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No. 09-846

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TOHONO O'ODHAM NATION

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

REPLY BRIEF FOR THE PETITIONER

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The Federal Circuit held that 28 U.S.C. 1500—which deprives the Court of Federal Claims (CFC) of jurisdiction over "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States pending in any other court—permits respondent to maintain two simultaneous actions against the United States arising from the "same operative facts" because the actions do not seek the "same relief." The court further reasoned that the two suits do not seek the same relief, even though both request a monetary recovery, because the relief is "legal" in one action and "equitable" in the other. Pet. App. 10a-12a, 15a. As the petition explains, the Federal Circuit's decision finds no support in the text of Section 1500's broad prohibition on CFC jurisdiction; the decision's reasoning is inconsistent with this Court's interpretation of Section 1500 in *Keene*

Corp. v. *United States*, 508 U.S. 200 (1993); and the decision resolves incorrectly important questions on which *Keene* reserved decision.

Respondent does not proffer a meaningful textual defense of the Federal Circuit's decision. It instead argues that review is unwarranted on the grounds that the Federal Circuit's "same relief" standard is settled precedent, policy considerations support the Federal Circuit's rule, and this case presents a poor vehicle for resolving the question presented. None of those contentions has merit or provides a sound basis for declining review.

This Court in *Keene* explained that the text of Section 1500 must not be "rendered useless by a narrow concept" of the types of suits triggering its jurisdictional bar, and emphasized that lower courts may neither "disregard[] nor evade[]" Section 1500's "limits upon federal jurisdiction" even though those limits may "deprive plaintiffs of an opportunity to assert rights." 508 U.S. at 207, 213, 217. The Federal Circuit, however, has now declared that it can no longer find "any purpose that § 1500 serves," pointing to its earlier decisions eroding the statute to the point that plaintiffs need engage in "nothing more than a 'jurisdictional dance'" to circumvent the statute. Pet. App. 16-17a (citation omitted). The court of appeals thus candidly warns that, "[w]hatever viability remains in § 1500," it will not apply Section 1500's bar "absent a clear expression of Congressional intent" requiring that application. *Id.* at 18a (citation omitted). That approach to an explicit limitation on Congress's waiver of the United States' sovereign immunity is exactly backwards. Pet. 29. The Federal Circuit's decisions since *Keene* have effectively rendered Section 1500 all but a dead letter, improperly displacing

Congress's "authority to define the jurisdiction of the lower federal courts," 508 U.S. at 207. This Court should not allow the Federal Circuit's decision in this case to be the last word on that court's evisceration of jurisdictional limitations it is charged with enforcing.

1. Respondent's leading contentions (Br. in Opp. 15-18 (Opp.)) are variations on one theme: *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), held that Section 1500 does not apply if a plaintiff seeks "entirely different" relief in the CFC and another court, *id.* at 650, and, in respondent's view, that holding is "settled law" for which no review is warranted. Those contentions are meritless.

First, respondent incorrectly asserts (Opp. 16) that *Casman* should be given *stare decisis* effect. No lower court decision has such effect in this Court.

Second, respondent errs in arguing (Opp. 16-17) that *Casman* reflects the kind of "settled precedent" to which *Keene* looked in interpreting Section 1500. *Keene* relied on this Court's own authoritative rulings and one Court of Claims decision reflecting what the Court independently found to be a "sensible reading" of Section 1500's predecessor because all of those decisions existed in 1948 when Congress adopted Section 1500 by "reenact[ing] the [relevant] language" from its predecessor provision. *Keene*, 508 U.S. at 210-213. *Casman* did not exist in 1948 and could not have influenced the Congress that enacted Section 1500's relevant text.

