No.

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

PETITION FOR A WRIT OF CERTIORARI

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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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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 559 F.3d 1284. The opinion of the Court of Federal Claims (App., *infra*, 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 (App., *infra*, 56a). 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. The jurisdiction of this Court is invoked under 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. In 1855, Congress established 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. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). Because that limited authority did not sufficiently relieve Congress of the burdens of the private-bill process, Congress, in 1863, adopted President Lincoln's recommendation and authorized the Court of Claims to issue final judgments. *Id.* at 213. 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 a provision prohibiting 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 later 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 another court is "against [either] the United States" or its agent. See Act of June 25, 1948, ch. 646, § 1, 62 Stat. 942; *Keene*, 508 U.S. at 211 n.5. Every modern-day statute conferring jurisdiction on the Court of Claims and its trial-court successor, the United States Court of Federal Claims (CFC)[1]—including 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 (App., *infra*, 60a)—has been enacted against the backdrop of the jurisdictional limitation embodied in Section 1500 and its predecessors. See Tucker Act, ch. 359, 24 Stat. 505 (enacted 1887); Indian Claims Commission Act, ch. 959, § 24, 60 Stat. 1055 (enacted 1946).

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[1] 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 as the CFC. See *Keene*, 508 U.S. at 202 n.1; *Mitchell*, 463 U.S. at 228 n.33.

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's prohibition on CFC jurisdiction over a claim "for or in respect to which" the plaintiff has a pending suit "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 jurisdiction "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 lawsuit, 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. And although observing that Section 1500 has been criticized as "anachronistic" and acknowledging that Section 1500's jurisdictional restrictions may "deprive plaintiffs of an opportunity to assert rights," the Court in *Keene* concluded 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, *Keene* 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" in 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 the present petition. See 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 the questions whether Section 1500's prohibition on CFC jurisdiction is subject to any exception when (1) the action in another court based on the same operative facts seeks "completely different relief," *id.* at 212 n.6, 214 n.9, 216 (discussing *Casman* v. *United States*, 135 Ct. Cl. 647 (1956)), or (2) the plaintiff 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)). The en banc Federal Circuit had rejected both of those judicially created exceptions when this Court decided *Keene*, see *UNR Indus.*, 962 F.2d at 1020, 1024-1025 (purporting to overrule *Casman*); *id.* at 1020, 1023 (purporting to overrule *Tecon*), 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

(Fed. Cir. 1994) (en banc) (*Casman*); App., *infra*, 16a-17a (*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. App., *infra*, 74a-93a. One day later, it filed a similar complaint against the United States in the CFC. App., *infra*, 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." App., *infra*, 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 under court judgments. *Id.* at 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." App., *infra*, 76a. It thus 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).

Count 1 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." App., *infra*, 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 clarifies that the Tribe 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 91-93a.

b. The Tribe's CFC complaint initiated "an action for money damages against the United States" for its alleged "mismanagement of the [Tribe's] trust property" through "breaches of statutory, regulatory, and fiduciary duties owed to the [Tribe]." App., *infra*, 58a-59a. The complaint specifies that the asserted duties pertain to the Tribe's reservation 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, contends 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." App., *infra*, 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). App., *infra*, 67a-71a. Those breaches 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 was without jurisdiction under Section 1500. App., *infra*, 27a-55a.

After comparing the district court and CFC complaints with a side-by-side table detailing their allegations, App., *infra*, 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 re-

lief 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. App., *infra*, 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. App., *infra*, 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." App., *infra*, 7a (quoting *Loveladies*, 27 F.3d at 1551); 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." *Id.* at 8a-9a. The majority

then found that "the 'same relief' prong is dispositive," and therefore declined to decide whether the Tribe's lawsuits "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." App., *infra*, 11a-12a. Although the majority recognized that the "equitable" relief sought in district court would, if granted, recover "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 lawsuits sought "overlapping relief" in two areas: "money and an accounting." App., *infra*, 12a. 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 found 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.*

The majority similarly found that the Tribe sought an "accounting" in district court but not in the CFC. App., *infra*, 15a. The court recognized that "what would

ensue [in the CFC] would amount to an accounting" in aid of the CFC's ability to enter judgment, but noted that the Tribe's "prayer for relief" in its CFC complaint "does not request an accounting." *Ibid.*

