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

REPLY BRIEF FOR THE UNITED STATES

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In *Keene Corp.* v. *United States*, 508 U.S. 200 (1993), this Court held that 28 U.S.C. 1500 deprives the Court of Federal Claims (CFC) of jurisdiction over a claim against the government if the plaintiff has another suit pending in another court against the United States or an agent thereof "based on substantially the same operative facts as the [CFC] action, at least if there was some overlap in the relief requested." 508 U.S. at 212. *Keene* did not resolve whether the CFC lacks jurisdiction in all cases where the other suit is based on "substantially the same operative facts." *Id.* at 212 & n.6.

The Federal Circuit in this case accepted that the Tribe's simultaneous suits against the United States in the CFC and in district court are based on the "same operative facts." Pet. App. 8a-9a & n.1. The court nevertheless held Section 1500 inapplicable because, in its

view, the Tribe's two cases sought different relief: legal monetary relief in the CFC and equitable monetary relief (including disgorgement and equitable restitution, *id.* at 11a-13a) in district court. The Federal Circuit declared that its distinction between legal and equitable relief was "critical to the § 1500 analysis." *Id.* at 12a.

The government's opening brief demonstrates that Section 1500 applies whenever a plaintiff's other suit or process arises from substantially the same operative facts as its claim in the CFC (U.S. Br. 19-31); that the Federal Circuit's contrary view cannot be sustained (*id.* at 31-42); and that its legal-equitable rationale is deeply flawed (*id.* at 43-45). The Tribe now abandons the Federal Circuit's reasoning, and instead argues (at 50) that "[i]t is the substance of the relief requested, rather than its characterization as equitable or legal, * * * that governs the §1500 analysis."

In the Tribe's view, Section 1500 applies only when the plaintiffs' "two suits seek the same substantive relief" (Resp. Br. 14, 22, 24) because Section 1500 uses the term "claim" to mean a demand for "particular relief" or a "particular kind of relief" (*id.* at 14, 18-19, 22, 28). The Tribe thus appears to distinguish between demands for "a specific thing, act, [and] sum of money" (*id.* at 18), and suggests that Section 1500 applies only where two parallel suits seek the same category of relief. *Id.* at 50-52. That reading, the Tribe asserts, follows from Section 1500's origins as a response to duplicative lawsuits brought by persons claiming ownership of cotton seized during the Civil War because those suits "sought the same relief—monetary compensation for the same lost cotton." *Id.* at 25-26.

The Tribe's arguments do not withstand scrutiny. Congress knew that cotton claimants brought a variety

of actions, some for money and others for specific relief. Moreover, the term "claim" does not embody a request for a *particular* kind of relief and, in any event, Section 1500 is triggered whenever the plaintiff's other "suit or process" is one "for *or* in respect to" its "claim" in the CFC. Finally, the Tribe's interpretation would improperly expand Congress's waiver of sovereign immunity beyond the text of Section 1500 and invite strategic manipulation of the pleading process.

I. SECTION 1500 PRECLUDES CFC JURISDICTION WHEN THE PLAINTIFF HAS A SUIT PENDING IN ANOTHER COURT BASED ON SUBSTANTIALLY THE SAME OPERATIVE FACTS

A. Historical Context Refutes The Tribe's Construction Of Section 1500

The Tribe's argument hinges on a misreading of the historical record. The Abandoned Property Collection Act (APCA), ch. 120, 12 Stat. 820, enacted on March 12, 1863, authorized Treasury agents to seize certain property in insurrectionist States and authorized persons claiming ownership to sue in the Court of Claims to recover monetary compensation. §§ 1, 3.[1] Many claimants, however, recognized the difficulty of satisfying the statutory requirement that they prove their loyalty to the Union, and they therefore "resorted to separate suits in other courts" against government officials. *Keene*, 508 U.S. at 206. The Tribe asserts (at 1, 4, 14, 25-27) that those "tort suits"—the very suits that prompted Congress to enact Section 1500's predecessor—"sought the same relief for the same injury as their

[1] Many authorities refer to APCA as the Captured and Abandoned Property Act.

counterpart suits in the Court of Claims: money for the same confiscated cotton." That assertion is wrong.

