No. 17-1353

In The Supreme Court of the United States

FORT PECK HOUSING AUTHORITY, BLACKFEET HOUSING, THE ZUNI TRIBE, ISLETA PUEBLO HOUSING AUTHORITY, PUEBLO OF ACOMA HOUSING AUTHORITY, ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY, NORTHWEST INUPIAT HOUSING AUTHORITY, BRISTOL BAY HOUSING AUTHORITY, ALEUTIAN HOUSING AUTHORITY, CHIPPEWA CREE HOUSING AUTHORITY, AND BIG PINE PAIUTE TRIBE,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; BEN CARSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT; DEBORAH A. HERNANDEZ, ASSISTANT SECRETARY FOR PUBLIC AND INDIAN HOUSING; GLENDA GREEN, HUD'S OFFICE OF GRANTS MANAGEMENT, NATIONAL OFFICE OF NATIVE AMERICAN PROGRAMS, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF PUBLIC AND INDIAN HOUSING,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN FREDERICKS III
Counsel of Record
JEFFREY S. RASMUSSEN
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
303-673-9600
jfredericks@ndnlaw.com
Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

ARGUMENT

In its opposition brief, Respondent United States Department of Housing and Urban Development (HUD) contends it can freely recover grant funds through "administrative offset" without fear of liability, even when it takes the funds illegally.[1] In essence, HUD contends that grant-in-aid recipients have no effective remedy when the government illegally recoups grant funds appropriated by Congress. This is so, HUD says, even when Congress has continuously appropriated the same block grant funds, for the same purpose, every single year since the Native American Housing Assistance and Self-Determination Act (NAHASDA) became effective over 20 years ago, and even though "HUD treats NAHASDA appropriations from different fiscal years as fungible." App. 100. In fact, HUD makes

[1] HUD's use of the term "administrative offset" is misleading. Administrative offset is a defined term in the Debt Collection Improvement Act of 1982, 31 U.S.C. § 3701(a)(1). The Debt Collection Act places conditions on the government's use of administrative offset to recover money the government claims is owed by a debtor. *Id.*; *King v. MSPB*, 105 F.3d 635, 639 (Fed. Cir. 1997). HUD did not recover the funds under the Debt Collection Act in this case but instead had to act under NAHASDA and its underlying regulations. The term administrative offset appears nowhere in NAHASDA or the regulations. Instead, HUD used the term "adjustment" and "recapture" 24 C.F.R. § 1000.532(a) (2002). There were a number of restrictions on HUD's authority to recapture and redistribute grant funds. For example, HUD could not recapture funds from future fiscal year grants where the recipient had spent the funds on affordable housing activities. *Id*. Moreover, HUD could not reallocate recaptured funds under section 1000.536 if a recipient requests a hearing under section 1000.532(b) until 15 days after the hearing has been held and HUD rendered a final decision. 24 C.F.R. § 1000.532(b).

a practice of adjusting recipients' annual block grant awards up or down each year when it believes a recipient has been either overfunded or underfunded in prior fiscal years. *E.g.*, 24 C.F.R. § 1000.336(b)(2)(i) (2002).[2] The example cited by the district court is illustrative. "[I]n FY 2008 HUD utilized over $26 million in FY 2008 funds to pay for underfunding that occurred prior to FY 2003." App. 100. In other words, the tribes who were underfunded in 2003 had their funding restored through upward adjustments from subsequent appropriations. This is the very same relief that the Court sanctioned in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), through an APA action, and which the district court ordered in this case. The district court, consistent with *Bowen*, correctly characterized the Petitioner's request for relief as "seeking the return of funds that were taken from them and to which they remain entitled." App. 101. The district court also interpreted its APA jurisdiction as encompassing the "authority to order restoration of all funds illegally recaptured from the Plaintiffs." *Id*. The district court then ordered HUD to "take action to restore the unlawfully recaptured funds through grant funding adjustments." *Id*.

Nevertheless, two of the three members of the circuit court panel took issue with the district court's order to restore the funding "from all available sources," including (1) funds that were "carried[] forward from

[2] Unless otherwise noted, all references to NAHASDA and its regulations are to the version in effect in 2002, when HUD began recapturing Petitioners' funds.

previous fiscal years" and (2) funds that were "appropriated in future grant years." App. 42. Accepting HUD's argument that an APA court could not order HUD to repay the specific grant funds that HUD recaptured and then redistributed, the majority below focused on the source of the funds, rather than on the nature of the relief sought, and this is where the majority ran afoul of *Bowen*. In fact, the same circuit court that decided *City of Houston v. Department of Housing & Urban Development*, 24 F.3d 1421 (D.C. Cir. 1994), a case which HUD relies on to support its argument, rejected the notion that the source of the funds is dipositive on the issue of whether a plaintiff seeks specific relief. *America's Cmty. Bankers v. FDIC*, 200 F.3d 822, 829 (D.C. Cir. 2000) ("*Bowen*, and subsequent cases focus on the nature of the relief sought, not on whether the agency still has the precise funds paid."). Thus, the fact that the government "no longer possesses the precise funds collected is not determinative of this analysis." *Id*. at 830. The circuit court decision conflicts with the D.C. Circuit Court's opinion in *America's Community Bankers*.

The only other case that HUD cites to support its "source of funds" argument is *County of Suffolk v. Sebelius*, 605 F.3d 135 (2d Cir. 2010). But that case, like *City of Houston*, turned on mootness and the Appropriations Clause of the Constitution, neither of which is relevant to the issue of whether the type of relief requested is specific relief so as to come within the court's APA jurisdiction. The dissent correctly noted the flaw in the majority's reasoning. App. 59-62.

