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No. 12-355

In the Supreme Court of the United States

CAROL EVE GOOD BEAR, MARY AURELIA JOHNS, AND CHARLES COLOMBE, PETITIONERS

v.

ELOUISE PEPION COBELL, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's decision approving the settlement of the long-running *Cobell* Indian trust class action litigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The opinion of the district court (Pet. App. 33a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2012. On August 17, 2012, Justice Scalia extended the time within which to file a petition for a writ of certiorari to and including September 19, 2012. The petition for a writ of certiorari was filed on September 19, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek this Court's review of the court of appeals' decision affirming the district court's approval of the multi-billion dollar settlement of the *Cobell* Indian trust litigation. The background of that suit is set out in detail in the government's brief in opposition in *Craven* v. *Cobell*, No. 12-234. An overview is provided here.

1. The Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887), allotted Indian tribal land to individual Indians, and related legislation provided that the Department of the Interior would manage those lands and place certain revenues into individual accounts, known as Individual Indian Money accounts (IIM accounts). *Cobell* v. *Norton*, 334 F.3d 1128, 1133 (D.C. Cir. 2003) (*Cobell VIII*). Over the years, as land allotments passed to multiple heirs, ownership of the allotments became increasingly "fractionated." *Babbitt* v. *Youpee*, 519 U.S. 234, 237 (1997). Multiple generations of inheritances yielded exponential growth in the number of individual interests per allotment, and beneficial ownership of the underlying lands is now shared among some four million interests. D. Ct. Doc. 1705, Ex. at II-1. Billions of dollars have flowed through the IIM accounts since 1887, leaving an estimated overall balance of $416.2 million as of December 31, 2000. *Cobell* v. *Norton*, 428 F.3d 1070, 1072 (D.C. Cir. 2005) (*Cobell XVII*).

In 1992, a congressional committee issued a report, entitled "Misplaced Trust," that was highly critical of the Interior Department's management of the IIM accounts. See H.R. Rep. No. 499, 102d Cong., 2d Sess. (*1992 House Report*). Two years later, Congress enacted remedial legislation. See American Indian Trust Fund Management Reform Act (the 1994 Act), Pub. L. No. 103-412, 108 Stat. 4239 (25 U.S.C. 162a(d), 4001

et seq.). The 1994 Act imposed various obligations on the Interior Department regarding the IIM accounts, including the requirement that the Department "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." 25 U.S.C. 4011(a). The statute did not specify the manner in which the Interior Department was to conduct the required accounting. The 1992 Report noted, however, that "it makes little sense" to spend hundreds of millions of dollars to conduct an audit "when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991." *1992 House Report* 26.

2. a. Elouise Cobell and three other named plaintiffs (the class representatives) brought this class action suit in 1996 on behalf of present and former IIM account holders. They sought, among other things, to compel the Interior Department to conduct a "complete historical accounting of their trust accounts." *Cobell* v. *Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001) (*Cobell VI*).[1] In 1997, the district court certified a class, under Federal Rule of Civil Procedure 23(b)(1)(A) and (2), of all present and former IIM account beneficiaries. *Cobell* v. *Babbitt*, 30 F. Supp. 2d 24, 28 (D.D.C. 1998) (*Cobell I*). After a six-week trial, the court declared that the government had not fulfilled its duties. It held, *inter alia*, that the 1994 Act required a historical accounting of all money in the IIM trust accounts and that the accounting had been unreasonably delayed. *Cobell* v. *Babbitt*, 91 F.

[1] The complaint also sought an order directing the government "to restore trust funds wrongfully lost, dissipated, or converted," but plaintiffs later disavowed any claim for "cash infusions into the IIM accounts." *Cobell* v. *Babbitt*, 30 F. Supp. 2d 24, 40 & n.16 (D.D.C. 1998) (citation omitted).

