No. 09-846

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

TOHONO O'ODHAM NATION,
Respondent.

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

BRIEF IN OPPOSITION

RAYMOND M. BENNETT
KILPATRICK STOCKTON LLP
3737 Glenwood Avenue
Suite 400
Raleigh, NC 27612
919-420-1700

KEITH M. HARPER
Counsel of Record
G. WILLIAM AUSTIN
CATHERINE F. MUNSON
KILPATRICK STOCKTON LLP
607 14th Street, N.W.
9th Floor
Washington, D.C. 20005
kharper@kilpatrickstockton.com
202-824-1448

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

Counsel for Respondent

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QUESTIONS PRESENTED

I. Whether 28 U.S.C. § 1500, which is intended to prevent duplicative lawsuits against the United States, deprives the Court of Federal Claims (CFC) of jurisdiction over a claim that seeks relief different from that requested in a suit pending in another court, even if such an interpretation would compel a litigant to pursue one form of relief and to abandon another form.

II. Whether for purposes of 28 U.S.C. § 1500, the Tohono O'odham Nation's complaint in the district court asserting a claim for an equitable accounting and restatement of its trust accounts seeks the same relief as requested in the Nation's complaint in the CFC seeking money damages for the government's failure to maximize the return on those trust assets.

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INTRODUCTION

The government fails to establish any "compelling" reason that satisfies this Court's exacting requirements for certiorari. Sup. Ct. R. 10. The principal issue the government raises in its petition challenges a rule settled since 1956. *Casman v. United States*, 135 Ct. Cl. 647 (1956), held that 28 U.S.C. § 1500 does not bar the filing of a suit in the Court of Federal Claims ("CFC") when it seeks relief different from that requested in a suit pending in another court. This Court declined to repudiate that rule or even cast doubt on it in *Keene Corp. v. United States*, 508 U.S. 200 (1993), and the Federal Circuit (the only court of appeals charged with interpreting the statute) reaffirmed the rule in a considered en banc decision in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994). Although this Court has not itself passed on *Casman* and *Loveladies*, it has noted the particular importance of settled law in the interpretation of § 1500. *See Keene*, 508 U.S. at 210-14. And in the more than half a century *Casman* has been the law, Congress has not taken any action to overturn it, but instead has adopted the rule through reenactment. Lower courts have applied the rule without mishap, indeed without the "significant adverse consequences" (Pet. 30) claimed by the government. Further, parties, including respondent Tohono O'odham Nation (the "Nation"), have acted in reliance upon the settled rule. Therefore, review is not warranted to entertain the government's argument that a statute intended only to prevent "duplicative lawsuits" against the United States, *Keene*, 508 U.S. at 216, should instead be applied to compel litigants to pursue only one form of relief and to abandon another form, even if completely different.

Nor is this Court's review warranted to consider whether the Federal Circuit properly applied the settled *Casman/Loveladies* rule to the specific facts presented in this case. Consistent with this settled rule, the Federal Circuit held that § 1500 does not bar the Nation's complaint in the CFC for money damages for failure to maximize the return on its trust assets because it does not seek the same relief as its complaint pending in the district court for an equitable accounting and restatement of its accounts. The only issue on which the majority and dissent below disagreed was the fact-specific question of how to interpret the two complaints; there was no disagreement on the law. Further, there was no dissent from the decision to deny the government's petition for rehearing en banc. This Court's review is not warranted to consider whether the Federal Circuit properly applied a settled rule of law on which the only disagreement in the court below involved the facts.

The other concerns the government raises are misplaced. Whether the Court should overturn the long-settled, and recently reaffirmed, precedent in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966), holding that a later-filed action in the district court does not deprive the CFC of jurisdiction under § 1500, is simply not presented in this case. And the decision below will not result in significant waste of judicial resources or inconsistent decisions. To the extent there is a risk of duplicated effort (and there is no reason to believe there would be), that risk may be eliminated through the use of case management techniques commonly employed in the litigation of related, complex cases and the application of traditional principles of comity, collateral estoppel, and res judicata.

COUNTERSTATEMENT

A. The Statute.

The history of § 1500 is straightforward and important to an understanding of the issues raised in the petition. During the Civil War, Congress passed the Captured and Abandoned Property Act of 1863, ch. 120, 12 Stat. 820, which allowed property in the Confederate states to be seized and used by the government to further the war effort. *UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1017 (Fed. Cir. 1992) (en banc), *aff'd sub nom. Keene, supra.* Claimants to the confiscated property (usually cotton) could recover any proceeds from its sale by filing a claim in the Court of Claims (the forerunner to the CFC), provided they could establish they had not "aided or provided comfort" to participants in the rebellion. *Id.*

When these so-called "cotton claimants" had difficulty meeting the statutory condition that they had not given comfort to the Confederacy, they resorted to separate suits in state and federal district courts on tort theories (like conversion) directly against the federal officials. *Keene*, 508 U.S. at 206. Although the claimants invoked different legal theories in each court (a statutory claim in the Court of Claims and a tort claim in the district court), in both courts the claimants sought to recover the same money for the same wrongful conduct. It was these "duplicative lawsuits" that induced Congress to enact the predecessor to § 1500 in 1868. *Id.*; *see* Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77.[1]

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1. The subsequent statutory history is explained in *UNR*, 962 F.2d at 1017-19.