Cotton claimants brought a variety of suits against federal officers. As *Keene* recognized, some brought actions on "tort theories such as conversion" that provided monetary relief for seized cotton. See 508 U.S. at 206; see, *e.g.*, *McLeod* v. *Callicott*, 16 F. Cas. 295 (C.C.D.S.C. June Term 1869) (No. 8897). But others sued federal officers for specific relief, *i.e.*, the return of their cotton. See, *e.g.*, *Tweed's Case*, 83 U.S. (16 Wall.) 504 (1873).[2] Their suits for writs of "replevin" and "detinue" (and Louisiana's civil-law analog, "sequestration") necessarily sought "recovery of the property itself," *i.e.*, the "property in specie." See Dan D. Dobbs, *Law of Remedies* § 5.13, at 399 (1973) (*Dobbs*); see also *Fuentes* v. *Shevin*, 407 U.S. 67, 78-79 (1972); *Hepburn & Dundas' Heirs* v. *Dunlop & Co.*, 14 U.S. (1 Wheat.) 179, 203 n.d (1816) ("the thing sued for is specifically recovered" in "actions of detinue and replevin," unlike in other actions providing "compensation in money").

As explained below, Congress was familiar with such cotton suits for specific relief. And by enacting Section 1500's predecessor, it sought to bar jurisdiction in the Court of Claims (now the CFC) when a plaintiff had "any" such related "suit or process" in another court—*i.e.*, a suit involving "substantially the same operative facts," *Keene*, 508 U.S. at 212—regardless whether it sought monetary or specific relief. 28 U.S.C. 1500.

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[2] Tweed sued a Treasury agent in 1866 "to recover * * * the cotton"; secured an interim "writ of sequestration" to have the marshal "take the cotton in question into his possession"; then recovered the cotton while the writ was adjudicated by "bond[ing] the property"; and ultimately showed he was entitled to keep it. 83 U.S. at 509, 513-515; *id.* at 521 (Bradley, J., dissenting).

1. Congress closely monitored litigation regarding seized cotton and its effect on the Nation's post-Civil-War fisc. In March 1868, Congress enacted legislation drafted by the same Senator—Senator Edmunds—who less than three months later authored Section 1500's predecessor. The March 1868 Act required the Secretary of the Treasury and his agents to deposit funds from sales of captured and abandoned property under APCA "immediately" into the Treasury. Act of Mar. 30, 1868, J. Res. 25, § 1, 15 Stat. 251; see Cong. Globe, 40th Cong., 2d Sess. 120 (1867) (Sen. Edmunds). Prompt deposit ensured that "the rights of the Government [would be] properly protected" against any claims to such funds. *Id.* at 378 (1868) (Sen. Trumbull); see *id.* at 380 (Sen. Howe) (Appropriations Clause protections).

Significantly, the statute also appropriated funds to defend suits for "captured and abandoned property" brought "against [the Secretary] or his agents." § 3, 15 Stat. 251; see Cong. Globe, 40th Cong., 2d Sess. 1466-1470, 1489-1497 (1868) (*1868 Cong. Globe*); *id.* at 1812-1813, 2171, 2176. The Senate Finance Committee had studied the cotton issue "for months" and, as Senator Edmunds explained, roughly "one hundred lawsuits" were then pending against the Secretary and his agents "in different parts of the country," with plaintiffs variously seeking specific and monetary relief—*i.e.*, "th[e] very cotton and * * * the proceeds of it." *Id.* at 1466-1468; see also, *e.g.*, *id.* at 1467-1470, 1490-1491 (repeated references to roughly one "hundred" suits). Senator Edmunds announced that one of the cases—"the case that came up from Missouri"—had equally divided this Court. *Id.* at 1468; see *Elgee's Adm'r* v. *Lovell*, 8 F. Cas. 449 (C.C.D. Mo. Oct. Term 1865) (No. 4344) (*Elgee*),

aff'd by an equally divided Court, No. 63 (Jan. 27, 1868). Notably, that case sought specific relief, not damages.[3]

During the debate, Members of Congress paid particular attention to the suit that the Tribe itself cites (at 4) as illustrative of the cotton cases: *Dennistoun* v. *Draper*, 7 F. Cas. 488 (C.C.S.D.N.Y. 1866) (No. 3804). That case too involved specific, not monetary, relief. The *Dennistoun* plaintiffs brought their "replevin suit in * * * state court" to recover their cotton, which was "in [the] possession" of a Treasury agent (Draper) who removed the action to federal circuit court. *Id.* at 489. That court held that the plaintiffs' challenge to removal must be decided in federal court. *Id.* at 489-490. It suggested that the parties agree to "the disposition of the cotton in the meantime," and that it might be appropriate to sell the cotton and deposit "the proceeds * * * into the [court] registry" as a substitute while the case was resolved. *Id.* at 490.