Supp. 2d 1, 47, 58 (D.D.C. 1999) (*Cobell V*). In 2001, the court of appeals largely affirmed the district court's decision. *Cobell VI*, 240 F.3d at 1107.

b. In 2003, the district court held a second proceeding to consider accounting plans proposed by the government and the class representatives. *Cobell* v. *Norton*, 283 F. Supp. 2d 66, 85, 147-211 (D.D.C.) (*Cobell X*). The Interior Department submitted a plan that would have cost an estimated $335 million. Pet. App. 7a. After hearing 44 days of testimony, *Cobell X*, 283 F. Supp. 2d at 85, the court noted the difficulty in completing a historical accounting given the effects of "fractionat[ion]" of ownership interests, *id.* at 169. The court nevertheless found the Interior Department's accounting plan inadequate, *id.* at 187-198, and it issued a "structural injunction," *id.* at 213, with an estimated cost of $6 to $12 billion, requiring the Interior Department to verify virtually every IIM account transaction since 1887, *Cobell* v. *Norton*, 392 F.3d 461, 465 (D.C. Cir. 2004) (*Cobell XIII*).

Congress swiftly reacted. Within a month of the district court's decision issuing the structural injunction, Congress authorized not more than $45 million to be used by the Interior Department in the upcoming fiscal year for specified trust management purposes. Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1263 (2003). Congress also provided that the 1994 Act should not "be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust" until December 31, 2004, or until Congress amended the 1994 Act "to delineate the specific historical accounting obligations of the Department of

the Interior with respect to the Individual Indian Money Trust." *Ibid.*; see also H.R. Conf. Rep. No. 330, 108th Cong., 1st Sess. 117 (2003) (observing that accounting ordered by district court "would not provide a single dollar to the plaintiffs" and that "Indian country would be better served by a settlement of this litigation").

In light of that legislation, the court of appeals vacated the structural injunction. *Cobell XIII*, 392 F.3d at 468. After the legislation lapsed on January 1, 2005, the district court reissued the same structural injunction. *Cobell* v. *Norton*, 357 F. Supp. 2d 298 (D.D.C. 2005) (*Cobell XIV*). The court of appeals again vacated the order, explaining that the 1994 Act "doesn't support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." *Cobell XVII*, 428 F.3d at 1075. The court of appeals eventually ordered the case assigned to a new district court judge. *Cobell* v. *Kempthorne*, 455 F.3d 301, 331-335 (D.C. Cir. 2006) (*Cobell XVIII*), cert. denied, 549 U.S. 1317 (2007).

c. In 2007, the district court held a trial to assess the Interior Department's progress in satisfying its obligations under the 1994 Act. The district court found "substantial improvements in the administration of the trust." *Cobell* v. *Kempthorne*, 532 F. Supp. 2d 37, 86 (D.D.C. 2008) (*Cobell XX*). But the district court also recognized that costs would be much greater than originally estimated, and that Congress had not appropriated the necessary funds. *Id.* at 58. The district court concluded on that basis that a "real accounting" was "impossible." *Id.* at 102. That was not because of "missing records." *Id.* at 103 n.21. Rather, the court found determinative "the tension between the expense of an ade-

quate accounting" and Congress's unwillingness to provide funds for such an accounting. *Ibid.*

In June 2008, after another ten-day trial, the district court awarded the class a lump sum of $455.6 million as "restitution," based on an unproven but what the court found to be a statistically possible difference between aggregate receipts and disbursements since the IIM accounts were first created in 1887. *Cobell* v. *Kempthorne*, 569 F. Supp. 2d 223, 225-227, 236-239, 252 (D.D.C. 2008) (*Cobell XXI*). The court of appeals again vacated the district court's order. *Cobell* v. *Salazar*, 573 F.3d 808, 809 (D.C. Cir. 2009) (*Cobell XXII*), cert. dismissed, 130 S. Ct. 3497 (2010). The court of appeals rejected the district court's conclusion that it was impossible for the Interior Department to fulfill its statutory obligation to conduct an accounting. *Id.* at 812-813. The Department's obligation, the court explained, is to carry out "the best accounting that Interior can provide, with the resources it receives, or expects to receive, from Congress." *Id.* at 811.