Nor did Congress later ratify *Casman* by adopting technical amendments to Section 1500 that updated the name of the relevant court from the "Court of Claims" to the "United States Claims Court" (in 1982) and the "United States Court of Federal Claims" (in 1992). Cf. Opp. 17. The presumption that Congress intends to

adopt earlier judicial interpretations of a statutory provision has no application when, as in 1982 and 1992, Congress "has made only isolated amendments" and has "not comprehensively revised a statutory scheme." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001). Moreover, even respondent admits that the presumption applies only in the presence of a settled judicial interpretation, Opp. 18 n.17, and, before Congress last amended Section 1500 (in 1992), the en banc Federal Circuit had made clear that "*Casman* and its progeny [were] no longer valid." *UNR Indus., Inc.* v. *United States*, 962 F.2d 1013, 1025 (1992). *UNR Industries*' repudiation of *Casman*, although not strictly necessary for the court's decision, reflects that, in 1992, *Casman*'s restrictive reading of Section 1500 was far from settled even within the Federal Circuit. Cf., *e.g.*, *Donnelly* v. *United States*, 28 Fed. Cl. 62, 64 (1993) (dismissing CFC claim under Section 1500 and rejecting plaintiff's reliance on *Casman* because the Federal Circuit had "expressly overruled" *Casman*).

Similarly, in 1993, when this Court interpreted Section 1500 in *Keene*, the en banc Federal Circuit had abandoned what this Court correctly characterized as *Casman*'s "'judicially created exception[]' to § 1500," *Keene*, 508 U.S. at 215-216. See *UNR Indus.*, 962 F.2d at 1020, 1024-1025. And against that background, *Keene* found it "unnecessary to consider" whether the then-repudiated *Casman* exception should be revisited. 508 U.S. at 212 n.6, 216. Now that the Federal Circuit has reversed course and (re)embraced *Casman*, review is warranted to resolve the question on which *Keene* reserved decision.

Third, even if Section 1500 could be construed to allow for a judicially created exception when a plaintiff

seeks "distinctly different *types* of relief" in two cases—such as monetary back-pay relief in the CFC and prospective reinstatement to federal employment in district court, as in *Casman*—such a narrow exception for "completely different relief" would be unavailable here. See *Keene*, 508 U.S. at 212 n.6, 216 (emphasis added); Pet. 18-19 & n.3, 21. Respondent's two suits do not seek "completely different relief": respondent seeks monetary relief in both of its suits, and in addition seeks in district court an accounting as a predicate for monetary relief, thereby duplicating the accounting that would be necessary in the CFC to calculate damages. The Federal Circuit's decision allowing the CFC suit to proceed thus dramatically expands the scope of what this Court identified as a very "limited" exception, *Keene*, 508 U.S. at 214 n.9 (discussing *Casman*), which itself finds no support in Section 1500's text or purpose.

2. a. Respondent attempts to defend (Opp. 18-22) the Federal Circuit's holding that Section 1500 does not apply if a plaintiff's CFC claim and another suit do not "seek the same relief." Pet. App. 7a, 10a. But respondent's defense of that holding is unavailing and in any event provides no sound reason for this Court to decline review.

The Federal Circuit's holding cannot be squared with Section 1500's text, which broadly proscribes CFC jurisdiction whenever the CFC plaintiff has a related suit arising from substantially the same operative facts pending in another court, even if the suits seek different relief. See Pet. 15-19. Respondent provides no analysis of the statutory text, which demonstrates by the use of the phrase "in respect to" that another suit need only be related to a CFC claim to bar CFC jurisdiction. Instead, respondent simply asserts (Opp. 21) that *Keene*

"rejected the government's proffered standard." That is incorrect. *Keene* expressly reserved the question "whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500." 508 U.S. at 212 & n.6. Even the Federal Circuit acknowledged as much in its decision in this case. Pet. App. 7a.

Respondent resorts to the atextual contention (Opp. 18-20) that Section 1500 should not be read to "deny litigants the ability to pursue legitimate claims" in two courts. Opp. 20. But *Keene* rejected such "policy arguments" as "addresse[d] [to] the wrong forum." 508 U.S. at 217. The Court specifically recognized that Section 1500 may operate "to deprive plaintiffs of an opportunity to assert rights," and held that Section 1500 nonetheless must be enforced according to its terms because courts "enjoy no 'liberty to add an exception . . . to remove apparent hardship.'" *Id.* at 217-218 (citation omitted). That logic applies equally to *Casman*'s 'judicially created exception[]' to § 1500," *id.* at 216.