Section 1500 provides, in relevant part, that "[t]he United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. Although the statute requires a comparison of the "claims" filed in each court, the "exact nature of the things to be compared is not illuminated . . . by the awkward formulation of § 1500." *Keene*, 508 U.S. at 210. Consequently, this Court and others have turned to "earlier readings of the word 'claim' as it appears in this statute" to determine the meaning of the term. *Id.*

Courts have long defined "claim" in terms of the operative facts involved and the relief sought. *See Keene*, 508 U.S. at 212 (Section 1500 requires dismissal of the CFC action when "the plaintiff's other suit [is] based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested.") (citing *Corona Coal Co. v. United States*, 263 U.S. 537 (1924); *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86 (1924)). With respect to the operative facts, the test does not depend on the legal theories underlying the claims. The Court of Claims' decision in *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940), rejected the argument that an action should avoid dismissal under § 1500 where "[t]he only distinction between the two suits" was "that the action in the District Court was made to sound in tort and the action in this court was alleged on contract." *Keene*, 508 U.S. at 212 (quoting *British Am. Tobacco*, 89 Ct. Cl. at 440). Because this interpretation of § 1500's immediate predecessor represented "settled law" when Congress reenacted the

"claim for or in respect to which" language in 1948, this Court held that the presumption applies that "Congress was aware of the earlier judicial interpretations and, in effect, adopted them." *Keene*, 508 U.S. at 212.

With respect to relief, the Court of Claims first held in 1956 that § 1500's bar on duplicative lawsuits does not extend to claims for different relief. *See Casman*, 135 Ct. Cl. 647. In *Casman*, a government employee sued for reinstatement to his position with the government in district court, and while that suit was pending, filed suit in the Court of Claims for back pay. At the time, the claim for back pay fell exclusively within the jurisdiction of the Court of Claims, but that court did not have jurisdiction to restore the plaintiff to his position. *Id.* at 649-50. The court denied the government's motion to dismiss under § 1500. Although the two suits involved the same wrongful conduct, the court held the claims were distinguished by the different form of relief each sought. *Id.* at 650.

Since *Casman*, the Court of Claims (and later the Federal Circuit) have consistently applied this principle. *See, e.g., Boston Five Cents Sav. Bank, FSB v. United States*, 864 F.2d 137 (Fed. Cir. 1988); *Truckee-Carson Irrigation Dist. v. United States*, 223 Ct. Cl. 684 (1980); *Allied Materials & Equip. v. United States*, 210 Ct. Cl. 714 (1976). In *UNR*, the Federal Circuit chose "to revisit the jurisprudence" regarding § 1500 and, in so doing, declared "overruled" a number of cases raising issues that were not presented in *UNR*, including *Casman*. *UNR*, 962 F.2d at 1021, 1022 n.3. This Court rejected that approach in *Keene*: Because the issue was not presented on the facts of the case, the Court concluded

it did not need "to consider, much less repudiate," the rule in *Casman* that two actions based on the "same operative facts, but seeking completely different relief," do not implicate § 1500. *See Keene*, 508 U.S. at 212 n.6, 216.

One year later, the Federal Circuit sitting en banc in *Loveladies* analyzed, in light of this Court's decision in *Keene*, the cases interpreting § 1500 and concluded that "we have consistently tested claims against both the principle established in *Casman* and that established in *British American*." 27 F.3d at 1551. Thus,

> [t]aken together, these tests produce a working definition of "claims" for the purpose of applying § 1500. For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from *the same operative facts*, and must seek *the same relief*.

Id. (emphases in original). If either requirement is missing, § 1500 does not apply. *Id.* at 1551-52. The Federal Circuit and the CFC have consistently applied this rule since 1994[2] and this was the well-settled rule at the time the Nation filed its two complaints.

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2. *See, e.g.*, *Harbuck v. United States*, 378 F.3d 1324 (Fed. Cir. 2004); *Agustin v. United States*, 92 Fed. App'x 786 (Fed. Cir. 2004); *United States v. County of Cook, Ill.*, 170 F.3d 1084 (Fed. Cir. 1999); *55 Motor Ave. Co. v. United States*, 194 F.3d 1332 (Fed. Cir. 1999); *Richmond, Fredericksburg Potomac R.R. Co. v. United States*, 75 F.3d 648 (Fed. Cir. 1996); *Dico v. United States*, 48 F.3d 1199 (Fed. Cir. 1995); *d'Abrera v. United States*, 78 Fed. Cl. 51 (2007); *Cooke v. United States*, 77 Fed. Cl. 173 (2007); *OSI, Inc. v. United States*, 73 Fed. Cl. 39 (2006).

B. The Complaints.

The Tohono O'odham Nation is a federally recognized Indian tribe located in southwestern Arizona. Nearly three million acres of its non-contiguous tribal land comprise the second largest Indian reservation in the United States. These lands produce copper, other minerals, sand, and gravel and are leased to third parties and the government for rights-of-way, business uses, and other purposes. The United States acts as trustee both for these tribal lands and mineral rights as well as for substantial monies and other assets belonging to the Nation and held in trust.

On December 28 and 29, 2006, the Nation filed two different complaints against the government for breach of its trust duties – the first in the District Court for the District of Columbia and another in the CFC. Each complaint sought to remedy different wrongful acts by the government (involving different operative facts) and sought different relief. The Nation filed two actions because, in light of jurisdictional limitations on the district court and the CFC, both actions were necessary to provide the Nation with full and complete relief for all of the government's wrongful conduct.

1. District Court Complaint.

In the district court, the Nation alleged the government had failed ever to provide a complete and accurate accounting of *all* property held in trust by the United States and demanded the equitable remedy of an accounting of all of its trust assets. App. 74a-75a. The duty to provide an accounting, one of the most basic

duties a trustee owes a beneficiary, requires a full disclosure and description of each item of property constituting the corpus of the trust. The relief is only available in the district court. *See Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483 (1966). The District Court Complaint cited decades of inaction on the part of the United States in disregard of its fundamental duty to account and the government's failure to maintain adequate records to permit the Nation to ascertain the true state of its trust assets. App. 84a-87a.