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 the same claims at the same time in different courts. App., *infra*, 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. Rather, the court reasoned, Section 1500 only prohibits plaintiffs from filing a district court action before a CFC lawsuit, while permitting plaintiffs to proceed with both lawsuits so long as the CFC action is filed first. *Ibid.* 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. 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." App., *infra*, 19a-20a. She accordingly concluded that this Court's decision in

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

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision holds that Section 1500, which 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, permits plaintiffs to maintain simultaneous actions against the United States in two courts arising from the same operative facts so long as the actions do not seek the "same relief." It further holds 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 court's decision finds no support in the broad text of Section 1500's prohibition on CFC jurisdiction; its reasoning is 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.

The Federal Circuit has itself changed course on the key questions concerning the proper interpretation of Section 1500, and its decision in this case will have significant adverse impact. The decision will force the government to litigate simultaneously against the same plaintiff in several fora concerning the same questions, thereby wasting significant judicial and litigation resources and risking inconsistent decisions. Indeed, in the Indian Tucker Act context alone, Tribes have brought more than 30 pairs of so-called tribal-trust lawsuits against the United States and are simultaneously

litigating those paired cases in both the CFC and district court.

The Federal Circuit stated that Section 1500 no longer serves "any purpose" because, under its interpretations, Section 1500 requires only a pointless "jurisdictional dance" and enables plaintiffs suing the federal sovereign to easily circumvent its restrictions. App., *infra*, 17a. 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 interpretations. Since 1868, Section 1500's jurisdictional restrictions have served as part of the legal framework for every waiver by the United States of its sovereign immunity from suit in the CFC. Congress itself *expanded* Section 1500's jurisdictional bar in 1948; efforts to repeal the provision have failed; and, as *Keene* emphasized, Section 1500's "limits upon federal jurisdiction . . . must be neither disregarded nor evaded." *Keene*, 508 U.S. at 207, 211 n.5, 217 & n.14. To the contrary, such express limitations on the scope of Congress's waivers of the United States' immunity from suit in the CFC must be strictly observed, with any ambiguity construed in favor of preserving that immunity.

The Federal Circuit's decision departs from those basic interpretive principles, greatly expands the jurisdiction of the CFC, disregards the basic teachings of this Court in *Keene*, and imposes the burden of duplicative litigation on the parties and the CFC. The Court should grant certiorari to correct the fundamental errors of the court of appeals and restore the jurisdictional limitations Congress enacted.

A. The Federal Circuit's Same-Relief Requirement Is Inconsistent With The Text Of Section 1500 And This Court's Decision In *Keene*

1. Section 1500 precludes CFC jurisdiction when a plaintiff has a second suit pending that is based on substantially the same operative facts as the CFC claim, even if the other suit seeks different relief

The court of appeals erroneously held that Section 1500's jurisdictional bar does not apply when a plaintiff who has sued the United States in the CFC has a related case based on the same operative facts pending in another court, so long as that other suit seeks "different relief." App., *infra*, 7a, 8a-9a.[2] Section 1500, by its terms, bars CFC jurisdiction over "any" claim "in respect to which" the plaintiff has "any suit" pending in another court. 28 U.S.C. 1500. A suit sharing the same operative facts as a CFC claim is such a suit.

a. Congress has broadly proscribed CFC jurisdiction over any claim against the United States for which a plaintiff has a related suit against the government pending in another court, regardless whether that other case seeks the "same relief" as the CFC claim. The phrase "any claim [in the CFC] for or in respect to which the plaintiff * * * has pending * * * any suit or process," 28 U.S.C. 1500, uses the word "which" to refer to the plaintiff's CFC claim. Section 1500's jurisdictional bar therefore is triggered by "any suit or process" "for or in respect to" the plaintiff's CFC claim, when that suit or process is pending against the United

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[2] The court of appeals accepted *arguendo* the CFC's determination that the "operative facts" in the Tribe's two complaints "are the same," App., *infra*, 48a-49a, by concluding that it need not address whether the complaints arise from the "same operative facts." *Id.* at 9a n.1.