Moreover, *Keene* makes clear that Section 1500 requires dismissal even if a plaintiff's district court action is based "on a [different] legal theory" that "could [not] have been pleaded" in the CFC. 508 U.S. at 213; see *id.* at 212-214. That result does not materially differ from one that prohibits a plaintiff from maintaining related suits seeking supposedly different relief. Pet. 19-20. For example, Section 1500 clearly precludes CFC jurisdiction when a plaintiff proceeds on a contract theory in the CFC and a tort theory in district court. *Keene*, 508 U.S. at 212. It therefore forces the plaintiff to elect between two types of monetary relief governed by different legal standards. That election may lead to the plain-

tiff's recovery of no relief or a different measure of relief than would have been available in the other suit.

b. Rather than defend the Federal Circuit's holding that Section 1500's jurisdictional bar can be avoided if a plaintiff seeks "legal" monetary relief in the CFC and "equitable" monetary relief in district court, see Pet. 20-23, respondent contends that "whether the two complaints seek equitable or legal relief" is not "dispositive." Opp. 27. That assertion, however, is not reflected in the Federal Circuit's analysis. After emphasizing that "injunctive relief is 'different' * * * from money damages," the court "look[ed] to each complaint's prayer for relief" to decide "whether the relief that [respondent] requested in its [CFC] complaint is the same as the relief that it requested in its district court complaint." Pet. App. 10a. The court specifically focused on whether the respective prayers sought "equitable" monetary relief or "legal" monetary relief, *id.* at 10a-12a, and made clear that respondent's "separation of equitable [monetary] relief and money damages [was] critical to [its] § 1500 analysis." *Id.* at 12a. The Federal Circuit thus ultimately concluded that respondent "requested different relief," and that Section 1500 was inapplicable, because respondent's "complaint in the district court requests only equitable [monetary] relief and not damages while [its] complaint in the [CFC] requests only damages and not equitable relief." *Ibid.*

Moreover, even if respondent were correct (Opp. 23-27) that the panel majority relied on the notion that respondent's CFC and district court complaints did not seek "overlapping" monetary relief, that analysis would

be flawed in its own right.[1] The judicial relief that is available on a claim in both the CFC and the district court is the "relief to which [the] party is entitled, even if the party has not demanded that relief in its [complaint]." Fed. R. Civ. P. 54(c) (adopted 1937); see CFC R. 54(c) (same text). A court therefore may grant legal damages even if a complaint seeks only equitable relief (and vice versa), and may award a quantum of monetary relief greater than that requested in the pleadings; except for default judgments, the proof adduced in litigation rather than the pleadings determines the relief available. See 10 James Wm. Moore et al., *Moore's Federal Practice* § 54.72[1][a]-[c] (3d ed. 2009) (citing cases). Rule 54(c) thus highlights the folly of hinging Section 1500's jurisdictional restrictions on the relief identified in a plaintiff's complaints. The Federal Circuit's approach encourages strategic manipulation of the pleading process to circumvent the Section 1500 bar when, at the end of the day, the details of a plaintiff's demand for relief would not restrict the relief ultimately available in either the CFC or the district court.

Respondent recognizes that the accounting it requested in district court may also be provided in its CFC action, but echos the Federal Circuit's rationale that "it is [only] the relief the plaintiff '*requests*' that matters under § 1500." Opp. 27; cf. Pet. 24-25. Nothing in Section 1500's text suggests that odd result, which would allow simultaneous suits potentially leading to the same relief based on a party's artfully crafted "requests" in its

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[1] As both the dissenting judge and the CFC explain, respondent's overlapping requests for relief are apparent from its pleadings. Pet. App. 23a-25a, 32a-39a, 42a, 49a-54a; see Pet. 6-9 (complaints seek "profits" that allegedly would have resulted from proper "invest[ment]" and funds allegedly not deposited into respondent's accounts).

