App. 1a.) The court held that Petitioners' first two arguments were "utterly without merit," "contrary to all precedent and to common sense," and based on a "blatant mischaracterization" of the record. (Pet. App. 2a.) The court held that the third and fourth arguments were "foreclosed by another decision of this court, *Cobell v. Salazar*, No. 11-5205," a separate decision in an appeal by a different objector. In that decision, which is included in Petitioners' appendix, the court of appeals held, *inter alia*, that the Trust Administration Class satisfied the commonality requirements necessary for class certification. (Pet. App. 26a-27a.) The court also

held that the Historical Accounting Class settlement was consistent with this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), because "the $1,000 settlement payment is properly viewed as nonindividualized and does not run afoul of *Wal-Mart*." (Pet. App. 18a.)

REASONS FOR DENYING THE PETITION

I. THIS PETITION RAISES THE SAME ISSUES AS *CRAVEN V. COBELL*, NO. 12-234, SET FOR CONFERENCE ON OCTOBER 26.

As noted above, the court of appeals rejected Petitioners' arguments in a one-page, per curiam, unpublished order. That order held that the two issues presented in the petition were "foreclosed by another decision of this Court." That other decision is currently before this Court on a separate petition for a writ of certiorari filed by another class objector. *See Craven v. Cobell*, No. 12-234. The *Craven* petition has been distributed for the Court's conference on October 26. If the Court denies the petition for a writ of certiorari in *Craven*, it should likewise deny this petition, which raises the same arguments but in a far more cursory fashion.

II. PETITIONERS' COMMONALITY ARGUMENT DOES NOT WARRANT REVIEW.

Petitioners first argue that "[t]he justification offered by the appeals court for approving the certification of the Trust Administration Class is clearly erroneous on its face" and that the class does not satisfy the Rule 23(a) commonality requirement as set forth in *Wal-Mart*. (Pet.

11-12.) This flawed argument does not warrant review by this Court.

As an initial matter, Petitioners do not identify any circuit split nor do they contend that the court of appeals' legal holding conflicts with this Court's precedent in *Wal-Mart* or any other decision. Moreover, Petitioners' assertion that "[t]here is no record that either court below conducted the slightest inquiry into the commonality required for maintenance of a class action" (Pet. 12) is plainly false. The district court conducted a commonality analysis at the fairness hearing. (App. 1411.) Likewise, the court of appeals addressed commonality at length in the *Craven* opinion. (Pet. App. 25a-27a.) Both courts below applied class certification principles fully consistent with this Court's precedent, including *Wal-Mart*, and the precedent in other circuits. Simply put, Petitioners' commonality argument does not involve any disagreement among the federal courts on the issue, but rather involves Petitioners' disagreement with the court of appeals' case-specific holding that "all of the class members' trust claims revolve around resolution of a single issue." (Pet. App. 27a.) That holding does not warrant review by the Court.

In any event, Petitioners' commonality argument is meritless. In the Claims Resolution Act, Congress expressly authorized the district court to certify the Trust Administration Class "[n]ot withstanding the requirements of the Federal Rules of Civil Procedure." CRA § 101(d)(2)(A). Thus, as the court of appeals acknowledged (Pet. App. 11a, 26a), the Trust Administration Class need not satisfy the Rule 23(a) commonality requirement described by this Court in *Wal-Mart*, but instead must satisfy only the "minimal procedural due process protection" necessary

to certify a class action consistent with the Due Process Clause of the Constitution. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Petitioners present no argument that the class certification in this case is inconsistent with due process.

Nonetheless, as the court of appeals explained, the Trust Administration Class readily satisfies both the "minimal due process" commonality requirement in *Shutts*, as well as the Rule 23(a) commonality requirement under *Wal-Mart*, because "all of the class members' trust claims revolve around resolution of a single issue—the extent of the Secretary's fiduciary obligation as trustee of the IIM accounts." (Pet. App. 27a.) The central claim of the Trust Administration Class concerns the government's mismanagement of IIM Trust assets. All class members share a common disputed legal issue with respect to that claim: the nature and scope of the government's fiduciary obligations to trust beneficiaries. Throughout this 16-year plus litigation, Plaintiffs maintained that the government's obligations and duties to manage IIM Trust assets are identical to those of a trustee at common law. The government, by contrast, has always asserted that its trust obligations and duties are substantially narrower than those of a common-law trustee. *See, e.g., Cobell VI*, 240 F.3d at 1094. Thus, the parties disagree about the fundamental fiduciary standards that govern the management of IIM Trust assets. The answer to that disputed question is not just common, but central, to all class members' mismanagement claims.

Petitioners do not dispute that this common, disputed question exists, but argue that commonality is absent because the class includes not only IIM account holders, but also any person who "had a recorded or

other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM [a]ccount." (Pet. App. 9a.) This argument fails. That second category of beneficiaries is included in the class definition because there are some Indian Trust beneficiaries who have owned trust land and *should* have IIM accounts, but never had specific accounts opened in their names because of poor government record-keeping and bureaucratic mistakes. But the fiduciary duty owed to those class members is *identical* to the duty owed to class members for whom specific IIM accounts had been opened. What legal standard governs that fiduciary duty is a common, disputed question that is central to all class members' claims. Thus, Petitioners' commonality argument is meritless.