Rather than lose control of the cotton, the Secretary deposited a substantial sum ($500,000) with a trust company to enable Draper to secure a replevin bond and regain possession of the cotton while the case was litigated. See S. Exec. Doc. 22, 40th Cong., 2d Sess. 2 (1868) (Secretary's Jan. 16, 1868, letter to Senate); *id.* at 5 (Secretary's Mar. 2, 1867, letter to Senate); cf. *Dobbs*

[3] The *Elgee* plaintiff filed a state-court detinue action against a Treasury agent (Lovell) to "recover the possession of 275 bales of cotton." 8 F. Cas. at 449, 451-453. The suit was later removed to federal court, the cotton was sold and its proceeds used as a substitute res pending judgment, which later was entered for the agent. See *id.* at 454; *Camp* v. *United States*, 113 U.S. 648, 650 (1885) (discussing *Elgee* as "an action of replevin"). After this Court equally divided, Elgee's representatives instituted a new suit in the Court of Claims and ultimately recovered the net sale proceeds under APCA. See *id.* at 651; *The Elgee Cotton Cases*, 89 U.S. (22 Wall.) 180, 185-186, 198 (1875).

§ 5.13, at 400-401 (explaining replevin bonds). The Senate passed multiple resolutions directing the Secretary to report on cotton claims and, while debating the May 1868 statute, repeatedly discussed the propriety of the "replevin"-bond decision in *Dennistoun*. See, *e.g.*, Cong. Globe, 40th Cong., 1st Sess. 322 (1867); *1868 Cong. Globe* 122, 383, 1466. Senator Edmunds, the statute's author, specifically explained that the suit was "an action of replevin for the cotton" and that the government therefore must "either let the cotton go without any right to it at all" or "furnish to Mr. Draper, it being a very large sum, the means of getting sureties to hold on to it himself and keep it for the Government." *Id.* at 383.[4]

2. Shortly after appropriating funds in the March 1868 statute to defend such suits against Treasury officials, Congress turned to two bills curtailing cotton suits: H.R. 1131 and the predecessor to Section 1500. On June 1, 1868, Representative Butler introduced H.R. 1131. *1868 Cong. Globe* 2750. That bill declared that a Court of Claims action under APCA was the "exclusive" remedy for claimants if their property had been obtained "in virtue or under color of" APCA, and it specified that claimants were therefore "preclud[ed] * * * from suit at common law, or any mode of redress whatever, before any court or tribunal other than [the] Court

[4] The cotton, bond, and associated deposit appear to have been released upon the government's lump-sum payment to settle *Dennistoun*. See S. Exec. Doc. 22, at 2; *1868 Cong. Globe* 1466 (Sen. Stewart). Congress was advised, however, that Draper—who had handled over half of the Treasury's seized-cotton sales by 1868—had been sued by many others in "suits of trespass," which (unlike replevin and detinue) sought damages at "the full value of the cotton" at the "market price at the time of seizure," an amount that exceeded "the gross proceeds" from its actual sale. *Id.* at 1491 (Sen. Edmunds); see S. Exec. Doc. 56, 40th Cong., 2d Sess. 2-3, 52 (1868).

of Claims," including "suits of trespass, *replevin*, *detinue*, or other forms of action" that "are now pending" or may "hereafter be brought." *Id.* at 3620 (text as introduced) (emphasis added); cf. *id.* at 3655, 4449 (amendments). Congress enacted H.R. 1131 with that express focus on pending replevin and detinue actions, illustrating its understanding that cotton cases like *Dennistoun* sought specific relief against government officials. See Act of July 27, 1868, § 3, 15 Stat. 243.

Just one day after H.R. 1131 was introduced, Senator Edmunds introduced and the Senate passed the amendment that became Section 1500. *1868 Cong. Globe* 2769, 3267, 3255; U.S. Br. 3-4. Senator Edmunds invoked the very same cotton cases that Congress previously debated, by again explaining that over a "hundred suits [were] pending" against the "Secretary of the Treasury and other agents" by "persons having cotton claims." *1868 Cong. Globe* at 2769. He announced that his proposal would put such plaintiffs "to their election" and force them "either to leave the Court of Claims or to leave the other courts." *Ibid.*[5]

In this context, Congress undoubtedly understood and intended that Section 1500's predecessor would be triggered by a related suit seeking *specific* relief different from the *monetary* relief available in the Court of Claims. The Tribe's reading of Section 1500, which would give dispositive effect to whether the non-CFC

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[5] Congress enacted H.R. 1131 one month after it enacted Section 1500's predecessor. The July 1868 Act thereafter significantly curtailed the option of a tort action for cotton seized under APCA, see *Lamar* v. *McCulloch*, 115 U.S. 163, 182-187 (1885) (suit is precluded if the Treasury agent in "good faith" but mistakenly seized cotton under APCA), but it did not affect Section 1500's more general bar on pursuing duplicative suits in the CFC and elsewhere.

suit seeks specific rather than monetary relief, cannot be squared with that history.