States in another court. *Keene* makes clear that that bar 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." 508 U.S. at 213. And the expansive text of the latter phrase eschews a "narrow concept of identity." See *ibid.*

A plaintiff's pending suit in another court is "in respect to" a claim in the CFC if it "relate[s] to," is "concern[ed] with," or has some "relation or reference to" that claim. *Webster's Third New Int'l Dictionary* 1934 (1993) (defining "respect" and "in respect to"). That reading is supported by this Court's conclusion that "the plain language" of a similar statutory phrase ("arising in respect of") is "encompassing" language that "sweep[s] within" its scope all related matters "associated in any way." *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 concessions "in respect to the transportation" of property include concessions that either "directly or indirectly" affect 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 'any suit or process'] 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 *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)). A suit that "aris[es] from the same factual foundation" as a claim in the CFC, *Keene*, 508 U.S. at 213, surely qualifies as a suit that "relate[s] to," is "concern[ed] with," or has some "relation or reference to" that claim, *Webster's Third New Int'l Dictionary* 1934, or as one that is "associated in any way" with the CFC claim, *Kosak*, 465 U.S. at 854.

b. Section 1500's broad gatekeeping function reinforces that conclusion. Before 1948, the predecessor to Section 1500 required only "an election 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) (emphasis added). Congress expanded the jurisdictional bar when it enacted Section 1500, which applies when a CFC plaintiff has a related suit in another court against either the United States or one of its agents. See *Keene*, 508 U.S. at 211 n.5. Congress accordingly "close[d] th[e] loophole" that permitted plaintiffs to maintain two related suits brought against the United States directly. *Ibid.*

In both contexts, Section 1500 bars CFC jurisdiction even in circumstances in which the CFC action and another pending suit involve claims that could not have been "joined in a single suit." *Keene*, 508 U.S. at 213. 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 or that lies "beyond the jurisdiction of the [CFC]." See *id.* at 213-214. It follows that Congress required plaintiffs to elect between fora in which they can have different prospects of successfully securing relief. The Court in *Keene* did not need to de-

cide whether Section 1500 applies when two suits seek "completely different relief" because "at least" some overlapping relief was sought in that case. *Id.* at 212 & n.6. But the Federal Circuit's holding that CFC jurisdiction is displaced only when another suit seeks the "same relief" in another forum ultimately cannot be reconciled with the logic of *Keene*'s holding that Section 1500 applies even when the plaintiff's legal theories in the two cases are so different that the theory relied upon in district court could not appropriately be advanced in the CFC.

c. The Federal Circuit's extra-textual "same relief" exception to Section 1500's categorical bar likewise finds no sound basis in *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), which the en banc Federal Circuit initially repudiated in considered dicta in *UNR Industries, Inc.* v. *United States*, 962 F.2d 1013, 1020, 1024-1025 (1992), aff'd *sub nom. Keene*, *supra*, but later reaffirmed, see *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549, 1551 (Fed. Cir. 1994) (en banc). *Casman* 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 concluded that the statute therefore should not apply if the "plaintiff has no right to elect between two courts." 135 Ct. Cl. 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 in *Casman* that Section 1500 did not apply when such

"entirely different" relief must be sought in different courts. *Ibid.*[3]

Casman's focus on the type of relief sought by the plaintiff in a suit in another court finds no textual foundation. 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 thus 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).

And although *Keene* reserved the question whether *Casman*'s "'judicially created exception[]' to § 1500" for suits seeking "completely different" or "distinctly different" relief was valid, 508 U.S. at 212 n.6, 215-216 (citation omitted), the Court's reasoning demonstrates that *Casman* relied on a fundamentally flawed rationale and incorrectly restricted Section 1500. As noted above, *Keene* holds that Section 1500 requires plaintiffs to elect between suing in the CFC and suing in another court even when the legal theories that could be raised in such suits are distinct. See 508 U.S. at 213-214. Those differences in legal theory typically would 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 differ-

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[3] In 1982, Congress eliminated the problem that concerned the *Casman* court by authorizing federal employees to seek both back pay and reinstatement in the CFC. See 28 U.S.C. 1491(a)(2).

ent from requiring the plaintiff to make the election at issue in *Keene*.

Keene recognized that Section 1500's restrictions may "deprive plaintiffs of an opportunity to assert rights that Congress has generally made available" and 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)). At the time, the en banc Federal Circuit, in the very decision under review, had "announced that it was overruling" *Casman*. See *Keene*, 508 U.S. at 212 n.6, 215-216 (citation omitted) (discussing *UNR Indus.*, *supra*). Now that the Federal Circuit has reinstated the *Casman* holding, *Loveladies*, 27 F.3d at 1549, 1551, and applied it in this case, see App., *infra*, 7a, this Court's review is again necessary.

