No. 09-

IN THE
Supreme Court of the United States

ELOUISE PEPION COBELL, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL PAST AND PRESENT INDIVIDUAL INDIAN TRUST BENEFICIARIES,

PETITIONERS,

v.

KENNETH LEE SALAZAR, *SECRETARY OF THE INTERIOR, ET AL.*,

RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than a century, the United States has exercised complete control over individual Indian land and natural resources, holding the income generated therefrom in trust for individual Indians in Individual Indian Money ("IIM") trust accounts. Today, the IIM trust holds hundreds of billions of dollars in assets on behalf of individual Indians, but as a result of generations of mismanagement and lack of oversight, the United States government does not know the correct balances for hundreds of thousands of trust accounts. The 1994 Indian Trust Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (1994), reaffirmed the federal government's pre-existing fiduciary duty to provide a complete historical accounting of "*all funds*" held in trust for the benefit of individual Indians. However, the court of appeals held that, despite the Trust Reform Act, and despite this Court's precedent applying traditional trust law principles to the IIM trust, the government need only conduct "the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate," and that the accounting itself need only address "low-hanging fruit." The question presented is:

Whether the court of appeals erred in holding—contrary to the plain language of the Indian Trust Management Reform Act, this Court's precedent, and a decision of the Eighth Circuit—that respondents need not conduct an accurate and complete fiduciary accounting of "all funds" in the IIM trust, but instead may substantially limit the accounting duty to one that can be discharged "in a reasonable time, with the money that Congress is willing to appropriate."

PARTIES TO THE PROCEEDING

The following were the parties to the proceedings before the United States Court of Appeals for the District of Columbia Circuit:

1. Elouise Pepion Cobell

2. Penny Cleghorn

3. Thomas Maulson

4. James Louis LaRose

5. Members of a class defined by the District Court to include all past and present Indians (including all original allottees, their heirs, and individual Indian successors-in-interest, including executors and personal representatives) on whose behalf, as Trust beneficiaries, Trust accounts are, have been, should be, or should have been established and maintained by the United States government to hold revenues generated by the Individual Indian Trust

6. Kenneth Lee Salazar, Secretary, Department of the Interior, in his official capacity

7. Larry EchoHawk, Assistant Secretary of the Department of the Interior for Indian Affairs, in his official capacity

8. Timothy Geithner, Secretary, Department of the Treasury, in his official capacity

TABLE OF CONTENTS

Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Cited Authorities

Statutes:

Page

Other Authorities:

PETITION FOR A WRIT OF CERTIORARI

Petitioners, plaintiffs Elouise Pepion Cobell, *et al.*, on behalf of themselves and a certified class of all past and present Individual Indian Money trust beneficiaries, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 573 F.3d 808. The opinions of the district court (App., *infra*, 18a-84a and 85a-242a) are reported at 569 F. Supp. 2d 223 and 532 F. Supp. 2d 37.

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1. On December 7, 2009, petitioners and respondents executed a settlement agreement that, *inter alia*, settles all claims asserted in this action. The settlement is expressly conditioned on two conditions precedent—enactment by Congress of certain legislation specified in the agreement and final approval of the settlement by the district court pursuant to Rule 23 of the Federal Rules of Civil Procedure. *See* http://www.cobellsettlement.com/docs/2009.12.07_Settlement_Agreement.pdf. Neither condition precedent can occur before petitioners' deadline for filing this petition. Petitioners intend to file a motion asking this Court to hold this petition in abeyance pending satisfaction *vel non* of the two conditions precedent.

STATUTORY PROVISION INVOLVED

The Indian Trust Management Reform Act ("Trust Reform Act"), Pub. L. No. 103-412, 108 Stat. 4239 (1994) (codified in pertinent part at 25 U.S.C. § 4011(a)), provides, in relevant part, that "[t]he Secretary [of the Interior] shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title."