B. The Tribe's Proffered Reading Improperly Restricts Section 1500's Expansive Text

1. Ignoring this history, the Tribe contends that whether a "suit or process" is "for or in respect to" a CFC "claim" under Section 1500 turns on whether the suit or process seeks the "same substantive relief" as the CFC claim. The Tribe argues that the "same substantive relief" is required because the term "claim" means a "demand for *particular* relief," that is, a "demand for a particular *kind* of relief" such as "a specific thing, act, or sum of money." Resp. Br. 14, 18-19, 22 (emphasis added). That contention cannot be squared with *Keene* or Section 1500's text or origins.

First, the Tribe's reliance on dictionary definitions of "claim" is misplaced. The dictionaries it cites (at 18)—which cite and borrow their definitions from *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539, 615 (1842) (Story, J.), and *Prigg*'s quotation from *Stowel* v. *Zouch*, 75 Eng. Rep. 536, 544, 1 Plowd. 353, 359 (Ct. of Exch. Chamb. 1569)—do not sustain the Tribe's narrow reading. *Prigg* simply states that a claim is a "demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty." 41 U.S. at 615. While a "claim" involves some demand, nothing suggests that the term must embody a "particular kind" of relief. Indeed, a claim in a complaint need not request the particular relief the court will award, because the relief awarded is that to which the party ultimately shows it is entitled. U.S. Br. 42 (discussing Fed. R. Civ. P. 54(c) and Fed. Cl. R. 54(c)). Even the "more limited" definition from *Stowel*—a "challenge by

a man of the propriety or ownership of a thing * * * which is wrongfully detained from him," *Prigg*, 41 U.S. at 615 (citation omitted)—does not suggest a demand for a particular kind of relief. It simply involves an assertion of some legal wrong. The term "claim" thus reflects an assertion of right that "is made out when the facts constituting it are established." *Minick* v. *City of Troy*, 83 N.Y. 514, 516 (1881). It embodies "the subject of the controversy and not the relief which the claimant asks." *Olcott* v. *Wood*, 14 N.Y. 32, 40 (1856). Section 1500's application therefore turns on an examination of a claim's "operative facts," *Keene*, 508 U.S. at 212.

Second, Congress's use of the term "any" to modify both "suit or process" and "claim" underscores Section 1500's breadth. U.S. Br. 22. When combined with Congress's use of the sweeping, disjunctive phrase "for *or* in respect to," the text demonstrates that Section 1500 is to be given a broad, not narrow, preclusive scope. *Id.* at 4-5, 21-22. By removing CFC jurisdiction when a plaintiff pursues any non-CFC suit either "for" any CFC claim or "in respect to" such a claim, Congress rejected "narrow concept[s] of identity" between the other suit and CFC claim (*Keene*, 508 U.S. at 213), such as the Tribe's assertion that both must involve the same "particular type of relief."

The Tribe argues (at 24) that "'[i]n respect to' frequently signifies something narrower than associated * * * in any way" and can mean "as to that specific [thing]." The Tribe's reading, however, does not account for Congress's use of the disjunctive "or" in the phrase "for or in respect to." Section 1500's application when the plaintiff has another suit "for" the CFC claim itself bars a CFC action "as to that specific" claim.

In an effort to give "in respect to" meaning, the Tribe suggests (at 24) that the phrase extends Section 1500 beyond simply "identical claims" to "claims seeking the same substantive relief, but pled on different legal theories or against different federal defendants." That reading, however, disregards this Court's authoritative construction of "claim" in *Keene* and other aspects of the plain text. *Keene* establishes that the term "claim" in Section 1500 itself includes "no reference to the legal theory upon which a claimant seeks to enforce his demand." 508 U.S. at 212 (citation omitted). Thus, under *Keene*, a "claim" encompassing different legal theories in two suits already constitutes the same "claim." Section 1500's remaining text similarly shows that the statute applies when the plaintiff has "any suit or process against the United States or any [agent thereof]" "for" the CFC claim. Given that language, the phrase "or in respect to" is not needed to capture cases in which the plaintiff sues the United States in the CFC and a federal agent in another court. The Tribe's construction therefore fails to give "in respect to" any independent role in Section 1500 and is "at odds with one of the most basic interpretive canons, that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009) (citation and brackets omitted).

The Tribe complains (at 23-24) that the government's reading of "in respect to" has no limiting principle and renders Section 1500 uncertain. That is incorrect. *Keene* held that Section 1500 turns on "whether the plaintiff's other suit [i]s based on substantially the same operative facts," reserving the question whether at least "some overlap" in relief was necessary. 508 U.S. at 212

& n.6. Overlapping relief is irrelevant. The relevant test is "substantially the same operative facts."

