No. 09-846

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TOHONO O'ODHAM NATION

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Under 28 U.S.C. 1500, the Court of Federal Claims (CFC) does not have jurisdiction over "any claim for or in respect to which the plaintiff * * * has * * * any suit or process against the United States" or its agents "pending in any other court." The question presented is:

Whether 28 U.S.C. 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 559 F.3d 1284. The opinion of the Court of Federal Claims (Pet. App. 27a-55a) is reported at 79 Fed. Cl. 645.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2009. A petition for rehearing was denied on August 18, 2009 (Pet. App. 56a-57a). On November 9, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 16, 2009. On December 4, 2009, the Chief Justice further extended the time to January 15, 2010, and the petition was filed on that date. The petition for

a writ of certiorari was granted on April 19, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1500 of Title 28 of the United States Code provides:

> The 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 or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

STATEMENT

1. a. It has long been an "established principle of jurisprudence in all civilized nations that the sovereign cannot be sued * * * without its consent" and that, when such consent is given, a suit against the sovereign must comply strictly with "the terms and conditions on which [the sovereign] consents to be sued." *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1858); see, *e.g.*, *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 290-291 (1851); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 379-380 (1821) (Marshall, C.J.). That rule "that 'the sovereign power is immune from suit'" was "'well settled and understood' at the time of the Constitutional Convention." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 562-564 (1962) (plurality opinion) (quoting *Williams* v. *United States*, 289 U.S. 553, 573 (1933), and citing *The Federalist No. 81*, at 511 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961)). Because of that immunity, "the only

recourse available to private claimants" with claims against the United States before 1855 was normally "to petition Congress for relief" in the form of a private bill. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983).

In 1855, Congress created the Court of Claims with limited authority to hear claims against the United States, report its findings to Congress, and, where appropriate, recommend enactment of a private bill to provide the claimant with monetary relief. *Mitchell*, 463 U.S. at 212-213. That limited authority did not sufficiently relieve Congress of the burdens of considering private bills. *Id.* at 213. Accordingly, in 1863, Congress adopted President Lincoln's recommendation to authorize the Court of Claims to issue final judgments. *Ibid.* In 1866, Congress enabled the Court of Claims to exercise full judicial power by repealing a provision that had allowed the Secretary of the Treasury to prevent complete execution of the court's judgments. *Id.* at 213 n.12.

Two years later, in 1868, Congress enacted the predecessor to 28 U.S.C. 1500. That provision prohibited the Court of Claims from exercising jurisdiction over "any claim * * * for or in respect to which" the plaintiff "has pending any suit or process in any other court" against an agent of the United States. See Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77; see *Keene Corp.* v. *United States*, 508 U.S. 200, 205-207 (1993). Congress reenacted that jurisdiction-limiting statute in 1874 as Section 1067 of the Revised Statutes and in 1911 as Section 154 of the Judicial Code, ch. 231, § 154, 36 Stat. 1138 (28 U.S.C. 260 (1946)). See *Keene*, 508 U.S. at 206-207. In 1948, when Congress again reenacted the statute and moved it to its current location at 28 U.S.C. 1500, Congress expanded the statute's scope to preclude Court of Claims jurisdiction if the plaintiff's related suit in the

other court is "against the United States" or against an agent of the United States. See Act of June 25, 1948, ch. 646, § 1, 62 Stat. 942; *Keene*, 508 U.S. at 211 n.5.[1]

Congress has enacted every modern-day statute conferring jurisdiction on the Court of Claims and its trial-court successor, the United States Court of Federal Claims (CFC), against the backdrop of the jurisdictional limitation now embodied in Section 1500.[2] Of particular relevance here, Congress enacted the Tucker Act, 28 U.S.C. 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. 1505—on which respondent rests CFC jurisdiction in this case (Pet. App. 60a)—with that statutory jurisdictional limit firmly entrenched in federal law. See Tucker Act, ch. 359, § 1, 24 Stat. 505 (enacted 1887); Indian Claims Commission Act, ch. 959, § 24, 60 Stat. 1055 (enacted 1946).

b. Section 1500 provides that the CFC shall not have jurisdiction of "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States or an agent thereof "pending in any other court." 28 U.S.C. 1500. In *Keene*, this Court explained that Section 1500 "requires a comparison between the claims raised in the [CFC] and in the other lawsuit." 508 U.S. at 210. The Court also reasoned that Congress's use of the disjunctive "or" in the phrase "for or in respect to which" demonstrates that Section 1500 bars CFC juris-

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[1] Congress repealed the prior version of the statute with each reenactment. See Act of June 25, 1948, ch. 646, § 39, 62 Stat. 996; Judicial Code, ch. 231, § 297, 36 Stat. 1168; Rev. Stat. § 5596 (1875).

[2] In 1982, Congress transferred the appellate and trial functions of the Court of Claims to the Court of Appeals for the Federal Circuit and the United States Claims Court, respectively. In 1992, the Claims Court was renamed the CFC. See *Keene*, 508 U.S. at 202 n.1; *Mitchell*, 463 U.S. at 228 n.33.

diction "not only as to claims 'for . . . which' the plaintiff has sued in another court," but also "as to those [CFC claims] 'in respect to which' he has sued elsewhere." *Id.* at 213. The latter restriction, *Keene* concluded, "make[s] it clear that Congress did not intend the statute to be rendered useless by a narrow concept of identity" of the CFC claim and the other suit, which would mistakenly allow a "liberal opportunity to maintain two suits arising from the same factual foundation." *Ibid.*

Keene ultimately held that Section 1500 requires dismissal of a CFC claim when "the plaintiff's other suit [is] based on substantially the same operative facts as the [CFC] action," "at least" if there is "some overlap in the relief requested." 508 U.S. at 212. Dismissal is required, the Court held, even if the other action is "based on [a] different legal theor[y]" that could not "have been pleaded" in the CFC. *Id.* at 212-214. Although the Court observed in *Keene* that Section 1500 has been criticized as "anachronistic" and acknowledged that Section 1500's jurisdictional restrictions may "deprive plaintiffs of an opportunity to assert rights," the Court stressed that the courts "enjoy no 'liberty to add an exception . . . to remove apparent hardship.'" *Id.* at 217-218 (quoting *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924)). Such concerns, the Court explained, must be directed to "Congress, for [it is] that branch of the government" that has "the constitutional authority to define the jurisdiction of the lower federal courts" and that has "limited the jurisdiction of the Court of Claims" by enacting Section 1500. *Id.* at 207, 217-218 & n.14 (quoting *Smoot's Case*, 82 U.S. (15 Wall.) 36, 45 (1873)).

Keene reserved two questions concerning "judicially created exceptions" to Section 1500 that are relevant

to this case. See *Keene*, 508 U.S. at 216 (quoting *UNR Indus., Inc.* v. *United States*, 962 F.2d 1013, 1021 (Fed. Cir. 1992) (en banc), aff'd *sub nom. Keene*, *supra*). Specifically, the Court reserved decision on whether an exception to Section 1500's bar might properly be fashioned to allow two suits based on "substantially the same operative facts" (*id.* at 212) to proceed when a plaintiff either (1) seeks "completely different relief" in the CFC and the other court, *id.* at 212 n.6, 214 n.9, 216 (discussing *Casman* v. *United States*, 135 Ct. Cl. 647 (1956)), or (2) files his CFC claim first, before filing the related suit in another court. *Id.* at 209 n.4, 216 (discussing *Tecon Eng'rs, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966) (*Tecon*)). The Federal Circuit had rejected both of those judicially created exceptions in the en banc decision that was reviewed by this Court in *Keene*, see *UNR Indus.*, 962 F.2d at 1020, 1024-1025 (declaring *Casman* overruled); *id.* at 1020, 1023 (declaring *Tecon* overruled), but the Federal Circuit has since stated that the pertinent portions of *UNR Industries* were non-binding dicta, and that the exceptions recognized in *Casman* and *Tecon* remain good law. See *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549, 1551 (1994) (en banc) (*Loveladies*) (discussing *Casman*); Pet. App. 16a-17a (discussing *Tecon*).

2. On December 28, 2006, the Tohono O'odham Nation (Tribe) filed a complaint against the United States in the District Court for the District of Columbia. Pet. App. 74a-93a. Just one day later, it filed a similar complaint against the United States in the CFC. *Id.* at 58a-73a.

a. The Tribe's district court complaint initiated "an action to seek redress of breaches of trust by the United

States * * * in the management and accounting of [the Tribe's] trust assets." Pet. App. 74a-75a. The complaint states that those assets include the Tribe's reservation lands, mineral resources, and associated income held for it in trust by the United States, as well as funds owed by the United States to the Tribe pursuant to court judgments. *Id.* at 75a-76a, 79a-80a. The complaint asserts that the United States owes "fiduciary obligations to the [Tribe] with respect to the management and administration of the [Tribe's] trust funds and other trust assets" that are "rooted in and derive from numerous statutes and regulations." *Id.* at 79a, 81a (citing illustrative provisions). "The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties," it asserts, "provide the 'general contours' of those duties" and "specific details are filled in through reference to general trust law." *Id.* at 82a (citation omitted).