complaints. That outcome illustrates how misguided the Federal Circuit's "same relief" inquiry has become, inviting the development of intricate pleading distinctions to facilitate the duplicative litigation that Section 1500 was intended to foreclose.

c. The Federal Circuit reached that result in part by disregarding established interpretive principles governing jurisdictional restrictions and waivers of sovereign immunity. Pet. 25-29. Despite *Keene*'s admonition that Section 1500's jurisdictional limits "must be neither disregarded nor evaded," 508 U.S. at 207 (citation omitted), the court of appeals justified its narrow interpretation of Section 1500 on the ground that its own prior decisions had reduced Section 1500's requirements to a purposeless "jurisdictional dance." Pet. App. 17a. And rather than strictly construing the scope of Congress's waiver of sovereign immunity in light of Section 1500's limitation, the court relied on its own policy judgment that suits against the sovereign advance the public interest. Pet. 28-29. The Federal Circuit's reasoning in this regard—as well as its associated rejection of the government's arguments concerning the proper scope of Section 1500 as "hollow" and of "no real consequence"—was no mere dicta (Opp. 30), but a necessary component of the court's decision. Pet. 25-27 & n.5.

Respondent's defense of the Federal Circuit's rationale underscores the court's errors. Rather than defend the court's order-of-filing rule as correct (it is not, Pet. 26-27), respondent simply asserts (Opp. 29-30) that the rule reflects "settled precedent." That assertion is wrong for the same reasons as the contention that *Casman* is "settled law." See pp. 3-4, *supra*; cf. *Keene*, 508 U.S. at 209 n.4, 215-216 (reserving judgment on the then-repudiated order-of-filing rule established by

Tecon Engineers, Inc. v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966)).

Respondent's statement (Opp. 31) that sovereign immunity canons are inapplicable because Section 1500 does not itself waive sovereign immunity is equally flawed. Since 1868, Section 1500 and its predecessors have confined the statutory waivers of sovereign immunity that confer jurisdiction on the CFC. As a limitation on the government's consent to be sued, Section 1500 must be strictly construed in favor of immunity. Pet. 3, 29.

3. Finally, respondent is mistaken in its contention that review is unwarranted because the question presented is "of limited applicability" (Opp. 32-33) and because this case is not a good vehicle for resolving the question (Opp. 22-23). The numerous decisions construing Section 1500 and its predecessors, including this Court's decision in *Keene*, reflect the many circumstances that trigger Section 1500's bar to duplicative litigation against the United States. Respondent acknowledges that the issue has arisen in numerous cases after *Keene*, including more than 30 pairs of Indian tribal trust cases currently pending in the CFC and district court. Opp. 6 n.2, 32. Respondent's own suits are based on allegations concerning government conduct spanning more than 100 years. Pet. App. 60a-63a, 65a-67a, 76a, 81a-83a. The prospect of such sprawling litigation in two courts simultaneously illustrates why Congress prohibited duplicative litigation in the CFC when the plaintiff has a suit pending in another court arising from the same operative facts.

Respondent further errs in suggesting (Opp. 22) that this case is a poor vehicle to resolve the question because the government did not ask the Federal Circuit to

overrule *Casman*. The en banc court in *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549 (Fed. Cir. 1994), rejected the government's argument for abandoning *Casman*, and, in this case, the government argued to the en banc court that *Casman* and *Loveladies* were wrongly decided. C.A. Pet. for Reh'g 8. Nothing more was required.[2]

Equally meritless is respondent's assertion (Opp. 23) that review is unwarranted because the Federal Circuit could have reversed the CFC on the ground that respondent's two suits do not involve the "same operative facts." The panel majority assumed *arguendo* that respondent's suits involve the "same operative facts" by declining to resolve the question and basing its holding on independent grounds. Pet. App. 9a n.1. And respondent does not now adequately develop the contrary position, which the panel's dissenting member and the CFC correctly rejected. See *id.* at 20a-21a, 48a-49a.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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[2] The government also argued that it could prevail without overruling those decisions because respondent's suits did not involve "completely different" relief. C.A. Pet. for Reh'g 9-10.

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