In Count One of the District Court Complaint, the Nation requested declarations that (1) the government owes a fiduciary duty to provide a complete and accurate accounting of all funds and assets, and (2) defendants are in violation of that duty. App. 89a-90a. In Count Two, the Nation requested injunctive relief directing defendants to provide such an accounting and to comply with their other fiduciary duties as determined by that court. *Id.* at 91a. To the extent the accounting uncovered errors in the account balances, the Nation requested "restatement of the Nation's trust fund account balances" to move funds in the trust from the incorrect to the correct accounts, as well as "any additional equitable relief that may be appropriate." *Id.* at 74a, 91a.

Even if the Nation prevails in the district court and obtains a correct restatement of its accounts, this will not compensate the Nation for the government's failure prudently to manage and invest the trust assets for more than 100 years. Redressing that wrongful conduct requires the proof of different operative facts and leads to a distinct remedy: damages. Accordingly, the Nation filed a separate suit in the CFC.

2. CFC Complaint.

In the CFC, the Nation sought money damages for losses it suffered as the result of the United States' breach of its fiduciary duties to maximize trust income by prudent investment and to obtain fair and reasonable compensation for the use of the Nation's non-monetary assets. App. 58a. The Nation sought only money damages for returns that should have been, but never were, earned due to the government's failure of prudent management and investment. *Id.* at 72a-73a. It did not request an accounting of any kind or other equitable relief. *See id.*

The CFC Complaint alleged four separate claims for damages arising from the government's failure prudently to manage and invest the Nation's trust assets. Count I alleged mismanagement of the mineral rights on the land the United States holds in trust for the Nation, including approving leases and issuing permits for interests in mineral rights for less than fair market value and failing to collect fair and reasonable compensation for the benefit of the Nation. App. 67a-68a. Count II alleged similar mismanagement of the Nation's non-mineral interests in its trust land, including easements, rights-of-way, and land and building leases. *Id.* at 69a-70a. Count III alleged failure to maximize trust income through mismanagement and failure prudently to invest the principal and earnings of judgment funds (*i.e.*, funds appropriated to satisfy court judgments). *Id.* at 70a-71a. Finally, Count IV alleged failure to maximize trust income through mismanagement and failure prudently to invest the principal and earnings of other funds held in trust for the Nation. *Id.* at 71a-72a.

C. Proceedings Below.

1. The government moved in the CFC to dismiss the Complaint for lack of subject-matter jurisdiction pursuant to 28 U.S.C. § 1500. The Nation raised two arguments in opposition to the government's motion. First, it argued that the operative facts – those that described the wrongful conduct giving rise to the claim as opposed to the "background facts" that provided the context for the claim – were different in each case. *See Loveladies*, 27 F.3d at 1550 (operative facts were the same where "the two suits involved the same conflict between the same parties"); *d'Abrera*, 78 Fed. Cl. at 58 (claims arising from different "conduct" were not the "same claim"). In the district court, where the Nation sought to compel the government to provide a complete accounting, the operative facts related to the government's failure ever to fulfill this fundamental obligation. Although the District Court Complaint referred to other background facts, they were not operative facts with respect to the accounting claim. In the CFC, by contrast, the Nation brought claims based on different operative facts – the failure of the United States to maximize trust income by prudent investment and to obtain fair and reasonable compensation for the use of the Nation's land and other assets. The Nation argued where, as here, two suits involve different operative facts and different wrongful conduct, § 1500 does not bar CFC jurisdiction.

Second, the Nation argued that § 1500 did not apply because it sought different relief in each court. In the district court, the Nation sought the equitable remedies available only in that court for the government's failure

to account: an order directing the government to provide the required accounting and other appropriate equitable relief including restatement of the Nation's accounts to correct the balances in accordance with the accounting. In the CFC, by contrast, the Nation did not request an accounting but sought only money damages to compensate it for money that should have been, but was never, earned as a result of the government's imprudent management and investment.

2. The CFC rejected the Nation's arguments and granted the government's motion to dismiss. Rather than examining the operative facts alleged in each complaint, the trial court inquired: "[a]s a practical matter, will the same background facts be relevant?" App. 49a. Accordingly, it compared, not the operative facts, but all of the factual allegations in the two complaints. *See id.* at 33a-37a. On the basis of its assessment of background facts, the court concluded that "there can be no meaningful dispute" that "the operative facts asserted in the complaint are, for all practical purposes, identical," and that there is "virtually 100% overlap" in the facts. *Id.* at 48a-49a.

With respect to relief, the CFC concluded there was "overlap" between the requests for relief because it believed the Nation sought a "full accounting" and "money" in both courts. App. 41a, 49a. As to the accounting, the court acknowledged that under "none of its broader jurisdictional grants does [the CFC] have general equitable powers" and that the court cannot order a pre-liability equitable accounting as "stand-alone relief." *Id.* at 40a. Nonetheless, the court concluded that an "accounting" would be "unavoidable" in the CFC

because an "accounting in aid of judgment," a procedural tool at the court's disposal to help to determine damages, would surely be necessary (even if the Nation never actually requested it). *Id.* at 40a, 55a.

As to monetary relief, the trial court concluded there were overlapping requests for money in both courts. Because the court interpreted the Nation's request in the district court for other appropriate equitable relief to include the same money damages the Nation sought in the CFC (App. 53a & n.14), the court concluded there was "virtually 100 percent overlap" between the relief sought in the two complaints. *Id.* at 49a.

3. The Federal Circuit reversed, holding that § 1500 does not apply because the two complaints do not seek the same relief.[3]

The Court of Appeals emphasized "it is the relief the plaintiff *requests* that is relevant under § 1500." App. 15a (citing *Keene*, 508 U.S. at 212). Examining the prayers for relief in each complaint, the Court of Appeals distinguished between the Nation's claims in the district court for equitable relief in the form of an equitable accounting, restatement of accounts, and other appropriate equitable relief in connection with the

3. Accordingly, the panel did not address the Nation's argument that its complaints also arise from different operative facts, which was an independent basis to reverse the CFC. The government errs in suggesting (Pet. 15 n.2) that the Court of Appeals "accepted *arguendo*" the determination that the operative facts in the Nation's two complaints "are the same." Given its holding, the Court of Appeals simply did not need to address this issue.

accounting, on the one hand, and in the CFC for money damages "for the injuries and losses . . . resulting from the United States' failure to properly manage the Nation's assets to obtain the maximum value," on the other. App. 10a-12a.