More specifically, the district court complaint alleges that the government, *inter alia*, failed "to provide an adequate accounting of the trust assets" and failed both to "collect" and to "invest" trust funds "in compliance with [its] fiduciary responsibilities and other federal statutory and regulatory law." Pet. App. 76a. It alleges numerous "breaches of trust [that] include, but are not limited to," the failure to preserve records and provide a proper "accounting of trust property" and failures to "deposit trust funds," take reasonable steps "to preserve and protect trust property," and "refrain from self-dealing." *Id.* at 83a-84a. The complaint further alleges that the government breached a duty to manage the property held in trust "to produce a maximum return to the [Tribe]" by "invest[ing]" such funds properly and "maximiz[ing] profits" therefrom. *Id.* at 76a, 84a; see

id. at 83a (duty to "invest" and "maximize" assets); *id.* at 86a (statutory investment duty).

Based on those factual allegations, Count 1 of the district court complaint asserts that the government has "failed to fulfill [its] fiduciary obligations," which include, "*inter alia*," the duty to provide a proper "accounting of the [Tribe's] trust assets." Pet. App. 89a-90a. Count 1 also requests a declaration that both defines "the [government's] fiduciary duties" and finds them to have been breached. *Ibid.* Count 2 asserts a "continuing pattern" of breaches of "fiduciary duties" and seeks an injunction directing both the completion of a proper accounting and compliance with "all other fiduciary duties." *Id.* at 91a. Count 2 thus requests a "complete accounting" that is "not limited to" the "funds under the custody and control of the United States," and adds that, based on the results of that "complete accounting," the Tribe seeks "restatement of [its] trust fund account balances" and "any additional equitable relief," such as "disgorgement" and "equitable restitution," that "may be appropriate." *Ibid.*; see *id.* at 92a. Finally, the Tribe's prayer for relief in district court restates the relief requested in Counts 1 and 2 and adds a general plea "[f]or such other and further relief as the Court, * * * sitting in equity, may deem just and proper." *Id.* at 91a-93a.

b. The Tribe's CFC complaint closely parallels the Tribe's district court complaint. The CFC complaint states that it asserts "an action for money damages against the United States" for alleged "mismanagement of the [Tribe's] trust property" through "breaches of statutory, regulatory, and fiduciary duties owed to the [Tribe]." Pet. App. 58a-59a. The complaint specifies that the asserted duties pertain to the Tribe's reserva-

tion lands, mineral resources, and associated income held by the United States, as well as funds owed to the Tribe by the United States under court judgments. *Id.* at 60a-62a. The complaint, like its district court counterpart, asserts that the government owes "fiduciary obligations" to the Tribe with respect to its "management and control of the [Tribe's] tribal assets" that are "rooted in and derive from a number of statutes, regulations and executive orders." *Id.* at 62a-63a (citing illustrative provisions). "The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties," it adds, "provide the 'general contours' of those duties," and "the details are filled in through reference to general trust law." *Id.* at 64a (citation omitted).

Like the district court complaint, the CFC complaint alleges several "fiduciary duties" and breaches by the government, including the failure to "[f]urnish complete and accurate information to the [Tribe] as to the nature and amount of trust assets" by "performing a [proper] accounting of all the trust property." Pet. App. 65a-66a (¶¶ 22.d, 23.d). It further alleges breaches of duties to keep "accurate information," "properly administer the trust," "collect and deposit the trust funds," "preserve the trust assets," and "refrain from self-dealing." *Id.* at 66a-67a. And, like the district court complaint, it alleges the breach of a duty to "invest" funds held by the government in trust "to maximize [its] productivity" for the Tribe. *Id.* at 67a; see *id.* at 70a-72a.

Counts 1 through 3 each invoke the government's alleged failure to perform a proper accounting, and assert that the Tribe was damaged by the government's alleged failure to properly manage the Tribe's mineral estate (Count 1), non-mineral estate (Count 2), and judgment funds (Count 3). Pet. App. 67a-71a. Those breach-

es allegedly include failures, *inter alia*, "to collect" appropriate compensation for leased lands and property rights, "to lease" such assets at fair market value, and "to invest" properly the Tribe's "judgment funds" and other "trust funds." *Ibid.* Count 4 asserts injury caused by alleged governmental failures to properly invest tribal trust funds. *Id.* at 71a-72a. The complaint's prayer for relief seeks, *inter alia*, damages for the government's "breaches of fiduciary duty" and "such other and further relief as the Court deems just and appropriate." *Id.* at 72a-73a.

3. The CFC granted the government's motion to dismiss, holding that it lacked jurisdiction under Section 1500. Pet. App. 27a-55a.

After comparing the district court and CFC complaints with a side-by-side table detailing their allegations, Pet. App. 33a-38a, the court explained that the "complaints clearly involve the same parties, the same trust corpus, the same asserted trust obligations, and the same asserted breaches of trust over the same period of time." *Id.* at 39a. The CFC added that, although the district court complaint has an "apparent emphasis" on an accounting, it also seeks equitable monetary relief in the form of a restatement of accounts, disgorgement, and restitution. *Id.* at 39a, 42a. The CFC complaint, in turn, "although focusing on money damages," seeks relief that "will require an accounting [by the government] in aid of judgment." *Id.* at 39a, 41a, 55a. And, in both cases, the court explained, "[t]he underlying facts are the same" for "all practical purposes." *Id.* at 48a-49a. In these circumstances, the court found it "obvious that there is virtually 100 percent overlap" between the two cases. *Id.* at 49a. The court accordingly held that, given the "substantial overlap in the operative facts" and "in

the relief requested," Section 1500 required dismissal without prejudice for want of jurisdiction. *Id.* at 55a.

In so holding, the court rejected the Tribe's contention that Section 1500 was inapplicable because the Tribe's request for equitable monetary relief in district court was "different" from its request for damages in the CFC. Pet. App. 49a-54a. The CFC explained that a plaintiff's "legal theory" is immaterial under Section 1500 and, in any event, an Indian breach-of-trust claim in the CFC is in substance "an equitable proceeding that produces a monetary remedy." *Id.* at 49a-50a, 53a-54a. What is "relevant" in this context, the CFC held, "is the form of relief"—that is, "money." *Id.* at 54a.

4. A divided panel of the Federal Circuit reversed and remanded. Pet. App. 1a-26a.

a. The majority interpreted its post-*Keene* en banc decision in *Loveladies* as holding that Section 1500's jurisdictional bar applies only if the plaintiff's claim in the CFC both "arise[s] from the same operative facts" and "seek[s] the same relief" as a "claim pending in another court." Pet. App. 7a (quoting *Loveladies*, 27 F.3d at 1551) (emphasis omitted); see *id.* at 8a-9a. It accordingly concluded that Section 1500 "does not divest the [CFC] of jurisdiction" if the plaintiff's action in another court seeks "'different' relief," even though the cases may "arise from the same operative facts." *Ibid.* (quoting *Loveladies*, 27 F.3d at 1551). The majority then determined that "the 'same relief' prong is dispositive" in this case, and it therefore declined to decide whether the Tribe's suits "arise from the same operative facts." *Id.* at 9a & n.1.

The majority reasoned that the two suits do not seek the "same relief" because the Tribe's CFC complaint "seeks damages at law, not equitable relief," whereas its

district court complaint "requests only equitable relief and not damages." Pet. App. 11a-12a. Although the majority recognized that the "equitable" relief sought in district court would, if granted, award the Tribe "money * * * in the government's possession," *id.* at 13a, it found "[t]he [Tribe's] careful separation of equitable relief and money damages" to be "critical to the § 1500 analysis in this case." *Id.* at 12a.

The majority disagreed with the CFC's conclusion that the Tribe's two suits sought "overlapping relief" in two areas: "money and an accounting." Pet. App. 12a (quoting *id.* at 49a). First, the majority concluded that the actions do not seek overlapping monetary relief. *Id.* at 12a-15a. It reasoned that the Tribe's district court complaint seeks only what the court labeled "equitable 'old money' relief"—*i.e.*, "money that is already in the government's possession, but that erroneously does not appear in the [Tribe's] accounts" and "balance sheet[s]." *Id.* at 13a-14a. The majority concluded that the CFC complaint, in contrast, seeks money damages for what the court labeled "'new money' that the [Tribe] should have earned as profit but did not" because the United States allegedly "fail[ed] to properly manage the [Tribe's] assets to obtain the maximum value." *Ibid.*

Second, the majority concluded that the complaints did not seek overlapping relief because the Tribe affirmatively "request[ed]" an "accounting" in district court but not in the CFC. Pet. App. 15a. The majority recognized that "what would ensue [in the CFC] would amount to an accounting" in aid of the CFC's ability to enter judgment, but it emphasized that the Tribe's "prayer for relief" in its CFC complaint does not expressly "request an accounting." *Ibid.* (quoting *id.* at 41a).