JURISDICTION

The court of appeals entered its judgment on July 24, 2009. On October 14, 2009, Justice Stevens extended petitioners' deadline to file this petition until December 21, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners are a certified class of individual Indians whose land and related natural resources have been held in trust by the United States for more than a century, and who sued in equity to enforce their rights as trust beneficiaries. This litigation has lasted more than 13 years and has resulted in more than eighty published opinions of the lower courts. During this action's lengthy history, both the district court and the court of appeals repeatedly have held that the United States is in breach of its trust obligations and has grossly mismanaged billions of dollars held in Individual Indian Money ("IIM") trust accounts. The lower courts also found, and

the defendants have admitted, that, as a result of decades of mismanagement and lack of oversight, the United States government does not know the correct balances for hundreds of thousands of trust accounts—and does not even know how many IIM beneficiaries exist. The parties to this action have spent much of the last decade litigating the proper scope of the trust accounting required by this Court's precedent and the Trust Reform Act, a federal statute passed in 1994 confirming respondents' obligation to undertake a complete and accurate historical accounting of "*all funds*" in IIM trust accounts.

In 2008, the district court held that, given the deplorable condition of IIM trust records, and the resources available to the Interior Department, a full historical accounting was impossible. *See Cobell v. Kempthorne* (*Cobell XX*), 532 F. Supp. 2d 37, 39, 103 (D.D.C. 2008). On appeal, the court of appeals rejected the district court's finding of legal impossibility. But the court also held that the United States is responsible only for "the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate." *Cobell v. Salazar* (*Cobell XXII*), 573 F.3d 808, 813 (D.C. Cir. 2009). As a result of that holding, the government is responsible only for whatever accounting it chooses to pay for, and Indian beneficiaries will never know what happened to billions of dollars of their assets that the United States purportedly held in trust for them subject to the most exacting fiduciary standards. The court of appeals' holding turns traditional, controlling trust law on its head, and is akin to giving the fox sole discretion to determine the security features of the henhouse.

Because the court of appeals' holding is inconsistent with the mandate of the Trust Reform Act, with this Court's precedent, with D.C. Circuit precedent, and with the decision of the Eight Circuit in *Loudner v. United States*, 108 F.3d 896 (8th Cir. 1997), and because of the overriding importance of the legal issues presented to thousands of Native Americans, who are among the poorest and most vulnerable American citizens and to whom the United States owes the highest overriding enforceable fiduciary duties, this case warrants the Court's review.

A. History of the Individual Indian Trust

In the late nineteenth century, the federal government adopted a policy of assimilation for Native Americans. To further that policy, the government divided certain reservation land into individually owned parcels and allotted those parcels to individual Indians. *See Cobell v. Norton (Cobell VI)*, 240 F.3d 1081, 1087 (D.C. Cir. 2001); General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887), *codified as amended at* 25 U.S.C. § 331 (2008) *et seq.*

The United States seized legal title to the allotted lands for the benefit of the individual Indians and, as trustee, exercised complete control over those lands and their resources, including oil, natural gas, coal, timber, and other valuable resources. *See Cobell VI*, 240 F.3d at 1087. Although purportedly entitled to their individual land allotments, trust beneficiaries could not sell or lease their land without government approval. *Id*. The government justified its trusteeship, in part, on a federal policy that deemed Native Americans "incompetent,"

due principally to their race. By assuming the role of trustee of Indian property, the United States "charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). The federal government also became bound by the same common law trust principles that govern all trustees. *See Mitchell v. United States* (*Mitchell II*), 463 U.S. 206, 225 (1983).

Despite the government's trust obligations, the history of the IIM trust is replete with the loss, dissipation, theft, waste, and wrongful withholding of trust funds. As early as 1914, it was reported to Congress that "[t]he Government itself owes millions of dollars for Indian moneys which it has converted to its own use." BUREAU OF MUNICIPAL RESEARCH, 63RD CONG., REPORT TO THE JOINT COMMISSION TO INVESTIGATE INDIAN AFFAIRS: BUSINESS AND ACCOUNTING METHODS EMPLOYED IN THE ADMINISTRATION OF THE OFFICE OF INDIAN AFFAIRS 2 (Comm. Print 1915). These misappropriations continued into modern times. In *Cobell VI*, the court of appeals noted that "[t]he General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of the IIM trust accounts over the past twenty years." *Cobell VI*, 240 F.3d at 1089 (citing various government reports); *see also* MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. Rep. No. 102-499 (1992).

As a result of the government's mismanagement and continuous failure to perform its enforceable duties as trustee, "[t]he federal government does not know the

precise number of IIM trust accounts that it is to administer and protect." *Cobell VI*, 240 F.3d at 1089. Moreover, "[n]ot only does the Interior Department not know the proper number of accounts, it does not know the proper balances for each IIM account, nor does Interior have sufficient records to determine the value of IIM accounts." *Id.*

Further compounding these problems, the full scope of the government's mismanagement remained hidden from the individual Indian beneficiaries because, as a matter of policy, beneficiaries were not provided with any trust account statements and "[n]o real accounting, historical or otherwise, has ever been done of the IIM trust." *Cobell XX*, 532 F. Supp. 2d at 43.