2. 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," App., *infra*, 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 re-

quested." 508 U.S. at 212. The Court thereby acknowledged 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; *id.* at 214 n.9 (emphasizing that *Casman* is "limited to that situation"). *Casman*, as noted, concluded that the specific (injunctive) relief of reinstatement available in district court and the 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. 508 U.S. at 216.

The Federal Circuit nevertheless concluded that monetary relief 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 for "damages at law, not equitable relief," in the CFC and for "equitable relief and not damages" in district court. App., *infra*, 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*. A suit involving equitable monetary relief might not be a suit "for" a CFC claim involving money damages in the technical sense, but 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 attention on the doctrinal source 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 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 it. See 508 U.S. at 203-204, 216. Indemnification and contribution are understood to be equitable relief.[4] 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

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[4] See, *e.g.*, *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 141 (2007) (ruling that "traditional rules of equity" governs statutory contribution claim); Restatement (Second) of Torts § 866A cmt. c (1979) ("Contribution is a remedy that developed in equity" and is governed by "equity rules" in the tort context.); *id.* § 866B cmt. c and f (explaining that "[t]he basis for indemnity" is the equitable concept of unjust enrichment and restitution; discussing relationship to contribution); Joseph Story, 2 *Commentaries on Equity Jurisprudence* § 648 (1918) (surveying the "equitable doctrine of contribution").

legal contract damages. *Keene*, of course, held otherwise.

b. The Federal Circuit's approach led it into a thicket of elusive and technical distinctions, largely based on respondent's characterization of its 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. of Ga.*, 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).

The court first reasoned that the Tribe's actions do not seek overlapping relief because the Tribe's district court complaint seeks so-called "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 so-called "new money" (*i.e.*, "profits that the [Tribe] would have made but for the United States' mismanagement"). App., *infra*, 13a. As the dissenting judge explained, the majority's distinction is 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 already in the government's possession) by challenging the government's trust-account record-keeping. See App., *infra*, 23a-25a; pp. 8-9, *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," App., *infra*, 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 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 "maximiz[e] profits" therefrom. See p. 7, *supra* (quoting complaint). Indeed, the complaint specifically states that its request for a trust-fund accounting extends beyond "funds under the custody and control of the United States" so as to capture such unrealized profits, see *ibid.*, and, in both stating its claims and articulating its prayer for relief, the Tribe requests "equitable restitution" and "any additional equitable relief" that may be appropriate. *Ibid.*; App., *infra*, 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" to the CFC, App., *infra*, 15a, further underscores the error in its approach to Section 1500. Even if the Tribe only sought to recover profits lost because of mismanagement (so-called "new money") in the CFC, an accounting would be necessary to determine the principal that should have been invested after the Tribe establishes a pertinent governmental investment-related violation. 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.*, 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. Compare *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's approach inevitably creates 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 where, as here, 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 p. 16, *supra*.

3. The Federal Circuit's interpretation of Section 1500 disregards established jurisdictional and sovereign immunity principles

The Federal Circuit's rationale for its interpretation of Section 1500 contravenes established principles governing the interpretation of statutes restricting federal jurisdiction and waivers of sovereign immunity in actions for monetary relief against the United States. The court 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 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." App., *infra*, 15a-16a. The court explained that its precedent in *Tecon Eng'rs, 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. App., *infra*, at 16a-17a. Observing that 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. On that basis, the court chose to disregard the statute's terms and dismantle its protections.

a. This Court in *Keene*, as noted above, emphasized 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. Yet the Federal Circuit blithely adopted an unduly narrow interpretation of Section 1500 based in part on the premise that it had previously succeeded in rendering Section 1500 a formality. Nothing could be further from the teachings of this Court than this seemingly purposeful attempt to progressively erode a jurisdictional restriction.