Finally, the majority rejected the argument that its ruling would undermine Section 1500's policy and purpose of relieving the United States from the burden of defending parallel suits in different courts. Pet. App. 15a. It concluded that such arguments "ring[] hollow" because, under Federal Circuit precedent, Section 1500 "does not actually prevent a plaintiff from filing two actions seeking the same relief for the same claims." *Id.* at 16a-17a. The majority stated that court of appeals had "overruled *Tecon*" in *UNR Industries* but, after *Keene*, had recognized that "*Tecon* is still good law." *Id.* at 16a. And under *Tecon*'s order-of-filing rule, Section 1500 only prohibits plaintiffs from filing a district court action before a CFC suit, while permitting plaintiffs to proceed simultaneously with both suits so long as the CFC action is filed first. *Id.* at 16a-17a. On that view, the majority concluded that Section 1500 "functions as nothing more than a 'jurisdictional dance,'" and it accordingly "found [no] purpose that § 1500 serves today." *Id.* at 17a (quoting *Loveladies*, 27 F.3d at 1549). The majority also expressed the view that it would not be "sound policy" to read Section 1500 to preclude damage actions in the CFC when plaintiffs challenge the same governmental action in other courts, because "[t]he nation is served by private litigation which accomplishes public ends" and "relies in significant degree on litigation to control the excesses [of] Government." *Ibid.* (quoting *Loveladies*, 27 F.3d at 1555-1556).

b. Judge Moore, in dissent, explained that the Tribe's suits "were based on substantially the same operative facts and that the two complaints included some overlap in the relief requested." Pet. App. 19a-20a. She accordingly concluded that this Court's decision in

Keene required that the CFC action be dismissed under Section 1500. *Ibid*.

SUMMARY OF ARGUMENT

For more than 140 years, Congress has ensured that plaintiffs cannot simultaneously pursue related actions in the Court of Claims (now the CFC) and the district court. The Federal Circuit erred in holding that Section 1500 permits the Tribe to bring such suits against the United States when its CFC claims and other suit arise from substantially the same operative facts. The court of appeals reasoned that a plaintiff may avoid Section 1500's jurisdictional bar by styling its complaints to avoid seeking the "same relief," and that, in this case, the Tribe may pursue its two suits against the government because it requested *legal* monetary relief in the CFC and *equitable* monetary relief in district court. Those holdings fundamentally misconstrue Section 1500's text and reflect an interpretive approach inconsistent with the teachings of this Court.

1. a. The plain text of Section 1500 prohibits CFC jurisdiction over "any" claim "for or in respect to which" the plaintiff has "any" pending suit or process in another court against either the United States or an agent thereof. 28 U.S.C. 1500. That broad language applies not only when the plaintiff's other suit is a suit "for" the CFC claim but also when it is a suit "in respect to" that claim. That latter phrase and this Court's decisions construing similar language demonstrate that Section 1500 applies when any suit brought by the plaintiff in another court "relat[es] to," is "concern[ed] with," has some "relation or reference to," *Webster's Third New International Dictionary* 1934 (1966), or is otherwise "associated in any way" to, *Kosak* v. *United States*, 465 U.S.

848, 854 (1984), the plaintiff's claim in the CFC. Even if it seeks different relief, a pending suit based on "substantially the same operative facts," *Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993), qualifies as such a related suit precluding CFC jurisdiction. Congress's direction that "any" such suit will trigger Section 1500's bar confirms that the statute does not depend on whether the related suit seeks the "same relief" as the claim in the CFC. Congress also expressly prohibited CFC jurisdiction when the plaintiff has a pending suit in another court against an individual government agent; by its very nature, such a suit against an individual involves distinctly different relief than a CFC claim against the United States.

Even if the text of Section 1500 were ambiguous, its restriction on the scope of Congress's waiver of sovereign immunity from suit in the CFC must be construed strictly to preserve immunity in this context. It is well established that the scope of a waiver of sovereign immunity, including the limitations and conditions on which Congress consents to suit, must be unequivocally expressed in statutory text and strictly construed in favor of the sovereign. Nothing in Section 1500 speaks to the "relief" sought by a plaintiff, and no text suggests that Section 1500's jurisdictional bar applies only when the plaintiff's CFC claim and other suit seeks the "same relief." The Federal Circuit's adoption of its same-relief requirement thus impermissibly expands, rather than strictly construes, the scope of Congress's waiver of immunity from suit.

That error is particularly significant in light of Section 1500's origin. The statute's restrictions date to 1868 and represent an important limit on the scope of the waivers of sovereign immunity through which Congress

gave the Court of Claims (now the CFC) authority to enter final judgment on claims that could previously be resolved only by Congress through private bills. The Federal Circuit's failure to strictly construe the scope of Congress's consent to suit in this context is unfaithful to the very sovereign-immunity principles that gave birth to the Court of Claims. Moreover, Congress enacted Section 1500's predecessor in the aftermath of the Civil War to force owners of property seized during the war to elect between two different actions that themselves involved completely different relief. Limiting Section 1500's jurisdictional bar to circumstances where a plaintiff seeks the "same relief" in two courts thus would erroneously render the statute useless for the very purposes for which it was enacted.

b. The Federal Circuit's decision relies on the interpretation of Section 1500 in *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), which the court of appeals had rejected before *Keene* but has now re-embraced. The court erred in returning to *Casman*'s analysis. *Casman* rests on the erroneous assertion that Section 1500 should not apply where a plaintiff is precluded from bringing a single suit for all forms of relief. That limitation finds no support in the statutory text, which does not mention "relief." Moreover, *Keene* held that Section 1500 bars jurisdiction where the plaintiff's other suit involves claims that could not have been "joined in a single suit" and is based on a cause of action that lies "beyond the jurisdiction of the [CFC]." 508 U.S. at 213-214 (citation omitted). Requiring a plaintiff to elect between a CFC claim and a factually related suit seeking different relief in another court is not materially different. Indeed, the Court in *Keene* recognized that Section 1500 may operate to deprive a plaintiff of the opportunity to

assert rights that Congress has generally made available, and it nevertheless concluded that only Congress, not the courts, has the authority to eliminate any resulting hardship.

The Federal Circuit concluded that Section 1500 no longer serves "any purpose" because, under its own interpretations, Section 1500 requires only a pointless "jurisdictional dance" that allows plaintiffs suing the federal sovereign to easily circumvent its restrictions. Pet. App. 17a (citation omitted). In so saying, the court of appeals got one thing right: Its post-*Keene* rulings have indeed reduced Section 1500 to an easily evaded, formal requirement. But that conclusion should have suggested to the Federal Circuit not that it disregard what it had left standing of Section 1500's jurisdictional restrictions, but that it revisit its own misguided interpretation of the statute.

The court of appeals strayed yet further from this Court's jurisprudence in declaring its view that it is "sound policy" to subject the government to suit in the CFC and, for that reason, it would demand a "clear expression" of Congress's intent to preserve sovereign immunity and limit CFC jurisdiction. Pet. App. 17a-18a (citation omitted). But it is well settled law that it is the elimination, not the preservation, of sovereign immunity that requires an unambiguous statutory command. And "policy concerns," no matter how compelling, are insufficient to waive that immunity.

2. Even if *Casman* had correctly held that a plaintiff may maintain two simultaneous suits against the United States if they seek "entirely different relief," the Tribe's requests for monetary relief in the CFC and the district court are not entirely different. The Federal Circuit believed that a distinction between the Tribe's request

for *legal* monetary relief in the CFC and *equitable* monetary relief in district court was "critical to the § 1500 analysis." Pet. App. 12a. That conclusion is both incorrect and inconsistent with *Keene*.

In *Keene*, this Court concluded that *Casman*'s exception to Section 1500's jurisdictional bar—under which prospective injunctive relief and retrospective monetary relief were deemed to be distinctly different—was inapplicable because Keene sought monetary relief in both the CFC and the district court. The same holds true here. Moreover, if the Federal Circuit's law-equity distinction were relevant to Section 1500, *Keene* would have had to address it, because the district court relief in that case was equitable monetary relief and the damages remedy in the CFC was legal. *Keene* did not do so because the law-equity distinction is irrelevant here.

The Federal Circuit's misguided approach led it into a thicket of elusive and technical distinctions that are in derogation of the principle that jurisdictional rules should be clear. Indeed, as this case vividly illustrates, the Federal Circuit's interpretation of Section 1500, if adopted by this Court, would encourage wasteful gamesmanship by litigants and the manipulation of the pleading process that, at the end of the day, will have no effect on the "relief" available to the plaintiff in its two simultaneous suits. See Fed. R. Civ. P. 54(c); Fed. Cl. R. 54(c).

ARGUMENT

I. SECTION 1500 PRECLUDES JURISDICTION IN THE COURT OF FEDERAL CLAIMS WHENEVER A PLAINTIFF HAS A SUIT PENDING IN ANOTHER COURT BASED ON SUBSTANTIALLY THE SAME OPERATIVE FACTS, EVEN IF THE OTHER SUIT SEEKS DIFFERENT RELIEF

Section 1500 deprives the 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. The Federal Circuit's decision nevertheless held that Section 1500 permits a plaintiff to maintain simultaneous actions against the United States in two courts arising from substantially the same operative facts so long as the actions do not seek the "same relief." It further held that parallel requests for monetary relief are sufficiently "different" under that jurisdictional test if the monetary relief is deemed "legal" relief in one action and "equitable" relief in the other. The Federal Circuit's decision has no support in the broad text of Section 1500's prohibition on CFC jurisdiction; its reasoning disregards well-established principles for interpreting the scope of waivers of sovereign immunity from suit; its conclusions are inconsistent with this Court's interpretation of Section 1500 in *Keene Corp.* v. *United States*, 508 U.S. 200 (1993); and it resolves incorrectly important questions on which *Keene* reserved decision. Properly construed, Section 1500 prohibits a plaintiff from pursuing simultaneous actions against the United States in two courts based on the same factual foundation, regardless of the relief that the plaintiff seeks.