B. The Indian Trust Management Reform Act

A century of complaints by Indians, and concerns of Congress about pervasive mismanagement of the trust, led to passage of the Trust Reform Act. The Trust Reform Act was the culmination of "many years of congressional frustration over Interior's handling of the IIM trust." *Cobell XX*, 532 F. Supp. 2d at 41. It confirmed and codified the government's pre-existing duty to provide a full accounting to IIM trust beneficiaries. *Cobell VI*, 240 F.3d at 1090.

Petitioners brought this class action in 1996, after the government failed to begin the accounting required both by the Trust Reform Act and the government's fiduciary duty as trustee. In 1999, the district court found the Departments of the Interior and Treasury in violation of the Trust Reform Act and in breach of their

trust obligations to petitioners. *See Cobell v. Babbitt* (*Cobell V*), 91 F. Supp. 2d 1, 58 (D.D.C. 1999). The district court granted declaratory relief, ordered the Interior Department "to provide plaintiffs an accurate accounting of all money in the IIM trust," and laid out a general plan for compliance. *Id.* The court of appeals affirmed the district court's order. *Cobell VI*, 240 F.3d at 1110.

C. Scope of the Trust Accounting

Over the last eight years, the central issue in this action has been the scope of the accounting required by the Trust Reform Act and the common law trust principles applicable to the IIM trust. In 2008, the district court held that it is "clear that . . . the required accounting is an impossible task," and that "the Department of the Interior has not—and cannot—remedy the breach of its fiduciary duty to account for the IIM trust." *Cobell XX*, 532 F. Supp. 2d at 39, 103. Based on that decision, and in the absence of an accounting, the district court conducted an evidentiary hearing to determine the equitable award of restitution necessary to remedy the government's breach of trust. Following that hearing, the district court ordered the United States to pay petitioners $455.6 million in restitution for IIM trust funds improperly withheld. *See Cobell v. Kempthorne* (*Cobell XXI*), 569 F. Supp. 2d 223 (D.D.C. 2008). The district court then certified its decisions in *Cobell XX* and *Cobell XXI* for petitioners' immediate interlocutory appeal under 28 U.S.C. § 1292(b). Petitioners timely appealed the decision in *Cobell XXI* and the government cross-appealed.

On appeal, the court of appeals rejected the district court's finding of impossibility and held that the Department of the Interior must provide an accounting. *See Cobell XXII*, 573 F.3d at 812. However, in a substantial departure from this Court's binding precedent and the language of the Trust Reform Act, a three-judge panel of the court of appeals repudiated the law of this case, including its prior holding in *Cobell VI* that the government must account for "all funds" as well as all other items of the trust, and, instead, relieved the government of traditional accounting duties, holding that the government now must undertake only "the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate." *Cobell XXII*, 573 F.3d at 813. The court of appeals also instructed that the government need only "concentrate on picking the low-hanging fruit." *Id.* at 815. Thus, under the new holding of the court of appeals, the United States is free to avoid its fiduciary trust duties, confirmed by Congress in 1994 in the Trust Reform Act, to account for billions of dollars in mismanaged Indian trust assets by declining to pay for an accounting whose high cost is solely attributable to the government's historical breaches of trust, including the destruction, loss, and corruption of essential trust documents.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision is erroneous in three key respects and warrants review by the Court.

First, the decision is contrary to precedent from this Court governing the United States' fiduciary obligations owed to Indian trusts. As the Court held in *Mitchell v. United States* (*Mitchell II*), 463 U.S. 206 (1983), and its progeny, when the United States holds in trust property belonging to Indians, the obligations of the United States are governed by traditional common law trust principles. *See id.* at 225. Those common law trust principles require trustees to account for all trust assets and disbursements. *See* GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 962 (1962); 76 AM. JUR. 2D TRUSTS § 371 (2009). While a court in equity may limit an accounting based on a finding of impossibility or impracticability, no common law trust principle excuses a trustee from its accounting obligations where, as here, the trustee has egregiously breached its trust duties and declines to pay the costs of the accounting. *See* RESTATEMENT (THIRD) OF TRUSTS § 73 (2007); UNIFORM TRUST CODE § 412, 7A U.L.A. 507-08 (2006). Because the court of appeals' holding on the scope of the required accounting is inconsistent with common law trust principles and duties, the decision is contrary to *Mitchell II*.