The court rejected the CFC's identification of two areas of "what looks like overlapping relief." App. 12a (citation omitted). First, it concluded that to the extent both complaints seek to recover relief in the form of money, the complaints do not seek the same money. *Id.* at 12a-13a. In the district court, the Nation requested a restatement of its trust account balances "to reflect the correct amounts to correct any errors discovered in the accounting." *Id.* at 13a. The court held that this request was for "old money," or "money that is already in the government's possession, but that erroneously does not appear in the Nation's accounts." *Id.* By contrast, the Nation sought "new money" in the CFC as "damages for the injuries and losses" resulting "from the United States' failure to properly manage the Nation's assets to obtain maximum value." *Id.* The damages sought in the CFC were "essentially consequential damages – profits that the Nation would have made but for the United States' mismanagement." *Id.*

The Court of Appeals emphasized that the relief requested in each court posed "no risk of double recovery." App. 18a. In the CFC, the Nation sought only "'new money' damages – relief that the Nation has not requested in district court, and which the district court is, in any event powerless to award." *Id.* (citing 5 U.S.C. § 702). Conversely, the court held, the Nation's

complaint in district court sought an equitable accounting and restatement – "separate equitable relief, which the Court of Federal Claims is powerless to award." *Id.*

The Court of Appeals also rejected the government's argument that the Nation had requested an accounting in both courts. App. 15a. In the CFC, the Nation's prayer for relief requested damages, not an accounting. Merely because the CFC could employ an accounting in aid of judgment if the Nation were to satisfy its burden of proving liability in the CFC did not "transform the Nation's unambiguous request for damages into a request for an accounting." *Id.*

Judge Moore dissented but did not disagree with the majority's holding on the law. Instead, while acknowledging that it would be possible to craft two complaints to avoid § 1500 by requesting "old money" in one court and "new money" in the other, Judge Moore read the Nation's CFC Complaint more broadly than the majority to include requests both for "old" and "new" money. App. 23a-24a.

The government filed a combined petition for panel rehearing and rehearing en banc. Both aspects of the petition were denied without dissent.

REASONS FOR DENYING THE PETITION

The decision of the Federal Circuit does not conflict with any decision of this Court or any other court of appeals nor does it present any other compelling reasons for certiorari. Therefore, the petition should be denied.

I. REVIEW IS NOT WARRANTED TO RECONSIDER THE WELL-SETTLED RULE THAT SECTION 1500 DOES NOT BAR SUITS THAT SEEK DIFFERENT RELIEF.

Despite failing to ask the Court of Appeals to revisit its precedent, the government argues for the first time here that this Court should grant review in order to overturn the rule adopted in *Casman* and reaffirmed by the Federal Circuit sitting en banc in *Loveladies*. Contrary to more than five decades of precedent in the lower courts, the government argues that § 1500 precludes jurisdiction when "a plaintiff has a second suit pending that is based on substantially the same operative facts as the CFC claim, even if the other suit seeks different relief." Pet. 15. This Court's review is not warranted to revisit the rule in *Casman*.

A. The Same Relief Requirement Is Settled Precedent That Does Not Warrant This Court's Review.

It was settled law at the time the Nation filed its complaints that two suits seeking different relief do not implicate § 1500. Overturning that rule in this case would upset the reasonable expectations of the Nation,

as well as many other litigants that have filed complaints in reliance on that rule. The Court of Claims settled the issue in *Casman* in 1956 and the courts have consistently applied this principle since then. *See, e.g.*, *Boston Five Cents*, 864 F.2d 137; *Truckee-Carson*, 223 Ct. Cl. 684; *Allied Materials*, 210 Ct. Cl. 714; *see also* note 2, *supra*. Although the Federal Circuit questioned the rule in *dicta* in *UNR*, this Court declined to repudiate *Casman* in *Keene*, the Federal Circuit sitting en banc reaffirmed the rule more than 15 years ago in *Loveladies*, and since then, the CFC and the Federal Circuit have applied the rule several dozen times.

As this Court has recognized, "considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the courts] have done." *Shepard v. United States*, 544 U.S. 13, 23 (2005) (brackets in original) (citation and quotations omitted); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (refusing to reverse settled interpretation of statute of limitations governing suits in the CFC). In this case, Congress has "long acquiesced," *John R. Sand & Gravel*, 552 U.S. at 139, in the interpretation of § 1500 set forth in *Casman* and *Loveladies*. Indeed, it has not taken action to overturn the rule in the nearly 55 years since *Casman* or in the more than 15 years since *Loveladies*.

Beyond that, settled precedent is accorded particular weight in the interpretation of § 1500. As this Court recognized in *Keene*, the "exact nature of the things to be compared is not illuminated . . . by the

awkward formulation of § 1500." 508 U.S. at 210. Therefore, "earlier readings" of the statute (including those of the Court of Appeals) take on particular importance in the interpretation of this statute. *Id.* In *Keene*, the Court followed the decision of the Court of Claims in *British American Tobacco*, which had "settled a key question" regarding whether two actions based on different legal theories were enough to avoid § 1500's bar. *Id.* at 211. In the same way here, it has long been the settled rule in the Federal Circuit (the only Court of Appeals charged with interpreting the statute, *see* Pet. 30 n.8) that § 1500 does not apply where two suits seek different relief.