A. The Plain Text Of Section 1500 Precludes CFC Jurisdiction Whenever A Plaintiff's Other Suit Or Process Arises From Substantially The Same Operative Facts

Congress has broadly proscribed CFC jurisdiction over any claim against the United States for which the plaintiff has a related suit pending against the government in another court. This Court in *Keene* determined that that longstanding jurisdictional bar in Section 1500 precludes CFC jurisdiction when "the plaintiff's other suit [is] based on substantially the same operative facts as the [CFC] action" and reserved decision on whether "some overlap in the relief requested" is also necessary to trigger that jurisdictional bar. 508 U.S. at 212 & n.6. The text of Section 1500, which defines the scope of the sovereign's consent to suit, and the statute's historical context demonstrate that Congress barred CFC jurisdiction whenever a plaintiff has a related suit against the United States or a government agent in another court arising from substantially the same factual foundation. The relief sought by the plaintiff is irrelevant to Congress's flat prohibition.

1. Section 1500 bars CFC jurisdiction over "any claim for or in respect to which the plaintiff * * * has pending * * * any suit or process" against the United States or an agent thereof "in any other court." 28 U.S.C. 1500. This statutory text employs the word "which" to refer to the plaintiff's CFC claim. Section 1500's jurisdictional bar therefore is triggered when a plaintiff pursues "any suit or process" "for or in respect to" the CFC claim, when its suit or process is pending in another court against the United States or an agent thereof. This Court in *Keene* found it significant that Section 1500 prohibits CFC jurisdiction "not only as to claims 'for . . . which' the plaintiff has sued in another

court," but also "as to those 'in respect to which' he has sued elsewhere." *Keene*, 508 U.S. at 213. Section 1500 thus does more than simply preclude CFC jurisdiction where the plaintiff has another suit "for" the same claim asserted in the CFC. It bars CFC jurisdiction where the plaintiff's two suits involve *different* claims, so long the suit in the other court is a suit "in respect to" the plaintiff's claim in the CFC.

The expansive phrase "in respect to" reflects Congress's judgment to deprive plaintiffs of a "liberal opportunity to maintain two suits arising from the same factual foundation." *Keene*, 508 U.S. at 213. A suit in another court is a suit "in respect to" a claim in the CFC if it "relat[es] to," is "concern[ed] with," or has some "relation or reference to" the CFC claim. *Webster's Third New International Dictionary* 1934 (1966) (defining "respect" and "in respect to").[3] A suit in another court that arises from substantially the same operative facts as a claim in the CFC qualifies as a suit that "relates to," is "concerned with," or has some "relation or reference to" that claim because their shared factual foundation establishes that relationship. That conclusion is confirmed by this Court's determination that "the plain language" of a similar statutory phrase ("arising in respect of") is "encompassing" and "sweep[s] within" its scope all related matters "associated in any way."

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[3] Accord *Webster's New International Dictionary* 2122-2123 (2d ed. 1958) ("respect" means "[r]elation; relationship; reference; [or] regard" and is used "chiefly in phrases" such as "in respect to," which means "[i]n relation to; with regard to; as respects"); *Webster's New International Dictionary* 1816 (1st ed. 1917) (same); 2 Noah Webster, *An American Dictionary of the English Language* 56 (1828) (defining "respect" to mean "[r]elation, regard, reference; followed by *of*, but more properly by *to*").

Kosak v. *United States*, 465 U.S. 848, 854 (1984) (interpreting 28 U.S.C. 2680(c)); cf. *Union Pac. R.R.* v. *United States*, 313 U.S. 450, 464 (1941) (concluding that a statutory reference to concessions "in respect to" the transportation of property includes any concession that either "directly or indirectly" affects the cost of such transportation).

Congress further underscored Section 1500's breadth by emphasizing that its jurisdictional bar is triggered by "*any* suit or process." 28 U.S.C. 1500 (emphasis added). "The term 'any' ensures that the [phrase] has a wide reach," *Boyle* v. *United States*, 129 S. Ct. 2237, 2243 (2009), and Section 1500 thereby gives "no warrant to limit the class of" related suits that preclude CFC jurisdiction, *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2189 (2009). See also *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)). Even if it does not seek the same relief, a suit that "aris[es] from the same factual foundation" as a claim in the CFC, *Keene*, 508 U.S. at 213, still qualifies as a suit that "relat[es] to," is "concern[ed] with," or has some "relation or reference to" that claim, *Webster's Third New International Dictionary* 1934, or as one that is "associated in any way" with the claim, *Kosak*, 465 U.S. at 854. The Federal Circuit's extratextual requirement that the plaintiff's other suit and CFC claim must seek the "same relief" to deprive the CFC of jurisdiction, Pet. App. 8a (citation omitted), therefore ignores the expansive language Congress employed in specifying that "any" related suit triggers the Section 1500 bar.

Congress's intent to foreclose CFC jurisdiction whenever a related suit is pending in another court, regardless of the relief sought, also follows directly from the types of actions to which Section 1500 expressly refers. Section 1500 applies when a CFC plaintiff has a related suit or process pending in another court "against" either "the United States" or "any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States." 28 U.S.C. 1500. Congress thus forced plaintiffs not only to choose between two different suits against the United States but to "elect[] between a suit in the Court of Claims [against the United States] and one brought in another court against an agent of the Government." *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 356 (1932); see *Keene*, 508 U.S. at 211 n.5. That election required by statute by its very nature forces a choice between suits seeking different relief.

A suit against an individual agent yields fundamentally different relief than a suit against the United States, even when both suits pursue monetary claims. With a suit against an agent, the most that the plaintiff may obtain is a "victory against the individual defendant" that establishes the individual's liability to the plaintiff requiring a payment out of "personal assets." See *Kentucky* v. *Graham*, 473 U.S. 159, 166-167 (1985).[4]

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[4] Such personal-capacity suits are different from suits against federal officials in their official capacity. The latter are suits against the government, not the individual, and require a waiver of sovereign immunity. See *Graham*, 473 U.S. at 165-166 & n.11, 167-168; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 373-374 (1945); cf. *Depart-*

Such relief confers no rights enforceable against the United States. In contrast, when judgment is entered against the United States (pursuant to a waiver of sovereign immunity) the government is itself liable to pay the plaintiff from federal funds. That distinct remedy conferring distinct rights is not the "same relief" that could be sought by suing a government agent. And because Congress expressly barred CFC jurisdiction over actions against the United States when the plaintiff has also sued an agent of the United States, Section 1500 necessarily applies when the plaintiff's CFC claim and other suit seek different relief.

Indeed, Section 1500 applies even in cases in which the CFC plaintiff could never obtain *any* relief in the related suit pending in another court. Congress expressly barred CFC jurisdiction over a plaintiff's claim not only when the plaintiff itself has sued elsewhere but also when an "assignee" of the plaintiff has a related suit in another court. 28 U.S.C. 1500. Congress thereby precluded CFC jurisdiction even when the plaintiff is not itself a party in the related suit and, for that additional reason, Section 1500's application cannot properly turn on the "relief" sought by that plaintiff in the other suit.

2. Sovereign immunity principles confirm that interpretation. The Tucker Act and Indian Tucker Act are "jurisdictional provisions that operate to waive sovereign immunity for [certain] claims" brought against the United States in the CFC. *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1551 (2009); see *United States* v. *Mitchell*, 463 U.S. 206, 212 & n.8, 215 (1983); *United*

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ment of the Army v. *Blue Fox, Inc.*, 525 U.S. 255, 260-261 (1999) (discussing waiver of sovereign immunity in 5 U.S.C. 702, which applies to official-capacity suits).

States v. *Testan*, 424 U.S. 392, 398 (1976). Congress confined the scope of that consent to suit through Section 1500's express prohibition against CFC jurisdiction when the plaintiff has a related suit in another court. It is well settled that ambiguities concerning the scope of such consent must be strictly construed to preserve the United States' immunity from suit. Accordingly, even if the text of Section 1500 were ambiguous, it must be read to bar CFC jurisdiction when a plaintiff has a pending related suit in another court, even when those two actions seek different relief.

This Court has "frequently held" that a congressional waiver of sovereign immunity must be "'unequivocally expressed' in the statutory text" and "strictly construed, in terms of its scope." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (quoting *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)); see, *e.g.*, *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 659 (1947) ("The consent necessary to waive the traditional immunity must be express, and it must be strictly construed."). The Court has therefore concluded that statutory "ambiguities [must be construed] in favor of immunity," *United States* v. *Williams*, 514 U.S. 527, 531 (1995), to ensure that the "limitations and conditions upon which the Government consents to be sued [are] strictly observed," *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) (quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)), and to guarantee that the requisite statutory consent is "not enlarge[d] . . . beyond what the language requires." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (quoting *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983)) (brackets in original; internal quotation marks omitted).