The decision also conflicts with *Loudner v. United States*, 108 F.3d 896 (8th Cir. 1997), where the Eight Circuit expressly held that "the government may not avoid its trust duties on the grounds that the budget and staff of the Department of Interior are inadequate" and that "the United States may not evade the law simply by failing to appropriate enough money to comply with it." *Id.* at 903 n.7.

Second, the court of appeals' decision is contrary to the Trust Reform Act, which provides, in relevant part, that "[t]he Secretary [of the Interior] shall account for the daily and annual balance of *all funds held in trust* by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title." 25 U.S.C. § 4011(a) (emphasis added). "[A]ll funds" means all funds; the Trust Reform Act's mandate is clear and unambiguous. The decision of the court of appeals, however, permits the United States to limit the scope of its accounting obligations based on "the money that Congress is willing to appropriate." *Cobell XXII*, 573 F.3d at 813. *Cobell VI* confirmed that when Congress enacted the Trust Reform Act, it understood the meaning of an "accounting" under common law trust principles and understood that decades of gross mismanagement and lack of oversight meant the required accounting would be complex and costly. Had Congress intended for that accounting to be limited to the trust assets for which an accounting could be accomplished through currently available funds (or, as the court of appeals described it, the "low-hanging fruit"), Congress would have said so in the Trust Reform Act. In the absence of such statutory language, the Department of the Interior remains obligated to conduct a full and accurate accounting, as that term is understood in trust law, "of *all funds* held in trust by the United States," regardless of whether Congress in a given year appropriates funding to accomplish that task.

Third, the limited accounting set out by the court of appeals necessarily would ignore funds that the court of appeals already has held were wrongly escheated to Indian tribes or improperly spent by the government, on the ground that accounting for those funds is too difficult or costly. This result creates potential constitutional

challenges under the Takings Clause and the vested rights doctrine of the Due Process Clause. Because a complete historical accounting of all IIM trust assets avoids these constitutional challenges, the court of appeals erred by construing the government's trust obligations in a manner that raises constitutional concerns.

I. THE COURT OF APPEALS' DECISION IS CONTRARY TO *MITCHELL II* AND OTHER PRECEDENT OF THIS COURT AND CONFLICTS WITH THE DECISION OF THE EIGHTH CIRCUIT CONCERNING THE GOVERNMENT'S INDIAN TRUST OBLIGATIONS.

In *Mitchell II*, the Court considered the federal government's obligations when it takes Indian land and holds that land for the benefit of individual Indians. 463 U.S. at 225. Early in the twentieth century, the United States divided the entire Quinault Reservation, representing 200,000 acres of coastal pacific property, into individual allotments and held the land and the income from its natural resources in trust for the individual Indians living in the region. *Id.* at 208-09. In 1971, thousands of Indians holding the individual allotments sued the United States based on "pervasive waste and mismanagement" of the trust assets. *Id.* at 210. The government argued that there was no substantive right to seek damages from the United States for mismanagement of individual Indian trusts.

This Court held that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus

(Indian timber, lands, and funds)." *Id.* at 225. The Court then applied common law trust principles to determine the scope of the government's trust obligations and the remedies available to Indians in the event of a breach of trust. *See id.* (citing various secondary sources on trust law). The Court held that "[i]t is well established that a trustee is accountable in damages for breach of trust." *Id.* at 226. The Court remanded the action for a determination of liability and damages for breach of trust.

Later decisions of the Court, citing *Mitchell II*, confirm that federal courts must apply traditional trust law principles to the government's management of Indian trusts. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003). Relying on the Court's holdings, numerous lower courts have recognized the federal government's duty to provide an accounting for Indian trust funds under common law trust principles. *See*, *e.g.*, *Pueblo of San Ildefonso v. United States*, 35 Fed. Cl. 777, 788 (1996) ("When a trust relationship between the government and Indians exists" the United States "is under a duty to keep and render clear and accurate accounts with respect to administration of the trust."); *White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446, 448 (1992) ("The obligation of a trustee to provide an accounting is a fundamental principle governing the subject of trust administration.").