Finally, Section 1500's origins, explained above, confirm that reading. Congress understood that cotton claimants seeking to evade the obstacles imposed by APCA in a Court of Claims action had brought tort actions that alternatively sought specific and monetary relief. See pp. 3-9, *supra*. Section 1500's evident purpose was to target all such "duplicative lawsuits." *Keene*, 508 U.S. at 206; U.S. Br. 23.[6]

2. Sovereign immunity principles further confirm that conclusion and require that any remaining ambiguity in Section 1500's limitation on Congress's consent to suit be construed to preserve immunity. U.S. Br. 24-28. The Tribe does not contend that Section 1500's text unambiguously supports its reading, nor does it dispute that the provision, strictly construed, would require reversal. It instead argues (at 36) that the "clear-statement rule" is inapplicable because that rule simply ensures that "Congress does not unknowingly subject the Government to suit" and, here, the Indian Tucker Act, 28 U.S.C. 1505, waives immunity from money damages. That reasoning is mistaken.

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[6] The Tribe suggests (at 25) that Section 1500's declared purpose was to address circumstances where *res judicata* did not preclude multiple suits with non-mutual defendants (the United States and its agents). The debates in Congress, however, never mentioned that doctrine, *1868 Cong. Globe* 2769, and it is unlikely that Section 1500's predecessors ever "perform[ed] th[at] preclusion function," *Keene*, 508 U.S. at 214 n.8, 217. Moreover, in 1948, Congress *expanded* Section 1500 to preclude simultaneous suits against the United States, *id.* at 211 n.5 (noting that legislation superceded *Matson Navigation Co.* v. *United States*, 284 U.S. 352 (1932)), demonstrating that Section 1500 cannot be restricted by such res-judicata concepts.

It is settled that Congress may "declare in what court [the sovereign] may be sued, and prescribe the forms of pleading and the rules of practice to be observed" when it waives immunity from suit. *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). Congress's power to waive immunity necessarily carries with it the power "to attach conditions to its consent," and the "terms of its consent * * * define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586-587 (1941). Both the general waiver and the associated conditions are equally important elements that define the scope of Congress's consent to suit, and both must be strictly construed in favor of immunity to preserve Congress's primacy in this area. See U.S. Br. 25-26; *United States* v. *Dalm*, 494 U.S. 596, 610 (1990); see also *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001); *West* v. *Gibson*, 527 U.S. 212, 224 (1999) (Kennedy, J., dissenting) (sovereign-immunity canons "reserve authority over the public fisc to the branch of Government with which the Constitution has placed it"). Thus, "[l]ike a waiver of immunity itself, * * * th[e] limitations and conditions upon which the Government consents to be sued must be strictly observed." *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981) (quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)).

The Tribe errs in asserting (at 36 n.8) that the strict-construction canon applies only when deciding whether immunity has been waived for a "particular cause of action or remedy." This Court "in many cases * * * has read procedural rules embodied in statutes waiving immunity strictly, with an eye to effectuating a restrictive legislative purpose when Congress relinquishes sovereign immunity." *Honda* v. *Clark*, 386 U.S. 484, 501 (1967). It has, for instance, applied the strict-

construction canon to require an "unambiguous[]" statutory grant to authorize a jury trial against the sovereign, *Nakshian*, 453 U.S. at 168; to interpret statutes of limitation, *Block* v. *North Dakota*, 461 U.S. 273, 287-289 (1983); and to apply certain "Rules of Civil Procedure" that would normally permit a judgment creditor to collect on its debtor's contract with a third-party, *Sherwood*, 312 U.S. at 588-590. See also, *e.g.*, *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (requirement that a plaintiff must surrender the bond on which he sues is a "term[] and condition[] on which [the sovereign] consents to be sued" within the "waive[r]" of immunity).

The Tribe relies (at 36-38) on four cases construing exceptions to Congress's waiver of immunity in the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* Those decisions reflect only that the Court has "on occasion" deemed it "consistent with Congress' clear intent" not to read such exceptions unduly broadly in the "context of the 'sweeping language' of the Federal Tort Claims Act." *United States* v. *Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) (citation omitted). They in no way "eradicate the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarged . . . beyond what the language requires." *Ibid.* (citations, internal quotation marks, and brackets omitted).