The canon of strict construction applies with special force when interpreting statutory waivers implicating monetary relief. A federal court's exercise of judicial authority "is limited by a valid reservation of congressional control over funds in the Treasury," *OPM* v. *Richmond*, 496 U.S. 414, 425 (1990), and Congress's exclusive authority to control federal expenditures "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good" rather than "the individual pleas of litigants." *Id.* at 428; see U.S. Const. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").[5] Narrowly construing statutory waivers of immunity protects that separation of powers by treating Congress's consent to sue "with that conservatism which is appropriate," *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941), to ensure that courts do not stray beyond the authority that the Legislature has affirmatively conferred. Courts thus must be "particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for" "monetary exactions." *United States* v. *Idaho*, 508 U.S. 1, 8-9 (1993); see *Lane*, 518 U.S. at 196 ("[W]hen it comes to an award of money damages, sovereign immunity places the Federal government on an entirely different footing than private parties.").

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[5] Cf. Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207, 1258-1264 (2009) (concluding that the Appropriations Clause provides a constitutional basis for federal sovereign immunity from damages claims); John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 437 n.192 (2010) ("The most plausible textual source for federal sovereign immunity [from monetary claims] is the Appropriations Clause.").

The Court of Claims' role in the development of sovereign immunity jurisprudence highlights the central role of those principles here. "Before 1855 no general statute gave the consent of the United States to suit on claims for money damages," and claimants were forced to seek redress directly from Congress, which could exercise its authority over the federal fisc to grant monetary relief with private bills. *Mitchell*, 463 U.S. at 212-213; see *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 290-291 (1851) (explaining that sovereign immunity bars actions against the government to enforce debts and that, "under our political and fiscal system," Congress must exercise its appropriation power to pay such claims). In 1855, Congress created the Court of Claims, but its initial grant of authority was modest and simply authorized the court to examine claims and make recommendations to Congress concerning the enactment of private bills. See Act of Feb. 24, 1855, ch. 122, §§ 1, 7-9, 10 Stat. 612-614; *Mitchell*, 463 U.S. at 212-213. Only after a decade of experience with the court's handing of such claims did Congress, in 1866, confer full authority to issue final judgments against the United States on monetary claims founded on a federal statute, regulation, or government contract. See Act of Mar. 17, 1866, ch. 19, § 1, 14 Stat. 9; Act of Mar. 3, 1863, ch. 92, §§ 2-3, 12 Stat. 765; see also p. 3, *supra*. Two years after that innovation providing a limited waiver of sovereign immunity for certain categories of claims, Congress enacted Section 1500's predecessor. That provision has formed the backdrop for and restricted the scope of every modern-day waiver of sovereign immunity conferring jurisdiction on the CFC over monetary claims against the United States. Section 1500's jurisdictional limitation lies at the center of Congress's efforts to provide limited waiv-

ers of sovereign immunity for general categories of monetary claims, highlighting the need to accord it the construction appropriate to ensure that the scope of the waivers are strictly construed.

When strictly construed, the waiver of sovereign immunity that Congress limited with Section 1500 does not permit a plaintiff to pursue two related suits simultaneously even when they seek different relief. Nothing in the statutory text supports the Federal Circuit's "same relief" requirement (Pet. App. 8a-9a): Section 1500 itself makes no reference to the "relief" that a plaintiff may seek, and it contains no other text unambiguously requiring that the other suit and CFC claim seek the "same relief" to trigger the prohibition on simultaneously pursuing a CFC claim and a related suit against the government or its agents. Congress limited the scope of its consent to sue the United States in the CFC by specifying that the CFC shall have no jurisdiction over a claim when the plaintiff has another suit "in respect to" that claim; that broad text encompasses "any" related suit arising from the same factual foundation, see pp. 20-22, *supra*; and, at the very least, it does not provide an express and unequivocal consent to simultaneously maintain such parallel actions.

3. The Congress that enacted Section 1500's predecessor would have recognized that the statute precludes CFC jurisdiction even when a plaintiff's related suit in another court seeks completely different relief. Congress passed that provision in the wake of the Civil War to stop claimants whose property (typically cotton) had been seized by the federal government from pursuing two suits—one against the United States and the other against its agents—arising from the same factual foun-

dation. See *Keene*, 508 U.S. at 206, 213-214; see also Cong. Globe, 40th Cong., 2d Sess. 2769 (1868).

The claimants' suits against the United States in the Court of Claims were brought under the Abandoned Property Collection Act, ch. 120, 12 Stat 820, which specified that "all abandoned or captured property" seized by the government in insurrectionist areas could be either put to "public use" or forwarded for "sale [at auction] within the loyal states" with "the proceeds thereof * * * paid into the [United States] treasury." §§ 1-2, 12 Stat. 820; see *Keene*, 508 U.S. at 206. The act also authorized a property owner loyal to the Union to pursue a claim in the Court of Claims to collect "the residue of such proceeds," *i.e.*, the auction funds less "expenses" incurred by the government. § 3, 12 Stat. 820.

Congress thereby established a statutory "trust for the benefit" of such an owner, *Intermingled Cotton Cases*, 92 U.S. 651, 653 (1876), who could collect only the trust corpus formed from auction proceeds. See *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 138-139 (1872); *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 543 (1870) (explaining that "the government is a trustee," which "hold[s] the proceeds of the petitioner's property for his benefit" and is "fully reimbursed for all expenses incurred"). That relief provided no compensation for government actions causing a reduction in (or the elimination of) the proceeds used to establish the trust or otherwise diminishing the funds actually deposited in the Treasury and held in trust for the claimant. See *Spencer's Case*, 8 Ct. Cl. 288, 292-294 (Dec. Term 1872) (no remedy for proceeds given by Treasury agent to persons not entitled to the funds because the funds were never deposited into the Treasury), aff'd *sub nom. Spencer* v. *United States*, 91 U.S. 577, 578 (1876); *By-*

num's Case, 8 Ct. Cl. 440, 442-444 (Dec. Term 1872) (no remedy for agent's unlawful charges reducing the amount deposited in the Treasury's "trust-fund"); see also *Intermingled Cotton Cases*, 92 U.S. at 653-654 (distributing only the sale proceeds "clearly traced into the treasury," with no remedy for the "portion of the cotton [that] was, after its capture, used for military purposes"); *United States* v. *Ross*, 92 U.S. 281, 282-283, 285 (1876) (rejecting claim of owner whose "cotton [was] captured" because he failed "to show that the United States is a trustee for him" by establishing a "connection between the cotton captured and the fund now held by the United States" after auction).

In contrast, the property claimants' "separate suits in other courts [sought] compensation * * * from federal officials * * * on tort theories such as conversion." *Keene*, 508 U.S. at 206. Such common-law suits, if successful, could recover as damages the full value of wrongfully seized property at the time of the alleged conversion. See *Ripley* v. *Davis*, 15 Mich. 75, 80 (1866); *Whitfield* v. *Whitfield*, 40 Miss. 352, 366 (1866); see also *Coolidge* v. *Guthrie*, 6 F. Cas. 461, 462 (C.C.S.D. Ohio 1868) (No. 3185) (tort suit against bona fide purchasor of seized cotton for the "full value" of the cotton); *Baltimore & Ohio R.R.* v. *O'Donnell*, 32 N.E. 476, 480 (Ohio 1892).

The trust-fund remedy that Congress established in the Court of Claims for a trust corpus held in the Treasury (minus costs incurred by the "government [as] trustee," *Padelford*, 76 U.S. (9 Wall.) at 543), is entirely different than the damages remedy at law available in common-law tort actions against government agents. The former was a special statutory proceeding to distribute a specific corpus (if any) held in trust, whereas

the latter involved a traditional action against an individual defendant providing full compensatory damages for tortious acts concerning the seizure of property. If Section 1500 were to be construed to apply only when the plaintiff's other suit and CFC claim seek the "same relief," it would impermissibly "render[] the statute useless, in all or nearly all instances, to effect the very object it was originally enacted to accomplish." *Keene*, 508 U.S. at 213-214.

B. The Federal Circuit's Interpretation Of Section 1500 Is Not Justified By The Statute's Text, This Court's Decisions, Or The Federal Circuit's Own Policy Views

The Federal Circuit's conclusion that Section 1500 precludes CFC jurisdiction only if the plaintiff's related suit in another court seeks the "same relief" as its claim in the CFC is based principally on the decision in *Casman* v. *United States*, 135 Ct. Cl. 647 (1956). The court of appeals' *Casman*-based holding is unwarranted by the statutory text, is contrary to this Court's decisions, and cannot be justified by the policy rationales asserted by the Federal Circuit.