The common law duty of trustees to provide an accurate accounting of trust assets and disbursements is inherent in the nature of a trusteeship and is well-settled. *See* George G. Bogert, The Law of Trusts and

TRUSTEES § 962; 76 AM. JUR. 2D TRUSTS § 371 (2009); 1A CJS ACCOUNTING § 1 (2007); BLACK'S LAW DICTIONARY 19 (7th ed. 1999). As the court of appeals held in *Cobell VI*, "[i]t is black-letter trust law that '[a]n accounting necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception.'" 240 F.3d at 1103 (citing *Engelsmann v. Holekamp*, 402 S.W.2d 382, 391 (Mo. 1966)); *see also Bravo v. Sauter*, 727 So. 2d 1103, 1107 (Fl. Ct. App. 1999) ("A trustee is under a strict duty to keep and render a complete and accurate record and accounting as to its trusteeship to the beneficiary"); *Reardon v. Riggs Nat'l Bank*, 677 A.2d 1032, 1035 (D.C. 1996). "[T]he trustee 'is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property . . .'" *Shriners Hosp. for Crippled Children v. Robbins*, 450 So. 2d 798, 801 (Ala. 1984) ("The trustees are also under a duty to furnish the beneficiary complete and accurate information as to the nature and amount of the trust property."); *Cox v. Cox*, 357 N.W.2d 304, 306 (Iowa 1984) ("Because the trustee acts on his or her behalf, the beneficiary is 'entitled to know what the trust property is and how the trustee has dealt with it.'" (citation omitted)); *Shannon v. Frost Nat'l Bank of San Antonio*, 533 S.W.2d 389, 393 (Tex. Ct. App. 1976) ("[I]t is well settled that a trustee owes a duty to give to the beneficiary upon request complete and accurate information as to the administration of the trust."). In addition, where the trustee fails to give an accurate account, the benefit of the doubt is given to the

beneficiary. *See Rainbolt v. Johnson*, 669 F.2d 767, 769 (D.C. Cir. 1981); *Corporation Audit Co. v. Cafritz*, 156 F.2d 839, 842 (D.C. Cir. 1946).

The strict limits on a trustee's ability to evade trust duties are similarly well-settled. A court in equity may excuse a trustee from a trust obligation *only* upon a finding of impossibility or impracticability. *See* RESTATEMENT (THIRD) OF TRUSTS § 73; UNIFORM TRUST CODE § 412. There is no common law trust principle that excuses a trustee from its accounting obligations simply because the trustee is unwilling to pay the costs of the accounting—costs that have increased materially solely because of continuing breaches of trust.

Here, the court of appeals expressly rejected the district court's holding of impossibility. *See Cobell XXII*, 573 F.3d at 812. Nevertheless, the court of appeals held, without citation to any trust authorities, that the United States can avoid its accounting obligations by declining to fund the accounting, in direct conflict with established trust law principles. *Id.* at 813.

The court of appeals' holding is particularly troubling given this Court's recognition of the special fiduciary relationship between the United States and American Indians. As this Court explained, the United States "has charged itself with moral obligations of the highest responsibility and trust" vis-à-vis Indians, and its conduct "should therefore be judged by the most

exacting fiduciary standards." *Seminole Nation*, 316 U.S. at 297. The federal government's exacting fiduciary obligations are, in part, a recognition that the relationship between the United States and American Indians has long been one of tragedy and injustice. Many Indians are among the poorest and most vulnerable people in this country, and the lack of quality education and job opportunities compound societal problems that resulted directly from the government's shameful treatment of Indians in the past. For more than a century, Indians have looked to the court system to protect their rights and remedy the injustices caused by past and continuing government misconduct. For this reason, it is particularly important that this Court carefully consider rulings, like the court of appeals' decision below, that radically minimize the government's trust obligations to Indians. Simply put, if the court of appeals' decision stands, it will permit the United States to ignore the "exacting fiduciary standards" owed to the Indians by destroying critical trust records and declining to fund its fiduciary duties, rendering the government's special trust relationship with the Indians essentially hollow and meaningless.