Moreover, *County of Suffolk* relied exclusively on the *City of Houston* "source of funds" analysis, 605 F.3d at 141-142, something that the D.C. Circuit Court subsequently rejected in *America's Community Bankers.*[3]

In this case, the Petitioners sought the specific relief that this Court sanctioned in *Bowen*. The crux of Petitioners' claim was that HUD wrongfully recaptured their grant funds, and Petitioners sought restoration of the grant funds taken; not the same exact dollars taken in a particular year, but the same NAHASDA grant funds, regardless if they were appropriated in 2002, 2008 or 2012. Petitioners were seeking specific relief under *Bowen*, i.e., the payment of a specific sum of money from a specific source, grant funds available under NAHASDA. As *Bowen* said, these funds could be restored through appropriate funding adjustments. 487 U.S. at 893.[4]

The majority of the lower court misapplied *Bowen*. Certiorari should be granted to determine whether the majority's opinion can withstand scrutiny under *Bowen*, and to resolve the circuit court conflict created by the majority's "source of funds" analysis, an analysis rejected in *America's Community Bankers.*

---

[3] This Court's decision in *Department of the Army v. Blue Fox*, 525 U.S. 255 (1999) does not support HUD's source of funds argument. As the dissent noted, *Blue Fox*, like *Bowen*, focuses on the function of the remedy. App. 54

[4] It's true that Congress authorized funding adjustments in the statute at issue in Bowen. *Id.* But Congress also provided for funding adjustments under NAHASDA, 25 U.S.C. § 4165(d), and did not limit those adjustments to a particular fiscal year.

In order to obtain the specific relief required by this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), HUD contends grant recipients must seek preliminary injunctive relief in the same funding year that the adverse action occurred. It is hard to see how such a limitation comports with the trust obligations Congress laid out in NAHASDA, 25 U.S.C. § 4101. The statute certainly does not require grant recipients to seek the extraordinary remedy of a preliminary injunction in order to claim the monetary relief to which they were entitled, and neither did *Bowen*. Putting such an onus on grant recipients in general, and Indian tribes in particular, runs counter to the fact that these statutes were passed for the benefit of the recipients, not the agency that administers them.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). Even if a grant recipient does seek a preliminary injunction, there is a good chance it will fail, as was the case in *County of Suffolk*, 605 F.3d at 102. Under the scheme proposed by HUD, the failure of a recipient to obtain a preliminary injunction would then result in a finding of mootness, and this is exactly what occurred in *County of Suffolk*. This further highlights why a "source of funds" analysis is simply unworkable. A district court's power to grant specific relief under the APA cannot be so constrained. Nor can such a burden be placed on grant recipients in order to obtain the specific monetary relief they are entitled to by statute, and which *Bowen* said they could obtain under the APA.

In its petition for a writ of certiorari in this case, the Tribes discussed why this Court should grant the petition to clarify the law on the important issue presented and to resolve the conflict between the Tenth Circuit in this case and the Federal Circuit in the companion case for which a petition for a writ of certiorari is also pending, *Lummi Tribe of the Lummi Reservation, Washington v. United States*, 870 F.3d 1313, 1320 (Fed. Cir. 2017); Sup. Ct. Case 17-1419. Both cases present the same legal question regarding the jurisdictional boundary between the Court of Federal Claims and the federal district courts.

HUD has submitted similar response to both Petitioners. For the reasons given by the Lummi Tribe in their Reply brief in Case 17-1419, HUD's response is unpersuasive.

Other than its repetition of the arguments that it made to the Tenth Circuit, which are discussed above and which are directly contrary to HUD's own arguments to the Federal Circuit Court and to this Court in its response to the Lummi Tribe's petition, the only substantial argument that HUD makes in this case which it did not make in *Lummi* is an assertion that this Court should deny the petition in this case because the Tenth Circuit, in what that Court described as "hollow victory" for the Tribes, remanded the case to the district court for some further proceedings. Those further proceedings are currently stayed pending resolution of pleadings in this Court. HUD asserts the limited remand makes this case a poor vehicle for certiorari.

Under the facts here, the latest limited remand is of insignificant weight, and it plainly does not outweigh the substantial benefits which would result from this Court granting certiorari in both this case and *Lummi*, and then consolidating the two companion cases for simultaneous briefing.

This Court would substantially benefit from setting *Lummi* and this case for simultaneous consolidated briefing because HUD would need to provide a single unified legal position. In the appellate courts, HUD adopted and prevailed on conflicting arguments. As the Federal Circuit Court succinctly stated:

> Of the government's *two faces*, we find the one presented to the Claims Court—the one arguing that this 'is not a suit for Tucker Act damages'—to be the correct one.

Lummi Tribe of the Lummi Reservation, 870 F.3d at 1320.

When HUD prevailed on its contradictory arguments in the two appellate courts below, it created a gap at the jurisdictional boundary between the Court of Federal Claims and the federal district courts. As HUD's latest response shows, the government is now content to sit in that gap, without fear of reprisal. But, in *Bowen*, this Court determined that Congress did not intend for that gap to exist, 487 U.S. 879, 915 (1988) (Justice Scalia discussed that he and the majority agreed that there is not "a gap in the scheme of relief—an utterly irrational gap which we have no reason to believe was intended.").

The best way to clarify this important issue of law and to close that irrational and significant gap is to grant both petitions, so that the parties will provide briefs analyzing how to close the gap, instead of briefs trying to take advantage of the gap that has developed.

Petitioners in the two cases share common lead counsel, and HUD is the respondent in both cases, and there are no other impediments to consolidating the cases for briefing and argument.

CONCLUSION

For all of the reasons stated in the Tribes' petition and in this reply, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN FREDERICKS III
Counsel of Record
JEFFREY S. RASMUSSEN
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
303-673-9600
jfredericks@ndnlaw.com
Counsel for Petitioners