The Tribe also relies (at 39) on decisions concerning statutes of limitations and certain filing deadlines associated with waivers of immunity. The cited decisions, however, at most suggest that courts should place "greater weight on the equitable importance of treating the Government like other litigants" in the specific context of certain claim-processing rules. *John R. Sand &*

Gravel Co. v. *United States*, 552 U.S. 130, 138 (2008); see *id.* at 136-138 (discussing cases). But where, as in Section 1500, Congress has limited the scope of its consent to suit by expressly restricting the court's "jurisdiction" over claims against the sovereign, those decisions do not affect the traditional and central role played by sovereign-immunity canons.

To be sure, if the text leaves "no ambiguity * * * to construe," the statutory waiver must be enforced. *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 590 (2008). But even the Tribe does not contend that Section 1500's text unambiguously supports its position. Congress thus has not waived immunity from suit where, as here, a plaintiff simultaneously pursues two actions sharing substantially the same operative facts.

3. The Tribe contends (at 28-32) that Congress "implicitly ratified" the Court of Claims' interpretation of Section 1500 in *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), because Congress did not amend Section 1500 when it expanded the court's jurisdiction in 1972 or when it divided the Court of Claims into separate trial and appellate courts in 1982. That contention is meritless.

The Tribe relies on *Shepard* v. *United States*, 544 U.S. 13, 23 (2005), which explains that *stare decisis* generally counsels in favor of "adhere[nce] to case law * * * once a decision has a settled statutory meaning." But that doctrine applies only to decisions of this Court, the only Court with final authority to settle the meaning of federal statutes. Cf. *ibid.* And although Congress may implicitly adopt an established statutory interpretation by lower courts when it recodifies the relevant law (as it did in the 1948 codification of Title 28, see *Keene*, 508 U.S. at 209, 212), that principle has no appli-

cation where, as here, Congress "has made only isolated amendments" and "not comprehensively revised a statutory scheme." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001). The 1972 and 1982 revisions that the Tribe invokes are a far cry from the type of recodification that this Court has determined reflects Congress's intent to adopt lower-court rulings in gross. Cf. *Keene*, 508 U.S. 202 n.1, 206 n.2. If the Tribe were correct, those revisions would have ratified the Court of Claims' interpretation of Section 1500 in *Brown* v. *United States*, 358 F.2d 1002 (1966) (per curiam), and *Hossein* v. *United States*, 218 Ct. Cl. 727 (1978) (per curiam). But neither was so ratified and neither "survive[d]" the Court's decision in *Keene*. See 508 U.S. at 215-216, 217 n.12.

C. The Tribe's Policy Arguments Must Be Directed To Congress

The Tribe contends (at 32-35) that applying Section 1500 to preclude CFC jurisdiction here will lead to "unjust" and "absurd" results by depriving litigants of the opportunity "simultaneously to pursue" suits for different types of relief. That concern is exaggerated. A litigant who promptly pursues judicial review of agency action in district court under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, will normally be expected to complete that litigation before the CFC's six-year limitations period expires.

The Tribe contends more specifically (at 33-34) that accepting the government's position will force "regulatory takings plaintiffs" to choose between judicial review of the underlying agency action under the APA and a (simultaneous) takings action in the CFC. That concern is also overstated. This Court need not decide here whether an appropriately tailored APA action seeking to

set aside agency action would preclude a simultaneous claim for just compensation in the CFC. That question would raise a number of issues, not presented in this case, concerning, *inter alia*, Section 1500's application to money-mandating constitutional claims in the CFC when the underlying agency action may be set aside; whether such claims for monetary losses stemming from an alleged impact on the claimant's property sufficiently overlaps with APA review on a particular administrative record of the prospective validity of discrete agency action under governing statutes; and whether regulatory takings claims are themselves sufficiently distinct from the lawfulness of the government action giving rise to them. Cf. *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 536-537, 539 (2005) (explaining that the Just Compensation Clause does not "limit the government['s] interference with property rights" and that takings claims merely address the failure to pay "compensation" for an "otherwise proper interference amounting to a taking") (citation omitted).

Moreover, the Tribe's wide-ranging district court action is unlike APA actions seeking to set aside discrete prospective actions or to enforce specific statutory duties. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-65 (2004). For instance, an APA suit by the Tribe to enforce a specific statutory right to obtain records in the government's possession or a Freedom of Information Act suit seeking such records—including records pertaining to the government's performance of statutory duties with respect to tribal property—normally would not involve the same "operative facts" as a suit based on past agency actions reflected in such records. But the Tribe's district court action bears no resemblance to that sort of focused APA action. As

explained below (pp. 20-22, *infra*), the Tribe seeks monetary and associated retrospective relief for government actions that purportedly violate trust duties derived from common-law principles. Such claims are not properly brought in an APA action for two reasons: First, federal agencies are creatures of statute, and their duties are defined by specific statutory and regulatory requirements, not by judge-created norms reflecting policy judgments developed at common law for non-sovereign actors. See, *e.g.*, *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1558 (2009) (rejecting reliance on "common-law trust principles" to impose government duties); Pet. at 21-30, *United States* v. *Jicarilla Apache Nation* (No. 10-382) (filed Sept. 20, 2010). Second, where, as here, a litigant seeks monetary and related retrospective relief for past harms, those claims must be presented to the CFC, as in *Navajo Nation*. The failure to do so here underscores the unusual and overlapping nature of the Tribe's CFC and district court suits.