At least one circuit has rejected the holding of *Cobell XXII* for this very reason. *See Loudner v. United States*, 108 F.3d 896 (8th Cir. 1997). In *Loudner*, lineal descendants of the Sisseton-Wahpeton Sioux Tribe brought a class action to recover from a fund held in trust by the United States to compensate tribal members for the government's breaches of a treaty with the tribe. *Id.* at 898-99. Although the claims were governed by a six year statute of limitations, the plaintiffs argued that the government breached its trust

obligations to identify and notify all beneficiaries of the trust, and as a result the plaintiffs only recently received notice of their potential claims against the fund. *Id.* at 901. In response, the government argued that the budget and staff of the Interior Department were inadequate to comply with the strict common law duty to notify beneficiaries of the trust. *Id.* at 903 n.7

The Eighth Circuit, citing *Mitchell II*, rejected the government's arguments. The court held that traditional common law trust principles apply to the federal government's trust obligations to identify and notify Indian beneficiaries. *Id.* at 901. The court further held that "the government may not avoid its trust duties on the grounds that the budget and staff of the Department of Interior are inadequate . . . . [T]he United States may not evade the law simply by failing to appropriate enough money to comply with it." *Id.* at 903 n.7.

The court of appeals' decision here, which permits the United States to "evade the law simply by failing to appropriate enough money to comply with it," directly conflicts with the Eighth Circuit's holding. As a result, the nature and scope of the Interior Department's fiduciary duty to preserve trust records and render future Indian trust accountings will vary greatly depending on the circuit in which the trust beneficiaries assert their claims. In light of the billions of dollars in individual Indian assets held in trust and the likelihood that future accounting disputes will arise, the Court should establish a uniform standard for the federal government's fiduciary accounting duties under the IIM trust.

In sum, the court of appeals' decision is contrary to this Court's binding precedent and conflicts with a decision of the Eighth Circuit addressing the precise question here. Moreover, the decision significantly alters the fundamental fiduciary obligations of the United States to individual Indian trust beneficiaries and leaves the whereabouts of billions of dollars in IIM trust assets forever in doubt. Accordingly, the Court should grant the petition for writ of certiorari and reverse the court of appeals' decision.

II. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE PLAIN LANGUAGE OF THE TRUST REFORM ACT.

In 1994, Congress passed the Trust Reform Act. Among other provisions, the Act provides that the Department of the Interior "shall account for the daily and annual balance of *all funds* held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title." 25 U.S.C. § 4011(a) (emphasis added). The court of appeals examined the Trust Reform Act's language in detail in *Cobell VI* and concluded that it "makes clear" that the Interior Secretary owes IIM trust beneficiaries "a complete historical accounting of trust fund assets." 240 F.3d at 1102.

In the Trust Reform Act, Congress expressly required the Interior Department to account for "*all funds* held in trust by the United States for the benefit of an Indian tribe or an individual Indian." 25 U.S.C. § 4011(a) (emphasis added). "[A]ll funds" means all

funds;[2] the statutory language is clear and unambiguous, and the plain language of the Act unquestionably requires an accounting of *each and every* dollar in the IIM trust.[3]

The court of appeals plainly disregarded the clear language of the Trust Reform Act. It held that the Interior Department could decline to account for many IIM funds simply because the federal government does not want to pay for the accounting. *See Cobell XXII*, 573 F.3d at 815. There is simply no basis whatsoever in the Trust Reform Act for the exception invented by the court of appeals.

In addition, because Congress declined to spell out the precise scope of the government's accounting obligations, except to provide that the accounting must encompass "*[a]ll funds*," the government's fiduciary duties are controlled by the common law of trusts.

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2. "All" means "1. The total entity or extent of . . . . 2. The entire or total number, amount or quantity . . . . 3. The utmost possible of . . . . 4. Every." THE AMERICAN HERITAGE DICTIONARY 94 (2d College ed. 1985).

3. *See Cobell VI*, 240 F.3d at 1102:

> Section 102 of the 1994 Act makes clear that the Interior Secretary owes IIM trust beneficiaries an accounting for '*all* funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938.' 25 U.S.C. § 4011(a) (emphasis added). 'All funds' means *all funds*, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938).

See NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981). "Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Id.* Moreover, when Congress uses those terms in the trust context, courts "must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary." *Id.* at 330.

As discussed above, a common law trust accounting requires a complete and accurate accounting of all trust assets, not merely an accounting of those portions of the trust that can be performed with the money the trustee unilaterally decides to spend. *See* RESTATEMENT (THIRD) OF TRUSTS § 83; 1A CJS ACCOUNTING § 44; GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 962. Thus, for the same reasons the court of appeals' decision is contrary to *Mitchell II* and its progeny, the decision also is contrary to the plain language of the Trust Reform Act.