Congress has taken no action to reverse the rule, and in fact, has adopted it. *Casman* was established law when Congress "reenacted" § 1500 in 1982 to change the name of the court to which it applied. *See* Federal Courts Improvement Act of 1982, § 133(e)(1), 96 Stat. 40 (substituting the "United States Claims Court" for the "Court of Claims"). As this Court held in *Keene*, where there is "no reason to doubt" that a case represents "settled law" at the time Congress reenacts it, the "presumption" applies "that Congress was aware of these earlier judicial interpretations and, in effect adopted them." *Keene*, 508 U.S. at 212; *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).[4] As *Keene* makes clear, Federal Circuit cases can establish settled precedent for purposes of § 1500.

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4. Congress amended § 1500 again on October 29, 1992 to substitute "Court of Federal Claims" for "Claims Court." Court of Federal Claims Technical and Procedural Improvements Act

(Cont'd)

Therefore, this Court should decline to revisit this settled rule.

B. The *Casman* Rule Is Consistent With The Text And Purposes Of Section 1500.

In any event, this Court's review is not warranted because the government's reading of § 1500 is wrong. According to the government, if a litigant can obtain complete relief only by filing complaints in two different courts, § 1500 requires the litigant to make a choice between relief. Pet. 19 (§ 1500 requires "a plaintiff to elect between a CFC claim and a factually related suit seeking 'different relief'"). As the Court of Claims in *Casman* described the choice the government seeks to impose: "'If you want your job back you must forget your back pay'; conversely, 'If you want your back pay, you cannot have your job back.'" 135 Ct. Cl. at 650. That reading would destroy the careful and logical judicial development of § 1500 explained above and replace it with a result that Congress did not intend.

(Cont'd)

of 1992, § 902(a), 106 Stat. 4516. Although the Federal Circuit purported to overrule *Casman* in *dicta* on April 23, 1992, Keene filed a petition for writ of certiorari on July 22, 1992, and this Court granted the petition on October 19, 1992. Therefore, the Federal Circuit's ruling in *UNR* purporting to overrule *Casman* was in no way a "settled judicial construction" at the time of reenactment. *See Keene*, 508 U.S. at 212-13 ("presumption does not apply when there is no 'settled judicial construction' at the time of reenactment").

As this Court recognized in *Keene*, 508 U.S. at 206, the statute's bar on "duplicative lawsuits" is illustrated by the circumstances that led to enactment of the statute in 1868. The statute was enacted to prevent cotton claimants from having two "bites at the apple" when suing to recover for confiscated property in two different courts. Those suits involved the same wrongful conduct and sought the same relief. *See id.* at 206-207. "It was these duplicative lawsuits that induced Congress" to enact § 1500. *Id.* at 206. The purpose was to require a litigant to elect a single forum in which to seek a given remedy. *See Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1564 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989).

Contrary to the government's expansive reading of § 1500, the statute was not designed to compel litigants to choose between relief available only in one court and that available only in another. No case has ever applied § 1500 in such a way to make it impossible for a plaintiff to craft his complaints to obtain full and complete relief. *See Johns-Manville*, 855 F.2d at 1564 ("[Section 1500] was intended to force an election where both forums could grant the same relief, arising from the same operative facts."); *Allied Materials*, 210 Ct. Cl. at 716 ("In neither court could [the plaintiff] combine all its claims. In these circumstances Sec. 1500 does not [apply]."); *Casman*, 135 Ct. Cl. at 649 ("Here the plaintiff obviously had no right to elect between courts."). Nor does the government identify any basis in the statutory text or congressional purpose for such an inequitable result.

The effect of the government's reading would be to deny litigants the ability to pursue legitimate claims. For example, a litigant would be forced to decide whether to seek reversal of an unlawfully denied permit in the district court, or money damages resulting from the unlawful denial in the CFC, but could not obtain both. *See Loveladies*, 27 F.3d at 1545. Other litigants would have to decide whether to forego injunctive relief to prevent future harm in order to obtain money damages for past harm. *See, e.g.*, *Boston Five Cents*, 864 F.2d at 139-40; *Truckee-Carson*, 223 Ct. Cl. 684. Or, as in this case, a tribe would have to decide whether to seek a general accounting to secure information about its trust assets or to abandon that right in favor of a suit for money damages.[5] Such a result finds no support in the text, purpose, or precedent of § 1500.

Contrary to the government's assertions (Pet. 15-19), the text of the statute does not support this dramatic departure from established precedent. The government argues that the statute, which is triggered by (1) "any suit or process" (2) "for or in respect to" the plaintiff's "claim" in the CFC, must be read to apply whenever a litigant has another suit pending that is "*associated in any way*" with the CFC claim. Pet. 15-17 (emphasis added).

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5. It is of no consequence that a litigant could file a suit first in the district court on the hope that when final judgment issues, the six-year Tucker Act limitations period will not have expired. That would merely invite the government to stall the district court action to block access to the monetary claim.

That the statute applies to "any suit or process" is unremarkable. The phrase refers to the nature of the proceedings outside the CFC that might trigger § 1500. *See UNR Indus., Inc. v. United States*, 920 F.2d 916, 917 (Fed. Cir. 1990) ("There can be no doubt that a petition for writ of certiorari is a 'suit or process' within the meaning of § 1500."). It does not define or expand the nature of the claims that must be compared.