To the extent a plaintiff must elect between two related actions involving different relief, that election is the consequence of the requirements Congress established in 1868. *Keene* previously addressed "policy arguments" like the Tribe's asserted "hardship" and concluded that "the 'proper theater' for such arguments * * * 'is in the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims.'" 508 U.S. at 217-218 (citations omitted). The Tribe's invocation (at 32-33) of *Casman* reinforces that point. Congress resolved the dilemma in *Casman* in 1972 by *expanding* the CFC's jurisdiction to provide more complete relief. U.S. Br. 33 n.6. Such "policy" judgments lie with Congress, not the courts. *Keene*, 508 U.S. at 217-218 & n.14; U.S. Br. 5, 33-35.

D. This Court Should Reject The Federal Circuit's Flawed Order-Of-Filing Rule

The government's opening brief explains (at 36-39) that *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966)—which holds that Section 1500 precludes CFC jurisdiction if a plaintiff files his CFC action after filing its district court suit, but not vice versa—cannot be reconciled with the statute's text or history, or this Court's decisions. The Tribe responds (at 40) that *Tecon*'s rule is not before this Court. That is incorrect, and there are sound reasons for this Court to resolve the issue. Pet. 26-28.

The Federal Circuit acknowledged that its decision in *Tecon* has rendered Congress's express limitation on its waiver of immunity a pointless "jurisdictional dance" that no longer serves any meaningful purpose. Pet. App. 17a (citation omitted). Unlike *Keene*, which was decided when *Tecon* had been overruled (U.S. Br. 6), any decision that this Court may now issue interpreting Section 1500's jurisdictional bar would be easily circumvented by litigants strategically ordering their simultaneous suits to take advantage of *Tecon*'s loophole. There is no serious question that this Court has authority to address the Federal Circuit's rationale for its holding in this case, which expressly relies on *Tecon*'s rule to justify dismantling Section 1500's restrictions because, in its judgment, Section 1500 does not preclude "filing two actions seeking the same relief for the same claims." Pet. App. 16a-17a.

Amicus Osage Nation argues (at 13-14) that *Tecon*'s order-of-filing rule simply reflects that a court's jurisdiction depends on the state of things when the action is filed. Although that principle is generally correct, it is

also true that subsequent events may deprive a court of jurisdiction (*e.g.*, mootness). The filing of a related suit in another court while a plaintiff "prosecute[s]" its CFC claim (28 U.S.C. 260 (1946)) similarly triggers Section 1500's jurisdictional bar. U.S. Br. 37-39.

II. THE TRIBE'S SUITS SEEK OVERLAPPING RELIEF

The Tribe argues (at 41-53) that CFC jurisdiction is not precluded under its reading of Section 1500 because its CFC and district court complaints seek "different relief." Section 1500 does not turn on the relief a plaintiff requests. But even if it did, the Tribe's suits involve "at least * * * some overlap in th[at] relief." *Keene*, 508 U.S. at 212.

Like its district court suit, the Tribe's CFC action seeks monetary relief on trust-accounting claims. U.S. Br. 8-10, 46. The CFC complaint alleges that "the [Tribe] has been damaged" by the government's breach of its fiduciary duties to keep "accurate accounts" and furnish "accurate information." Pet. App. 66a-67a. Even without the liberal construction appropriate for pleadings, each count in the complaint expressly incorporates those allegations, and at least two counts specifically assert the failure to provide an "accurate accounting of the revenue the United States *collected*" as part of the purported "mismanagement" of the Tribe's trust. *Id.* at 68a-69a (emphasis added). Those claims obviously are not, as the Tribe contends (at 44-45), limited to "the loss of income it *never earned*" and, in fact, overlap with the Tribe's district court claims concerning "assets it *already owns*." Moreover, the Tribe now admits (at 47-48) that the CFC would have to perform an accounting to calculate damages even for its pure investment-based claims, but stresses that the accounting will occur only

if it establishes liability. See U.S. Br. 47-49. A proper reading of Section 1500, however, must be based on the assumption that a plaintiff prevails on its claims. Otherwise, under the Tribe's logic, its CFC complaint may yield *no* relief whatsoever and, as such, will not (necessarily) produce relief overlapping with any other suit.