III. PETITIONERS' OPT-OUT ARGUMENT DOES NOT WARRANT REVIEW.

Petitioners next argue that the Historical Accounting Class is improperly certified under Rule 23(b)(2) because Plaintiffs did not "prove in fact" that their claims sought injunctive or declaratory relief and that, because the class cannot be certified under Rule 23(b)(2), the district court should have permitted class members to opt out. (Pet. 13-15.)

As with their commonality argument, Petitioners do not assert the presence of a circuit split or a conflict with this Court's precedent. Instead, Petitioners' argument turns entirely on their assertion that the court of appeals erred by holding that the Historical Accounting Class satisfied the requirements of Rule 23(b)(2). That case-specific holding does not warrant review by this Court.

In any event, Petitioners' argument is meritless on multiple grounds. As an initial matter, even if Petitioners were correct that the Historical Accounting Class did not satisfy the requirements of Rule 23(b)(2), that would not be grounds to reverse the court of appeals' decision in this case. As the court of appeals noted in the *Craven* opinion, the district court certified the Historical Accounting Class "pursuant to, in the alternative, Rule 23(b)(1)(A) and (b)(2)." (Pet. 12a.) Petitioners argue only that the class is improperly certified under Rule 23(b)(2), and do not even reference the alternative certification under Rule 23(b)(1)(A). Nor could Petitioners plausibly argue that the class is improperly certified under Rule 23(b)(1)(A). Class actions such as this one, involving fiduciary duties owed to large groups of beneficiaries of a commingled trust or common trust fund, and in which multiple lawsuits create the risk of inconsistent or varying adjudications of the fiduciary's duties, are the paradigmatic example of a proper Rule 23(b)(1)(A) class. *See* Fed. R. Civ. P. 23(b)(1)(A) & advisory cmt. note, 39 F.R.D. 69, 100 (1966).

Moreover, the court of appeals correctly held that the class was properly certified under Rule 23(b)(2). As the court explained, "Rule 23(b)(2) provides for class certification where 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole.'" (Pet. App. 16a.) "Just such a circumstance presents itself here: the Secretary refused to provide an historical accounting to IIM account holders; their claim for injunctive and declaratory relief in Count I of the amended complaint applied to the Historical Accounting Class as a whole." (*Id.*)

The court of appeals further held that, because it previously determined that the Interior Department "need only provide 'the best accounting possible . . . with the money that Congress is willing to appropriate,'" any accounting ultimately obtained through injunctive relief in this case "would likely rely heavily on statistical sampling" and would uncover few if any errors. (Pet. App. 17a-18a.) As a result, the court held that the flat $1,000 payment to class members in lieu of an accounting in the settlement "is properly viewed as nonindividualized and does not run afoul of *Wal-Mart*." (Pet. App. 18a.)

Petitioners argue that this conclusion is erroneous because "[a]ny inquiry into behind [*sic*] the pleadings in this Amended Complaint would reveal that the district court was granted jurisdiction only for purposes of the settlement, and the settlement provided only for monetary payment in exchange for the right plaintiffs proposed to surrender of behalf of absent parties." (Pet. 14.) This argument is wrong. The district court *always* has possessed jurisdiction over the Historical Accounting Class claims, which were the claims on which this action was brought in 1996, and originally certified as a class action in 1997. (App. 441-43.) In the Claims Resolution Act, Congress conferred jurisdiction on the district court over the separate Trust Administration Class claims for purposes of the settlement because, unlike the Historical Accounting Class claims, the Trust Administration Class claims sought substantial money damages for trust mismanagement. CRA § 101(d)(1). Ordinarily, the Court of Federal Claims has exclusive jurisdiction over money damages claims against the United States for more than $10,000. *See* 28 U.S.C. §§ 1346, 1491.

Finally, Petitioners argue that "[r]efusing to permit [Petitioner Good Bear] to opt out of the Historical Accounting Class was a clear denial of her due process rights." (Pet. 15.) This argument is plainly meritless. Opt-outs ordinarily are not permitted in class actions certified under Rules 23(b)(1) and 23(b)(2) and the Federal Rules do not provide for opt-outs from those classes. *See Wal-Mart Stores*, 131 S. Ct. at 2558; Fed. R. Civ. P. 23(c)(2). Indeed, this case demonstrates why opt-outs are impermissible in most Rule 23(b)(1) and (b)(2) classes; if Good Bear were permitted to opt-out and proceed with her accounting claims, the government would have no reason to settle with the remaining 500,000 class members. This is so because the IIM Trust is a commingled trust: the government pools the income that it collects for hundreds of thousands of beneficiaries into a single trust account at the Treasury and invests their pooled income in government securities and in other financial instruments. Hence, an accounting for *one* beneficiary of the IIM Trust would require an accounting for *each* of the half-million or more beneficiaries of the Trust. Thus, given the low likelihood that class members could receive meaningful injunctive relief in light of the court of appeals' prior holdings in this case (Pet. App. 17a-18a), the court of appeals correctly rejected Petitioner Good Bear's argument that the denial of an opt-out right for the Historical Accounting Class violated her due process rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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