Moreover, the court erred in relying on *Tecon*'s limitation of Section 1500, App., *infra*, 16a, because (as the en banc Federal Circuit previously declared) that order-of-filing rule is incorrect. See *UNR Indus.*, 962 F.2d at

1020, 1023.[5] 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 his claim in the CFC. See 28 U.S.C. 1500. 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 CFC action is filed first.[6] To be sure, the relevant text was even clearer before 1948, when plaintiffs were expressly prohibited from "fil[ing] or *prosecut[ing]*" any CFC claim 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; cf. *id.* at 212 (observing that Congress presumably was aware of similar decisions and adopted them in its 1948 codification). Thus, while *Keene* reserved the question whether *Tecon*

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[5] 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.

[6] 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 district 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).

was properly decided, *id.* at 209 n.4, *Keene*'s rationale compels the conclusion that it was not.[7]

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." App., *infra*, 17a-18a (quoting *Loveladies*, 27 F.3d at 1555-1556). That rationale not only disregards *Keene*'s admonition about the proper role of the courts in this sphere, see 508 U.S. at 217-218,

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[7] 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 several related cases on the same day, see, *e.g.*, Pet. App. 94a-98a, requiring evidentiary hearings to determine what *time* 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).

but also contravenes fundamental tenets of federal sovereign immunity.

As the Tribe's own complaint reflects (App., *infra*, 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 *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1551 (2009); *Mitchell*, 463 U.S. at 212, 215; *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 CFC (and Court of Claims) jurisdiction. Such "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) (citation omitted); see *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941) ("[T]he terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit."). By invoking policy rationales to insist that Congress provide "a clear expression of [its] intent" to preserve sovereign immunity and limit CFC jurisdiction, App., *infra*, 18a, the Federal Circuit had it precisely backwards: It is the waiver, not the recognition, of federal sovereign immunity that 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 *United States* v. *Williams*, 514 U.S. 527, 531 (1995) (Statutory "ambiguities [must be construed] in favor of immunity."); *Library of Cong.* v. *Shaw*, 478 U.S. 310, 321 (1986) ("[P]olicy, no matter how compelling, is insufficient" in this context.).

B. The Federal Circuit's Decision Threatens Significant Adverse Consequences

By holding that Section 1500 permits a plaintiff to maintain two simultaneous actions based on substantially the same operative facts so long as the two suits seek different relief—and by adopting a test that uses technical pleading concepts to discover differences in relief where none appear to the naked eye—the Federal Circuit has eviscerated Section 1500's limitation on CFC jurisdiction. Since this Court in *Keene* returned Section 1500 to the court of appeals' interpretive domain, the Federal Circuit has reinstated its flawed decisions in *Casman* and *Tecon*, and now has used those decisions to support a holding that would allow two suits, one in the CFC and one in district court, to go forward simultaneously against the government, even when based on the same operative facts and seeking similar relief. The court of appeals' decision is plainly incorrect. And because the Federal Circuit exercises exclusive appellate authority over the CFC, 28 U.S.C. 1292(c)(1), 1295(a)(3), this is not a context in which this Court could await for a circuit conflict to develop.[8]

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[8] Regional courts of appeals previously could have construed Section 1500 in an appeal from a Little Tucker Act action for which district courts have concurrent jurisdiction with the CFC. 28 U.S.C. 1346(a)(2); see *Shapiro* v. *United States*, 168 F. 2d 625, 626 (3d Cir. 1948) (finding district court jurisdiction governed by Section 1500). But the Federal Circuit now has exclusive appellate jurisdiction over district court cases based "in whole or in part" on the Little Tucker Act unless the relevant claim is founded on an internal revenue statute or regulation. 28 U.S.C. 1295(a), (a)(2). The potential for Section 1500 to arise in the context of a case concerning an internal revenue provision and falling within the Little Tucker Act's $10,000 threshold is vanishingly remote, and we have identified no such appellate decision.

The implications of the court of appeals' evisceration of Section 1500 are substantial. In the Indian Tucker Act context alone, we have identified at least 31 other pairs of pending cases that Indian Tribes have brought against the United States in the CFC and district court. See App., *infra*, 94a-99a (listing cases). As is true here, the cases in each pair are based on substantially the same operative facts. While the Tribes are entitled to pursue an action against the government, the Federal Circuit's approval of their double-barreled strategy imposes a substantial litigation burden on the United States and the courts and threatens inconsistent judicial rulings. Section 1500 was intended to prevent just such duplicative litigation. Certiorari is therefore warranted to restore that provision's limitations on CFC jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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