The Tribe's district court suit is similar. The Tribe's suggestion (at 48) that the suit merely seeks an accounting for "information" regarding its assets is inaccurate. The complaint alleges that "the true balances of the [Tribe's] trust accounts" are "far greater" than those on government records and specifically requests the "restatement" of those records. Pet. App. 75a, 91a. The Tribe admits (at 10, 50-51) that it also "seeks equitable monetary relief" if "appropriate," *i.e.*, if its allegations are proven. Furthermore, the district court complaint (like the CFC complaint) alleges breaches of a duty to "invest" properly and "maximize" assets, Pet. App. 83a-84a; requests a declaration that the government has breached the "duties [it] owes" and "delineating" such duties (including, "*inter alia*," accounting duties); and seeks equitable relief to address any "fiduciary obligations and otherwise address breaches of trust," *id.* at 90a-91a. See U.S. Br. 6-8, 47.

The Tribe's revisionist reading of its complaints in response to an assertion of Section 1500's jurisdictional bar—and the Federal Circuit's crabbed view that its same-relief inquiry turns only on the relief requested in a complaint's "prayer for relief," Pet. App. 15a—underscore the degree to which the Federal Circuit's interpretation of Section 1500 is fundamentally misguided and susceptible to strategic manipulation. Congress intended Section 1500 to broadly preclude simultaneous lawsuits arising from substantially the same oper-

ative facts. That restriction on Congress's waiver of sovereign immunity from suit in the CFC should be fully enforced.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

SEPTEMBER 2010

APPENDIX

1. The Act of March 30, 1868, J. Res. 25, 15 Stat. 251 (H.R.J. Res. 19, 40th Cong.), provided:

[No. 25.] *Joint Resolution requiring certain Moneys of the United States to be paid into the Treasury, and for other Purposes.*

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys which have been received by any officer or employe[e] of the government, or any department thereof, from sales of captured and abandoned property in the late insurrectionary districts, under or under color of the several acts of Congress providing for the collection and sale of such property, and which have not already been actually covered into the treasury, shall immediately be paid into the treasury of the United States, together with any interest which has been received or accrued thereon.

SEC. 2. * * * *

SEC. 3. *And be it further resolved*, That a sum of the proceeds of such sales not exceeding seventy-five thousand dollars is hereby appropriated for the payment of the necessary expenses incurred by or under the authority of the Secretary of the Treasury for incidental expenses in acting under the laws respecting the collection and disposition of captured and abandoned property, and for the necessary expenses of defending, in the discretion of the Secretary of the Treasury, such suits as have been brought against him or his agents in the premises, and for prosecuting suits in the United States for the recovery of such property, and for providing for the

defence of the United States against suits for or in respect to such property in the court of claims.

2. Section 8 of the Act of June 25, 1868, ch. 71, 15 Stat. 77 (S. 164, 40th Cong.), provided:

And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

3. The Act of July 27, 1868, ch. 276, 15 Stat. 243 (H.R. 1131, 40th Cong.), provided:

CHAP. CCLXXVI — *An Act regulating Judicial Proceedings in certain Cases, for the Protection of Officers and Agents of the Government, and for the Defence of the Treasury against unlawful Claims*

* * * * *

SEC. 3. *And be it further enacted*, That it is hereby declared to have been the true intent and meaning of the act approved March twelfth, eighteen hundred and sixty-three, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,"

that the remedy given in cases of seizure made under said act, by preferring claim in the court of claims, should be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said act from suit at common law, or any other mode of redress whatever, before any court or tribunal other than said court of claims; and in all cases in which suits of trespass, replevin, detinue, or any other form of action may have been brought and are now pending, or shall hereafter be brought against any person for or on account of private property taken by such person as an officer or agent of the United States, in virtue or under color of the act aforesaid, or the act approved July second, eighteen hundred and sixty-four, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection," the defendant may and shall plead or allege in bar thereof that such act was done or omitted to be done by him as an officer or agent of the United States in the administration of one of the acts of Congress aforesaid, or in virtue or under color thereof, and such plea or allegation, if the fact be sustained by the proof, shall be, and shall be deemed and adjudged in law to be, a complete and conclusive bar to any such suit or action: *Provided, however*, That no judgment, recovered in accordance with this act, shall be paid by the United States, unless the amount received by the defendant as the proceeds of the transaction which was the foundation of the suit shall have been paid into the treasury, except upon an appropriation duly made therefor after a full examination of the claim upon its merits.