1. The Federal Circuit erred in relying on Casman*'s reading of Section 1500*

The Federal Circuit's embrace of *Casman*'s understanding of Section 1500 lends no support to its judgment in this case. The en banc Federal Circuit had correctly repudiated *Casman* in *UNR Industries, Inc.* v. *United States*, 962 F.2d 1013, 1020, 1024-1025 (1992), aff'd on other grounds *sub nom. Keene*, *supra*. Cf. *Keene*, 508 U.S. at 215 (noting that the en banc court had "announced that it was overruling * * * *Casman*"). But one year after *Keene*, the divided court of appeals reinstated *Casman* and held that Section 1500's

jurisdictional bar applies only when the plaintiff's CFC claim and other suit arising from the same operative facts "seek *the same relief*." *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549, 1551 (Fed. Cir. 1994) (en banc). The Federal Circuit in this case followed that binding circuit precedent, Pet. App. 7a-8a; assumed *arguendo* that the CFC correctly held that the Tribe's CFC and district court complaints "arise from the same operative facts," *id.* at 9a n.1; cf. *id.* at 20a-21a (Moore, J., dissenting); *id.* at 48a-49a (CFC opinion); but held Section 1500 inapplicable because, in its view, the Tribe's two complaints did not seek the "same relief," *id.* at 9a. That was error.

In *Casman*, Casman brought suit in district court seeking an order to reinstate him to his former government position, from which he claimed to have been wrongfully discharged. 135 Ct. Cl. at 648. While that action was pending, Casman filed suit in the Court of Claims "to recover salary for the alleged wrongful separation." *Ibid.* The Court of Claims held that Section 1500 did not preclude its exercise of jurisdiction. The court reasoned that Section 1500's purpose was "to require an election between a suit in the Court of Claims and one brought in another court," and it concluded that the statute therefore should not apply if the "plaintiff has no right to elect between two courts." *Id.* at 649-650. Because Casman's request for back pay fell "exclusively within the [Court of Claims'] jurisdiction," and because the Court of Claims (at the time) lacked "jurisdiction to" grant Casman's request for specific relief "restor[ing] [him] to his [federal] position," the Court of Claims held that Section 1500 did not apply when such

"entirely different" relief must be sought in different courts. *Ibid.*[6]

Casman's focus on the type of relief sought by the plaintiff in a suit in another court finds no textual foundation in Section 1500. A suit seeking specific relief rather than monetary relief is nevertheless a "suit or process." And although the suit may not be "for" the CFC claim under Section 1500, it qualifies as a suit "in respect to" that claim if it arises from substantially the same operative facts. A leading commentary on Section 1500 has therefore properly concluded that the court in *Casman* "overr[ode] the words of the section." David Schwartz, *Section 1500 of the Judicial Code And Duplicate Suits Against the Government and its Agents*, 55 Geo. L.J. 573, 587 (1967); cf. *Keene*, 508 U.S. at 206, 217 (citing this commentary); *id.* at 221 (Stevens, J., dissenting) (same).

Casman did not purport to interpret Section 1500's statutory text. It instead concluded that Section 1500 should not apply where jurisdictional restrictions prohibit a plaintiff from seeking all relief in a single court because, in those circumstances, the "plaintiff has no right to elect between two courts." 135 Ct. Cl. at 649-650. But nothing in Section 1500 suggests that it forces a plaintiff's election between a CFC claim and a suit in another court only if the plaintiff could seek all forms of relief in a single court.

Indeed, *Keene* specifically concluded that Section 1500 bars CFC jurisdiction even in circumstances in

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[6] In 1972, Congress eliminated the problem that concerned the *Casman* court by authorizing federal employees to seek both back pay and reinstatement in the Court of Claims (now the CFC). See Act of Aug. 29, 1972, Pub. L. No. 92-415, § 1, 86 Stat. 652 (28 U.S.C. 1491(a)(2)); S. Rep. No. 1066, 92d Cong., 2d Sess. 2 (1972).

which the CFC action and the plaintiff's other suit involve claims that could not have been "joined in a single suit." 508 U.S. at 213. The Court held that the CFC lacked jurisdiction over Keene's contract-based claim (in *Keene I*) where Keene had brought a district-court action against the government seeking monetary relief on indemnification and contribution theories, *id.* at 203, thus forcing Keene to elect between suing in the CFC and suing in another court even though the legal theories that could be raised in such suits were distinct. *Id.* at 213-214 & n.7. A suit in district court arising from the same factual foundation can therefore qualify as a suit "in respect to" the plaintiff's CFC claim even though its request for district court relief "rest[s] on a legal theory that could [not] have been pleaded" in the CFC or that lies "*beyond the jurisdiction* of the [CFC]." See *id.* 213-214 (emphasis added). The Court recognized that Section 1500's jurisdictional restrictions may "deprive plaintiffs of an opportunity to assert rights that Congress has generally made available," but emphasized that only Congress—not the courts—may remove such "apparent hardship" through new legislation. *Id.* at 217-218 (quoting *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924)).

It follows from *Keene* that Congress required plaintiffs, rather than suing simultaneously in two courts, to elect at least as an initial matter between fora in which they can have dramatically different prospects of successfully securing relief. Those differences in legal theory would also typically result in differences in the judicial relief that the plaintiff would ultimately be able to secure. Requiring a plaintiff to elect between a CFC claim and a factually related suit seeking "different relief" therefore is not materially different from requiring

the plaintiff to make the election at issue in *Keene*. Such an election may lead to the plaintiff's recovery of no relief or a different measure of relief than would have been available in the other suit. In short, *Casman*'s allowance of a simultaneous action in the CFC seeking different relief is inconsistent with *Keene*'s reasoning.[7]

The Federal Circuit's rationale in *Loveladies* is equally wanting. *Loveladies*' premise was that Section 1500 applies only if a plaintiff's "'claims' * * * brought to the [CFC] are the same as the 'claims' * * * sued upon in the district court." 27 F.3d at 1549, 1551. We can assume *arguendo* that this premise would be true if Congress had precluded jurisdiction only when a plaintiff has a "suit or process" in another court "for" the plaintiff's claim in the CFC. But Section 1500 also applies even when the plaintiff's claims in its two suits are distinct because it applies not just when the other suit is "for" the same claim but also when it is a suit "in respect to" that claim. See pp. 20-21, *supra*.

2. The Federal Circuit's policy analysis does not justify its restrictive reading of Section 1500

The Federal Circuit's interpretation of Section 1500, rather than focusing on statutory text, relied on its own understanding of policy arguments. In so doing, the court contravened established principles governing the interpretation of statutes restricting federal jurisdiction and waivers of sovereign immunity. The court's imposition of an extra-textual exception to Section 1500 based on the "relief" that a plaintiff requests erroneously

[7] The election *Keene* requires does not foreclose a plaintiff who chooses to file a suit in district court from bringing a subsequent action in the CFC after the district court suit has been terminated if the plaintiff's CFC claim ultimately survives the district court's judgment.

hinges federal jurisdiction on a collection of intricate pleading concepts wholly detached from the relief available in a suit, rewards gamesmanship by litigants, and ultimately circumvents the jurisdictional bar that Congress enacted to prevent plaintiffs from pursuing in the CFC and other courts parallel suits against the United States that arise from the same factual foundation.

The court of appeals reasoned that its decision does not improperly "undermine the policy and purpose of § 1500" of preventing plaintiffs from pursuing two simultaneous actions against the United States (or its agents) in different courts because, "[i]n practice, § 1500 does not actually prevent a plaintiff from filing two actions seeking the same relief for the same claims." Pet. App. 15a-16a. The court explained that its precedent in *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), created an "anomalous rule" under which a plaintiff may evade Section 1500 by strategically "order[ing]" his actions—that is, by filing his CFC claim prior to filing a related suit in another court. Pet. App. 16a-17a. Observing that under this view Section 1500 "would never have even come into play" if the Tribe had "simply filed its complaints in reverse order," the court declared that it found no "purpose that § 1500 serves today," that Section 1500 requires "nothing more than a 'jurisdictional dance,'" and that concerns about undermining Section 1500 therefore are "of no real consequence." *Id.* at 17a (quoting *Loveladies*, 27 F.3d at 1549). On that basis, the court erroneously chose to disregard the statute's terms and dismantle its protections. The court had no basis to ignore the jurisdictional limitations in Section 1500 in that manner.

a. This Court emphasized in *Keene* that Section 1500's "'limits upon federal jurisdiction . . . must be

neither disregarded nor evaded,'" because it is "Congress [that] has the constitutional authority to define the jurisdiction of the lower federal courts." *Keene*, 508 U.S. at 207, 217 (quoting *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1979), and citing *Finley* v. *United States*, 490 U.S. 545, 548 (1989)). Yet the Federal Circuit nevertheless adopted an unduly narrow interpretation of Section 1500 based in part on the premise that its decision in *Tecon* had previously succeeded in rendering Section 1500 a readily evaded formality. Nothing could be further from the teachings of this Court than this seemingly purposeful attempt to progressively erode a jurisdictional restriction.