With respect to the second phrase, this Court already declined in *Keene* to adopt the government's expansive reading of that phrase. There, the government argued that a suit is "in respect to" a claim in the CFC if it is merely a "related action." Brief of United States at 16, Keene v. United States, 508 U.S. 200 (1993) (No. 92-466). This Court rejected the government's proffered standard. Instead, the Court held the suit must be "based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested." 508 U.S. at 212. To be sure, the "in respect to which language" makes clear that Congress did not intend the statute "to be rendered useless by a narrow concept of identity." *Id.* at 213. But distinguishing between claims that seek different relief hardly renders the statute "useless." Furthermore, as the Federal Circuit recognized in *Loveladies*, "[v]iewing claims as related to the nature of the relief sought is unremarkable." 27 F.3d at 1550. And using "differing relief as a characteristic for distinguishing claims [is] especially appropriate here, because the [CFC] and its predecessors have been courts with limited authority to grant relief." *Id.*

Finally, the government is incorrect that requiring plaintiffs to "elect between suing in the CFC and suing in another court" on a different legal theory is "not materially different" from requiring a plaintiff to elect between two suits seeking "different relief." Pet. 19-20. The former rule holds that § 1500 applies where a plaintiff pursues the same relief in two courts by merely attaching a different legal label to the cause of action. The latter rule holds that litigants must elect one remedy and abandon another, which does not serve the statute's purpose to preclude "duplicative lawsuits." *Keene*, 508 U.S. at 206.

C. Even If The Court Were Inclined To Review The Same Relief Requirement, This Case Is A Poor Vehicle For Doing So.

There are other reasons this Court's review is not warranted to revisit the settled interpretation of § 1500 regarding the same relief requirement. First, the government never asked the appellate panel or the en banc court to revisit and overturn *Casman* and *Loveladies*. Even if the argument is not waived because it is jurisdictional, review is not warranted here because "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (citation omitted); *see also Adams v. Robertson*, 520 U.S. 83, 91 (1997) (Requiring litigants to raise arguments in the lower courts "assists us in our deliberations by promoting the creation of an adequate factual and legal record" and gives the parties the opportunity to "test and refine their positions before reaching this Court.").

Second, different from many other cases that, without dispute, involve claims for different relief but the same operative facts (and therefore present an opportunity to review only the rule in *Casman* and *Loveladies*), in this case, the Nation also contends that the two cases do not involve the same wrongful conduct on the part of the government (or operative facts). *See* pp. 10, 12 n.3, *supra*. This argument presents an independent basis to reverse the CFC. Therefore, if review were granted and the Federal Circuit were reversed, this issue would still need to be addressed by this Court or the court below.

II. REVIEW IS NOT WARRANTED TO CONSIDER WHETHER THE FEDERAL CIRCUIT CORRECTLY APPLIED A SETTLED RULE TO THE PARTICULAR COMPLAINTS IN THIS CASE.

The government also challenges the Federal Circuit's fact-bound application of the settled rule in *Casman* and *Loveladies* to the particular relief requested in the Nation's complaints. Pet. 20-25. However, "a petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." S. Ct. R. 10. This is not one of those rare cases.

As an initial matter, although the government highlights the dissenting opinion (Pet. 23-24), it fails to mention that the dissent did not disagree with the majority's reading of the law; it merely disagreed with the majority's reading of the complaints. *See* App. 14a ("The dissent acknowledges that it would be possible to craft two complaints to avoid § 1500 by requesting

'old money' in one, and 'new money' in the other."); *id.* at 23a (Moore, J., dissenting) ("It seems plausible that carefully drafted complaints could distinguish particular pots of money as different relief."). Such a fact-bound interpretation of the two complaints in this case is not appropriate for this Court's review.

The government raises several other challenges (not made in the dissent) to the Federal Circuit's application of the rule in *Casman* and *Loveladies* to the particular facts of this case. First, it argues that if suits for different relief do not trigger § 1500, then the bar may be avoided only if a litigant (as in *Casman*) seeks solely injunctive relief in one court and monetary relief in the other. If both suits seek any relief in the form of money – irrespective of any differences in the categories or amounts of money requested – § 1500 applies. Pet. 21. Therefore, the government concludes, the Federal Circuit erred by concluding that "monetary relief in the CFC and monetary relief in district court are 'completely different' for purposes of Section 1500." *Id.*

The lower court correctly rejected as wholly unsupported that "sweeping rule." App. 9a. Where the plaintiff requests relief in the form of money in each case, the "relief sought" is the same only where the same money is at issue. Otherwise, the government is not subjected to a risk of double liability. *See id.* at 9a, 18a; *Dico*, 48 F.3d 1199 (holding that § 1500 applies where the amount of money requested in both judicial fora was identical, and represented the identical measure of compensation); *Cooke*, 77 Fed. Cl. at 178 (no risk of double liability where relief could be granted in each

case for different form and measure); *OSI*, 73 Fed. Cl. at 45 (two claims were not the same when each sought different measure and amount of money).

This application of the rule is not "inconsistent" with this Court's decision in *Keene*. Pet. 20, 21. To be sure, the Court held in that case that the rule in *Casman* was inapplicable because Keene sought "monetary relief" in both the CFC and the district court. 508 U.S. at 216. But in *Keene*, the plaintiff's suits did not merely seek recovery of monetary relief; they sought recovery of the *same* money, at least in significant part – reimbursement for payments made to individuals claiming injury or death due to asbestos products supplied in accordance with government specifications. *Id.* at 203-05.

In contrast, in this case the Federal Circuit accurately concluded that the equitable relief the Nation requested in connection with the accounting (an adjustment of its account balances to reflect the correct amounts) "is not the same as the 'damages for the injuries and losses' that the Nation has requested in the [CFC] . . . resulting from the United States' failure to properly manage the Nation's assets to obtain the maximum value." App. 13a. The former is a request for the "return of 'old money' that belongs to the Nation but erroneously does not appear on its balance sheet" while the latter seeks "damages in the form of 'new money' that the Nation should have earned as profit but did not." *Id.* at 13a-14a. Since the suits do not seek the same money at all, § 1500 does not apply. *Id.*

Nor is the government correct that the Federal Circuit's holding depends upon a "technical law-equity distinction." Pet. 21. It is true the Federal Circuit recognized the "careful separation of equitable relief and money damages is critical to the analysis" in this case. App. 12a. But that is not because it is "dispositive" that one complaint demands equitable relief while the other seeks money damages,[6] Pet. 21; rather, it is because the Nation's careful tailoring of the relief requested in each complaint, consistent with the jurisdiction of each court, is relevant to the determination whether the relief sought in this case is "duplicative." *Keene*, 508 U.S. at 206.