The court of appeals' interpretation of the Trust Reform Act also runs counter to the clear legislative intent of the Act. When Congress passed the Trust Reform Act, it did so with full knowledge of the deplorable state of the IIM trust records and the decades of continuous mismanagement and lack of oversight. *See Cobell VI*, 240 F.3d at 1089 (citing reports from the General Accounting Office, Interior Department Inspector General, and Office of Management and Budget); *see also* MISPLACED TRUST:

THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. No. 102-449 (1992). Thus, Congress understood that the accounting likely would require substantial time and expense on the part of the federal government. But Congress nonetheless chose to impose an unqualified statutory duty on the Interior Secretary to conduct a full historical accounting of the IIM trust assets. *See Cobell VI*, 240 F.3d 1102. Had Congress intended to alter common law trust principles and to limit the required accounting based on available funding, it would have said as much in the statute. *See Amax Coal Co.*, 453 U.S. at 329. Moreover, "statutes passed for the benefit of dependent Indian[s] . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (citation omitted). Thus, any doubt as to the intent of the statute must be resolved in favor of the complete accounting requested by petitioners.

In sum, the Trust Reform Act mandates a full historical accounting of "all funds" in the IIM Trust. The decision of the court of appeals, which permits the Interior Department to limit the nature and scope of the accounting simply by limiting the amount of money available to pay for it, is contrary to this clear statutory mandate. As discussed above, the court of appeals' decision will deprive five hundred thousand individual Indian trust beneficiaries of a remedy for the loss of their property and permit the United States to brush aside the loss of billions of dollars in IIM trust assets as a result of the government's own malfeasance and gross negligence. For this reason as well, the Court should grant the petition and reverse the court of appeals.

III. THE COURT OF APPEALS' DECISION RAISES SERIOUS CONSTITUTIONAL CONCERNS.

The limited accounting set out by the court of appeals necessarily would result in the taking of individual Indian trust assets by the United States without any compensation or procedural safeguards. For example, the court of appeals found that certain IIM trust assets improperly had escheated to Indian tribes. *See Cobell XXII*, 573 F.3d at 813. But the court's opinion permits the Department of the Interior to ignore those escheated funds if "the cost to account will exceed the amount recovered by class beneficiaries." *Id.* at 814. Likewise, the court of appeals recognized that the government withdrew funds from the IIM trust for its own use, and that there is no way to determine what portion of those funds were appropriate administrative fees and what portion amounted to improper misappropriation. But the court held that "[i]f accounting for [those funds] causes an enormous increase in cost . . . and only a small effect on the ultimate balances, then the district court is free to approve of Interior's low-cost ways to avoid this." *Id.* at 814-15.

These holdings raise substantial constitutional concerns. First, the United States cannot retain or take assets belonging to the individual Indian trust beneficiaries, or convey those assets to others, without providing compensation to the Indians under the Takings Clause. There is no *de minimis* exception to the principle that the United States cannot take private property without just compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 436 (1982). But the effect of the court of

appeals' decision is to permit the United States to permanently deprive individual Indian trust beneficiaries of assets of unquestioned value that at one time were known and accountable by concluding that it lacks funding to account for those assets today. This result violates the Due Process Clause and Takings Clause of the U.S. Constitution. Moreover, petitioners have a vested right to future accountings of their IIM trust assets under *Mitchell II* but, under the decision of the court of appeals, Congress could effectively eliminate that right by declining to appropriate sufficient funds to carry out the accounting. This result similarly violates the vested rights doctrine of the Due Process Clause. *See McCullough v. Virginia*, 172 U.S. 102, 123 (1898); *Hodges v. Snyder*, 261 U.S. 600, 603 (1923).

In sum, if the decision of the court of appeals stands, it will not only deprive petitioners of their unqualified right to a complete historical accounting in this case, but also could result in future constitutional litigation over billions of dollars in past and future assets for which the Interior Department cannot adequately account because of the lack of sufficient funding and continuing breaches of trust. It is well-settled that courts should interpret statutes to avoid raising these types of serious constitutional doubts. *See*, *e.g.*, *Clark v. Martinez*, 543 U.S. 371, 381-382 (2005). An interpretation of the Trust Reform Act that mandates a complete and accurate common law trust accounting avoids the constitutional problems described above. Accordingly, the Court should grant the petition for writ of certiorari and interpret the government's trust accounting obligations in a manner that removes these constitutional concerns.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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