The court erred in relying on *Tecon*'s limitation of Section 1500, Pet. App. 16a, because (as the en banc Federal Circuit had previously declared) that order-of-filing rule is incorrect. See *UNR Indus.*, 962 F.2d at 1020, 1023.[8] Section 1500 applies regardless whether a plaintiff files its CFC claim first or second, because it precludes CFC "jurisdiction" whenever the plaintiff has "pending" in another court a suit that is related to its CFC claim. See 28 U.S.C. 1500. The Court of Claims thus itself had held (even before *Tecon*) that Section 1500 "clearly deprive[s] th[e] court of jurisdiction" when a plaintiff files its other suit after filing its claim in the

[8] Although *Tecon*'s rule does not directly apply to this case because the Tribe filed suit in district court (one day) before filing in the CFC, the court of appeals incorporated *Tecon*'s interpretation of Section 1500 into its *ratio decidendi* by concluding that the outcome in this case comports with the narrow and self-defeating purpose *Tecon* had attributed to Section 1500. Because the Federal Circuit's order-of-filing rule was part of its *ratio decidendi*, it is appropriate for this Court to reject that extra-textual limitation on Section 1500 in order to restore the proper overall interpretation of the jurisdictional bar.

Court of Claims (now the CFC). *Hobbs* v. *United States*, 168 Ct. Cl. 646, 647-648 (1964) (per curiam); see *Maguire Indus., Inc.* v. *United States*, 114 Ct. Cl. 687, 688, 690 (1949) (assuming that Tax Court action was an agency proceeding and treating appeal therefrom as a later-filed suit in another court precluding CFC jurisdiction), cert. denied, 340 U.S. 809 (1950).

The only two decisions of this Court prior to *Keene* that found the statute applicable confirm that conclusion. Both held that the jurisdictional bar in Section 1500's direct predecessor applied when the Court of Claims (now CFC) action was filed first. See *In re Skinner & Eddy Corp.*, 265 U.S. 86, 92, 95 (1924) (Court of Claims erred in vacating voluntary dismissal of petition because the plaintiff filed a state court action immediately after the dismissal); *Corona Coal*, 263 U.S. at 539-540 (dismissing appeal from Court of Claims decision because related district court action was filed while the appeal was pending). To be sure, the relevant text was even clearer before 1948, when plaintiffs were expressly prohibited from "fil[ing] or *prosecut[ing]*" any claim in the Court of Claims if they had a related suit "pending in any other court." 28 U.S.C. 260 (1946) (emphasis added). But as *Keene* makes clear, Congress's enactment of Section 1500 made no change to the "underlying substantive law" with its "deletion of the 'file or prosecute' language in favor of the current reference to 'jurisdiction.'" 508 U.S. at 209; see *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) (explaining that "no changes of law or policy are to be presumed from changes of language" in the 1948 codification of the Judicial Code "unless an intent to make such changes is

clearly expressed");[9] cf. *Keene*, 508 U.S. at 212 (observing that Congress presumably was aware of similar pre-codification decisions and adopted them in its 1948 codification of Title 28). Thus, while *Keene* reserved the question whether *Tecon* was properly decided, 508 U.S. at 209 n.4, *Keene*'s rationale and this Court's prior precedents compel the conclusion that it was not.[10]

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[9] See also *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 831 n.4 (1989) (following *Fourco Glass* to construe 1948 codification of Title 28); *Finley*, 490 U.S. at 554 (same); *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 350 n.15 (1976) (same).

[10] The court in *Tecon* was likely motivated to retain jurisdiction because the plaintiffs before it, after conducting a significant amount of litigation in the Court of Claims, "filed the same claims in a district court and then moved the Court of Claims to dismiss [their] case under Section 1500." *UNR Indus.*, 962 F.2d at 1020. The government and the Court of Claims viewed the plaintiff's effort to force the Court of Claims to release jurisdiction as unacceptable conduct and the court, at the government's urging, "retained jurisdiction so it could dismiss the [plaintiff's] case with prejudice." See *ibid.* Although the government supported that result at the time, it subsequently concluded, based on further experience, that Section 1500 should be enforced by its terms and that similar conduct by plaintiffs "should be addressed by imposing sanctions for abuse of process and vexatious litigation." U.S. Br. at 39 n.19, *Keene*, *supra* (No. 92-166); see *UNR Indus.*, 962 F.2d at 1020.

The bizarre litigation spawned by *Tecon*'s order-of-filing rule confirms this judgment. Plaintiffs have filed numerous pairs of related cases on the same day, see, *e.g.*, Pet. App. 94a-98a, requiring evidentiary hearings to determine the *time* at which a messenger delivered (and court clerks filed) the relevant complaints. In such cases, *Tecon* makes federal jurisdiction turn on whether a CFC judge finds sufficiently credible the testimony of the plaintiff's messenger (perhaps years after the fact) regarding the specific times that the plaintiff's complaints arrived at each court. See, *e.g.*, *Passamaquoddy Tribe* v. *United States*, 82 Fed. Cl. 256, 274-280 (2008) (finding such testimony neither "persuasive [n]or credible" after evidentiary hearings).

b. The Federal Circuit's departure from the text, history, and purpose of Section 1500 cannot be justified by its view of "sound policy"—that "[t]he nation is served by private litigation" against the sovereign that can "control the excesses to which Government may from time to time be prone." Pet. App. 17a-18a (quoting *Loveladies*, 27 F.3d at 1555-1556). That rationale not only disregards *Keene*'s admonition that Congress—not the courts—must make any revision to Section 1500 in light of policy considerations, see 508 U.S. at 217-218, but also contravenes fundamental tenets of federal sovereign immunity.

As the Tribe's own complaint reflects (Pet. App. 60a), Congress enacted limited waivers of sovereign immunity in the Tucker Act and Indian Tucker Act by conferring jurisdiction on the CFC to hear certain claims against the United States. See *Navajo Nation*, 129 S. Ct. at 1551 (Tucker Act and Indian Tucker Act are "jurisdictional provisions that operate to waive sovereign immunity"); *Mitchell*, 463 U.S. at 212 & n.8, 215 (similar); see also *Testan*, 424 U.S. at 398; *Tempel* v. *United States*, 248 U.S. 121, 129 (1918). Congress enacted those waivers to precisely the extent it wished, against the well-understood backdrop of Section 1500's longstanding limits on the scope of Congress's consent to suit in the Court of Claims and now the CFC. As explained above, the scope of such waivers, including the "limitations and conditions upon which the Government consents to be sued," must be "strictly observed and exceptions thereto are not to be implied." *Nakshian*, 453 U.S. at 161 (citation omitted); see pp. 25-26, *supra*.

By invoking policy rationales to insist that Congress provide "a clear expression of [its] intent" to preserve sovereign immunity and limit CFC jurisdiction, Pet.

App. 18a (citation omitted), the Federal Circuit had it precisely backwards: It is the "elimination"—not the preservation—"of sovereign immunity" that must be "unequivocal[ly] express[ed]," and that "expression" must itself be found "in statutory text," *Nordic Vill., Inc.*, 503 U.S. at 37; see *id.* at 33-34, and must be "strictly construed, in terms of its scope," *Blue Fox, Inc.*, 525 U.S. at 261. Indeed, the court of appeals has repeated the error of its predecessor, which had entertained claims under the Declaratory Judgment Act's authorization for "any court" to award declaratory relief, 28 U.S.C. 2201, by mistakenly requiring the government to show a "clear indication that Congress affirmatively intended to exclude" the Court of Claims from that authorization. *United States* v. *King*, 395 U.S. 1, 4 (1969). Then as now, the search for a "clear indication" that Congress affirmatively preserved sovereign immunity is entirely ill conceived; the relevant demand is for an "unequivocal[] express[ion]" defining the "extent" of a waiver of immunity. *Ibid.*

The Federal Circuit's belief that it would be "sound policy" to subject the sovereign to suits for damages in the CFC, notwithstanding the pendency of suits in district court based on substantially the same operative facts, is doubly flawed. From a historical perspective, it ignores that *congressional* waivers of immunity were needed to create the CFC's predecessor (the Court of Claims) and confer its authority. See pp. 2-3, *supra*. And, more fundamentally, it disregards this Court's clear instruction that "policy, no matter how compelling, is insufficient" to "waive [sovereign] immunity." *Library of Cong.* v. *Shaw*, 478 U.S. 310, 321 (1986).

c. The Federal Circuit's decision to base the CFC's jurisdiction on whether a plaintiff seeks the same "re-

lief" in its two suits, and its understanding that "it is the relief that the plaintiff *requests* [in its complaint] that is relevant," Pet. App. 10a, 15a, invoke pleading concepts entirely ill suited for the jurisdictional rule here. The judicial relief ultimately 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 pleadings." Fed. R. Civ. P. 54(c) (adopted 1937); see Fed. Cl. 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. 10 James Wm. Moore, *Moore's Federal Practice* § 54.72[1][b]-[c], at 54-133 to 54-135 (3d ed. 2009) (citing cases). Except for a default judgment, the proof adduced in litigation rather than the pleadings will determine the relief that a court should award. See *id.* § 54.72[1][a], at 54-130; Charles Alan Wright et al., *Federal Practice and Procedure* § 2664, at 173-174 & n.2 (1998) (explaining that a party's demand for relief in its pleadings under Fed. R. Civ. P. 8(a)(3), does not govern the relief granted outside the context of a default judgment; 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.