The Federal Circuit recognized in this case there is "no risk of double recovery" because the Nation tailored its requests for different relief in each court to the jurisdiction of each court to award the relief. App. 18a. Specifically, it requested "damages" in the CFC to compensate it for the failure of the United States properly to manage the Nation's assets to obtain the maximum value. *Id.* at 13a. The Nation did not request that compensatory relief (or "new money") in the district

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6. The government claims that this Court would have reversed rather than affirmed in *Keene* if the Federal Circuit's holding were correct because Keene sought to be reimbursed for the same money through the equitable remedy of indemnification/contribution in the district court and contract damages in the CFC. Pet. 22. Even if the government's characterization of the relief sought in *Keene* is correct, as noted above, § 1500 applied to bar Keene's claim because he sought *the same money* in both courts, thus subjecting the government to the risk of double recovery. Different from *Keene*, in this case there was "no risk of double recovery." App. 18a.

court, which is, "in any event, powerless to award" it. *Id.* at 18a; *see* 5 U.S.C. § 702 (excluding district court actions seeking "money damages" from waiver of sovereign immunity). On the other hand, the Nation specifically limited the relief it sought in the district court (consistent with that court's jurisdiction) to an equitable accounting and restatement of its accounts – specific relief (including the return of "old money") that is not duplicative of the compensatory damages sought in the CFC. *See* App. 18a. Thus, what is dispositive is not whether the two complaints seek equitable or legal relief, but whether the two complaints seek duplicative relief in the form of the same money in both courts.

Finally, the government argues that the Nation's suits seek the same relief because an "accounting" may "be necessary" in the CFC. Pet. 24. That is incorrect for two reasons. First, as the Federal Circuit recognized, there is no request for an accounting in the CFC Complaint and it is the relief the plaintiff "*requests*" that matters under § 1500. App. 15a (citing *Keene*, 508 U.S. at 212). Second, the government's argument reflects a fundamental misunderstanding of the pre-liability equitable accounting sought (and only available in) the district court and the accounting in aid of judgment, which is a litigation tool available to the CFC to calculate an award of damages. The pre-liability equitable accounting that is the gravamen of the District Court Complaint is principally informational and will require the government to render a detailed account of all of the lands, funds, and resources it holds in trust. G. Bogert *et al.*, *The Law of Trusts and Trustees* § 963 (2d ed. 1983) ("The trustee . . . owes his beneficiary a duty to render at suitable intervals . . . a formal and

detailed account of its receipts, disbursements, and property on hand, from which the beneficiary can learn whether the trustee has performed his trust and what the current status of the trust is."). The obligation to account exists irrespective of any showing of liability or entitlement to damages; it is a freestanding and fundamental trust obligation of the trustee without precondition. *Id.* An accounting in aid of judgment (which was not requested and may not be necessary in the CFC), on the other hand, is not a form of relief at all; it is a litigation tool available in the CFC to calculate an award of damages. *See Klamath & Modoc Tribes*, 174 Ct. Cl. at 491. The scope is extremely narrow; it is derivative of, and inextricably tied to, an antecedent determination of liability and therefore is confined to determining damages for the specific, proven breach of a trust duty. It does not extend to all of the property held in trust for the beneficiary or to all information necessary for the beneficiary readily to ascertain whether the trust has been faithfully carried out, as does the equitable accounting requested in the district court. Therefore, the government is incorrect to suggest in any way that the Nation has requested this relief in the CFC or that § 1500 applies to this case on this basis.

III. REVIEW IS NOT WARRANTED TO ADDRESS POLICY CONSIDERATIONS AND *DICTA* IN THE FEDERAL CIRCUIT'S DECISION.

The government also seeks review based on the Federal Circuit's *dicta* and discussions of policy considerations in the decision below. These issues provide no basis for certiorari.

A. The Time Of Filing Rule Is Not Presented Here.

First, the government objects to the Federal Circuit's observation in *dicta* that § 1500 does not actually prevent a plaintiff from filing two actions seeking the same relief for the same claims because a claimant may avoid the jurisdictional bar, pursuant to *Tecon Engineers v. United States*, 343 F.2d 943, by simply filing its CFC complaint first. Pet. 26-28. That observation does not provide a basis for this Court's review, however, because, as the government concedes (*id.* at 27 n.5), the rule adopted in *Tecon* is not presented in this case.

The Nation does not dispute that it filed its complaint in the district court one day prior to its complaint in the CFC, so the Nation's claims were pending in the district court at the time it filed its claims in the CFC. Therefore, were the Court to review the holding in *Tecon* in this case, any ruling regarding its viability would have literally no impact in this case and thus would represent an impermissible advisory opinion. *See Coffman v. Breeze Corps.*, 323 U.S. 316, 324 (1945). This Court already rejected that approach in *Keene*. As the government points out (Pet. 26), the en banc Federal Circuit once repudiated *Tecon* in *UNR*, 962 F.2d at 1021-23. But when this Court affirmed in *Keene*, it overturned this aspect of *UNR* precisely because, as here, it was "unnecessary for the Court to address the *Tecon* question in ruling on the dismissal of Keene's claims." 508 U.S. at 216 (citation and quotations omitted).

In any event, the *Tecon* rule is settled precedent that was unequivocally reaffirmed after *UNR*. *See Hardwick Bros. Co. II v. United States*, 72 F.3d 883,

886 (Fed. Cir. 1995) ("After *UNR/Keene* and *Loveladies I*, *Tecon Engineers* remains good law and binding on this court."). As with the rule in *Casman*, this rule was long-settled when Congress reenacted § 1500 in 1982 and Congress has taken no steps to overturn it in the 45 years it has been settled law. *See* pp. 16-17, *supra*. Therefore, the discussion in the lower court's decision regarding the "jurisdictional dance" required by § 1500, and the continued viability of the *Tecon* holding, provide no basis for this Court's review.

B. The Government Is Incorrect That The Federal Circuit Invoked Policy Considerations To Expand The Jurisdiction of the CFC.

Contrary to the government's contention (Pet. 28-29), the Federal Circuit did not invoke a "policy rationale" that the "nation is served by private litigation" against the sovereign that can "control the excess to which Government may from time to time be prone" to narrow the scope of § 1500 and expand the jurisdiction of the CFC. The government takes this quote out of context. This quotation is from a longer passage in *Loveladies*, which the Federal Circuit cited in response to the government's arguments that the statute's policy and purpose favor dismissal. The opinion below noted that the government's attempt to rationalize the application of § 1500 "rings hollow" and is of "no real consequence in this appeal" because the statute no longer serves its original purpose. App. 17a. For this reason, the court "ought not extend the statute to allow the Government to foreclose non-duplicative suits, and to deny remedies the Constitution and statutes otherwise provide." *Id.* at 18a (quoting

Loveladies, 27 F.3d at 1555-56). In other words, policy arguments notwithstanding, § 1500 should be read no more broadly than required by the statute's text.

There is no contradiction between this rejection of the government's policy arguments and the interpretive rule that a waiver of sovereign immunity must be strictly construed in favor of the government. First, § 1500 is not a waiver of sovereign immunity. *See Johns-Manville*, 855 F.2d at 1565 (§ 1500 is "solely jurisdictional"); *see also Lane v. Pena*, 518 U.S. 187, 192 (1996) (waivers of sovereign immunity must be "unequivocally expressed"). It is, as the government recognizes (Pet. 29), a jurisdictional limitation that is separate from the waiver of sovereign immunity in the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. § 1505. Therefore, the canon of construction that waivers of sovereign immunity must be construed in favor of the sovereign does not apply to § 1500.

Second, even if § 1500 does constitute a waiver of sovereign immunity, the canon construing such waivers in favor of the sovereign cannot simply be invoked in any circumstance to "compel a broad reading of § 1500." *Griffin v. United States*, 85 Fed. Cl. 179, 187 (2008). As this Court recognized in *Richlin Security Service Co. v. Chertoff*, 128 S. Ct. 2007 (2008), "[t]he sovereign immunity canon is just that – a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction"; instead, it must be used "in tandem" with other tools of construction. *Id.* at 2019. Thus, invocation of the canon alone will not support the imposition of limitations on the CFC's review or expansion of § 1500's

jurisdictional bar beyond its text. *See Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002); *Bowen v. City of New York*, 476 U.S. 467, 479 (1986); *Griffin*, 85 Fed. Cl. at 188 & n.6.

IV. THE GOVERNMENT'S CLAIMS OF ADVERSE CONSEQUENCES ARE EXAGGERATED AND DO NOT WARRANT THIS COURT'S REVIEW.

The government's claim that failure to review the Federal Circuit's decision would result in "significant adverse consequences" to the government (Pet. 30-31) is meritless. Although this Court has not itself reviewed and affirmed the rule in *Casman*, the lower courts have applied it regularly for more than five decades without mishap. As the government acknowledges, there is no circuit split here and little opportunity for one to develop. Pet. 30 & n.8. That fact counsels against review, not in favor of it, particularly where the decision below involves the mere application of a well-settled rule that Congress has taken no action to upset and has even adopted through reenactment. *See* pp. 16-17, *supra*.

Furthermore, the particular issue raised here – whether a tribe's claim for money damages in the CFC involves the same relief as its demand for an equitable accounting in the district court – is one of limited applicability. True, the issue is raised in a number of suits filed recently by Indian tribes in district courts seeking to compel the government finally to comply with its basic trust duty to provide an accounting, while the tribes also preserve and pursue their rights to obtain money damages in the CFC for the government's failure to invest and manage the tribes' trust assets. But this case has limited or no applicability outside the Indian trust context.

Moreover, even if the government were correct that these suits involve the same operative facts and the same relief (it is not), the decision below would not impose a "substantial litigation burden" on the United States and the courts, nor "threaten[] inconsistent judicial rulings" to permit the cases to proceed. Pet. 31. As the trial court itself recognized, if the filing dates of the complaints had been reversed and the cases had been permitted to proceed on that basis alone, the "two courts would use traditional principles of comity, collateral estoppel, and res judicata to sort out any duplication."[7] App. 55a n.16. And as in any complex litigation, courts have numerous techniques available to eliminate duplicative effort. *See Manual for Complex Litigation (Fourth)* § 20.14 (2004) (even when related cases pending in different districts cannot be joined together, judges may coordinate proceedings in a variety of ways including joint appointment of a special master, coordination of discovery, joint depositions, and making relevant discovery available in all cases). Further, either court could impose a stay in one case while the other proceeds. *See id.*; *Loveladies*, 27 F.3d at 1547 (suit in CFC was stayed pending outcome of district court litigation).

In sum, it is not the case that the government faces "significant adverse consequences" from the ruling in the court below. Therefore, this Court's review is not warranted.

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7. The courts would need to apply the same techniques if the complaints were filed seriatim, since § 1500 applies only to bar simultaneous suits, not a suit in the CFC that is the same as a suit already litigated to completion in another forum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND M. BENNETT
KILPATRICK STOCKTON LLP
3737 Glenwood Avenue
Suite 400
Raleigh, NC 27612
919-420-1700

KEITH M. HARPER
Counsel of Record
G. WILLIAM AUSTIN
CATHERINE F. MUNSON
KILPATRICK STOCKTON LLP
607 14th Street, N.W.
9th Floor
Washington, D.C. 20005
kharper@
kilpatrickstockton.com
202-824-1448

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

Counsel for Respondent