II. THE TRIBE DID NOT SEEK "DIFFERENT RELIEF" IN DISTRICT COURT BECAUSE BOTH CASES SOUGHT MONETARY RELIEF AND OTHER OVERLAPPING RELIEF

Even if *Casman* were correct in concluding that Section 1500 does not preclude simultaneous suits if they seek "entirely different" relief, *Casman*, 135 Ct. Cl. at 650, the Federal Circuit erred in holding that the Tribe's requests for monetary relief in the CFC and district court qualify as different relief. The court of appeals' conclusion that identifying and distinguishing the legal or equitable bases for such relief is "critical to the § 1500 analysis," Pet. App. 12a, is both incorrect and inconsistent with *Keene*.

A. *Keene* held that Section 1500 requires dismissal of a CFC claim if "the plaintiff's other suit [is] based on substantially the same operative facts as the [CFC] action, at least if there [is] some overlap in the relief requested." 508 U.S. at 212. The Court thereby acknowledged (but declined to resolve) the *Casman*-based argument that suits based on substantially the same facts might not trigger Section 1500 if they seek "completely different relief"—*i.e.*, "distinctly different types of relief." *Id.* at 212 n.6, 216; see *id.* at 214 n.9 (emphasizing that *Casman* is "limited to that situation"). *Casman*, as noted, concluded that the specific (injunctive) relief of prospective reinstatement available in district court and retrospective monetary relief available in the Court of Claims were "entirely different." 135 Ct. Cl. at 650. *Keene* accordingly held that *Casman*'s exception, even if valid, was inapplicable because Keene sought "monetary relief" in both the CFC and the district court actions. *Keene*, 508 U.S. at 216.

The Federal Circuit in this case nevertheless concluded that monetary relief that the Tribe seeks in the CFC and monetary relief in district court are "completely different" for purposes of Section 1500. The court found it dispositive that the Tribe styled its requests as ones for "damages at law, not equitable relief," in the CFC and for "equitable relief and not damages" in district court. Pet App. 11a-12a. The technical law-equity distinction the court found "critical to the § 1500 analysis," *id.* at 12a, strays even further afield from Section 1500's text than does the holding in *Casman*. Even if it is assumed for present purposes that a suit seeking equitable monetary relief might not be "for" a CFC claim for money damages in some technical sense, if it arises from substantially the same operative facts, it is a suit "in respect to" that claim because it is related to the claim and has "at least * * * some overlap" with it, *Keene*, 508 U.S. at 212. The Federal Circuit's narrow focus on the doctrinal theory for relief, relevant in the days of a divided bench, disregards *Keene*'s teaching that Congress eschewed "a narrow concept of identity" in Section 1500 and so denied plaintiffs a "liberal opportunity to maintain two suits arising from the same factual foundation." *Id.* at 213.

If the law-equity distinction were relevant to *Casman*'s exception, *Keene* would have had to address it. But the Court did not do so. Without inquiring whether the "monetary relief" sought in Keene's CFC and district court cases constituted relief at law or at equity, the Court held that the exception for "distinctly different types of relief" did not apply because both actions sought "monetary relief" from the government. 508 U.S. at 216.

Indeed, the Court likely would have reversed rather than affirmed in *Keene* if the Federal Circuit's distinction were correct. The Court affirmed dismissal of a CFC breach-of-contract claim (*Keene I*) because, in a separate district court tort action in which Keene was the defendant, Keene had pending a third-party complaint "seeking indemnification or contribution from the Government" for any damages that might be awarded against Keene. See *Keene*, 508 U.S. at 203-204, 213 & n.7, 216. Indemnification and contribution are understood to be equitable relief.[11] Thus, if the Federal Circuit were correct, Section 1500 would not have applied in *Keene* because such equitable monetary relief would have been "different relief" than legal contract damages. *Keene*, of course, held otherwise.

B. The Federal Circuit's misguided approach led it into a thicket of elusive and technical distinctions, largely based on the Tribe's characterization of its own complaints. That result is in derogation of the principle that "jurisdictional rules should be clear," especially in the sovereign immunity context. See *Lapides* v. *Board of Regents of Univ. Sys.*, 535 U.S. 613, 621 (2002); *Heckler* v. *Edwards*, 465 U.S. 870, 877 (1984) (explaining that "litigants ought to be able to apply a clear test to determine" which federal court has jurisdiction). "[A]dminis-

[11] See, *e.g.*, *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 141 (2007) (ruling that "traditional rules of equity" govern statutory contribution claim); Restatement (Second) of Torts § 886A cmt. c at 338-339 (1979) ("Contribution is a remedy that developed in equity" and is governed by "equity rules" in the tort context.); *id.* § 886B cmt. c and f at 345-347 (explaining that "[t]he basis for indemnity" is the equitable concept of unjust enrichment and restitution; discussing relationship to contribution); 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 648, at 63 (1918) (surveying the "equitable doctrine of contribution").

trative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1193 (2010). The creation of "[c]omplex jurisdictional tests" should therefore be avoided because they encourage "gamesmanship" by litigants, consume "[j]udicial resources," and lead to legal uncertainty. *Ibid.* The decision below vividly illustrates the point.

The court of appeals first reasoned that the Tribe's actions do not seek overlapping relief because the Tribe's district court complaint seeks what the Tribe has chosen to call "old money" (*i.e.*, "money that is already in the government's possession, but that erroneously does not appear in the [Tribe's] accounts"), whereas its CFC complaint seeks what the Tribe has chosen to call "new money" (*i.e.*, "profits that the [Tribe] would have made but for the United States' mismanagement"). Pet. App. 13a. Those labels and distinctions appear nowhere in the complaints, are the result of counsel's ex-post recharacterization of the claims in the Tribe's intertwined complaints (see *id.* at 53a n.14), and are, as the dissenting judge explained, untenable, *id.* at 22a-25a.

In fact, as the dissenting judge noted, the Tribe's CFC complaint—not just its district court complaint—seeks so-called "old money" (money allegedly already in the government's possession) by challenging the government's trust-account record-keeping. See Pet. App. 23a-25a; pp. 9-10, *supra* (discussing CFC complaint). The majority reiterated its law-equity distinction in arguing that the Tribe's CFC complaint seeks "*damages* alone" and not "equitable relief of any type," Pet. App. 14a, but it provided no reasoned response—let alone one consistent with liberal notice-pleading rules—to the simple observation that the Tribe's complaints seek overlapping monetary relief.

Conversely, the Tribe's district court complaint—not just its CFC complaint—seeks so-called "new money" (money not allegedly already in the government's possession). It does so by requesting monetary relief under equitable doctrines for any injuries resulting from the government's alleged violation of fiduciary duties to "invest" the Tribe's trust assets properly and "maximize profits" therefrom. Pet. App. 76a, 84a; see *id.* at 83a (duty to "invest" trust funds "to maximize the[ir] productivity"); *id.* at 86a (identifying purported statutory investment duty). Indeed, the district court complaint specifically states that its request for a trust-fund accounting is "not limited to" the "funds under the custody and control of the United States," so as to capture such unrealized profits. See *id.* at 91a. And in both stating its claims and articulating its prayer for relief, the Tribe requests "equitable restitution," "disgorgement," and "any additional equitable relief" that may be appropriate. *Ibid.*; *id.* at 92a (prayer for relief).

The Federal Circuit's conclusion that the Tribe does not seek an "accounting" in both courts because it does not include an express request for an accounting in its "prayer for relief" in the CFC, Pet. App. 15a, further underscores the error in its approach to Section 1500. Even if the Tribe in the CFC sought only to recover profits lost because of mismanagement of the funds already held in trust (so-called "new money"), an accounting would be necessary to determine the "principal" that should have been invested if the Tribe were to establish a pertinent governmental investment-related violation of a statute. Without knowing that initial investment, there is no way to determine the proper amount of investment profits. The court of appeals accordingly acknowledged that "what would ensue [in the CFC] would

amount to an accounting," *ibid.* (quoting *id.* at 41a), but found that result irrelevant to the application of Section 1500.

The court's technicality-laden analysis finds no support in the text of Section 1500. That provision does not refer to "legal" or "equitable" relief—or indeed to the type of relief sought at all—and therefore provides no basis for the Federal Circuit to hinge Section 1500's application on an assessment of the historical and jurisprudential roots for the relief. Cf. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 253 (1993) (construing the term "appropriate equitable relief" under ERISA, 29 U.S.C. 1132(a)(5)). And the court of appeals' approach, if adopted by this Court, would inevitably create incentives for counsel to generate novel and intricate distinctions in order to pursue the duplicative litigation that Section 1500 was intended to foreclose, thereby opening the door to inconsistent decisions.

Section 1500, properly read, prevents that result and precludes CFC jurisdiction whenever a plaintiff's district court suit against the United States has some "relation or reference to," or "is concerned with," the plaintiff's claim against the government in the CFC. See pp. 21-22, *supra*. That is so with respect to the Tribe's complaint in its district court action for breach of trust, and the CFC therefore properly held that Section 1500 foreclosed jurisdiction over the Tribe's parallel CFC claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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