3. a. Given the ongoing uncertainty about the scope of a historical accounting, "and the likelihood of many more years of litigation," Pet. App. 8a, in December 2009, the parties reached a settlement of the suit, contingent on congressional legislation, *id.* at 8a-11a. The settlement committed almost $2 billion for the Department of the Interior to purchase and consolidate fractionated land interests, thereby addressing the central underlying problem that led to many of the difficulties the Interior Department experienced in managing IIM accounts. *Id.* at 10a. The settlement committed an additional $1.4 billion—later increased to $1.5 billion—to be used to pay the claims of two overlapping plaintiff classes. *Id.* at 9a-10a, 11a. It also provided for the filing of

an amended complaint setting out both classes. *Id.* at 9a.

The "Historical Accounting Class" consists of individuals "who had an IIM Account open during any period between October 25, 1994 and the Record Date [set by the parties' agreement, September 30, 2009], which IIM Account had at least one cash transaction credited to it." Pet. App. 9a; see C.A. App. 709. In lieu of receiving a historical accounting, each of the estimated 360,000 members of the class, C.A. App. 1463 (Tr. 176), instead is to receive a $1000 payment, Pet. App. 9a-10a. Because the Historical Accounting Class was to be certified under Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(2), absent class members would not be permitted to opt out of the settlement. *Id.* at 9a.

The "Trust Administration Class" consists of individuals who held IIM accounts at any time between 1985 and the date of the proposed amended complaint, as well as individual Indians who, as of the Record Date, had an ownership interest in restricted or trust land. Pet. App. 9a; C.A. App. 713. All members of the Historical Accounting Class also are, necessarily, members of the Trust Administration Class. Unlike the Historical Accounting Class, however, members of the Trust Administration Class may opt out of the settlement of their claims. Pet. App. 9a. Those who do not opt out are to receive a base payment of at least $800, plus a *pro rata* share of the class funds based upon "the average of the ten (10) highest revenue generating years in each individual Indian's IIM Account." C.A. App. 729; see Pet. App. 10a; see also *id.* at 11a (noting that congressional appropriation increased minimum payment to Trust Administration Class from $500 to approximately $800).

The settlement provides for a release of certain claims. Pet. App. 10a. While all historical accounting claims are released, *ibid.*, claims for payment of account balances in existing accounts, claims for any breaches committed after the Record Date, and claims for future trust reform are not released, C.A. App. 742-744. In addition, class members who do not opt out of the Trust Administration Class waive the right to challenge the accuracy of the balance of their IIM accounts, as reported in the last periodic statement of 2009. *Id.* at 746. Persons opting out of the Trust Administration Class remain free to pursue individual damages claims concerning management of funds and approvals of uses of trust lands. *Id.* at 745.

b. In December 2010, the President signed into law the Claims Resolution Act of 2010 (Claims Resolution Act), Pub. L. No. 111-291, § 101(e)(1)(C), 124 Stat. 3067. In that Act, Congress "authorized, ratified, and confirmed" the agreed upon settlement of this suit. *Id.* § 101(c)(1), 124 Stat. 3066. The Act also appropriated the necessary funds, *id.* § 101(e) (appropriating $1.9 billion for land consolidation) and (j) (appropriating $1.5 billion for Trust Administration Class payments), 124 Stat. 3067, 3069; amended the district court's jurisdiction to permit the matter to proceed, *id.* § 101(d), 124 Stat. 3066; and provided that "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure," the court "may certify the Trust Administration Class" and that class shall thereafter "be treated as a class certified under rule 23(b)(3)," *id.* § 101(d)(2), 124 Stat. 3067. See Pet. App. 11a.

4. a. In December 2010, the district court provisionally certified the Historical Accounting and Trust Administration Classes, granted preliminary approval of

the parties' settlement, ordered an expansive program of class notice, and invited objections to the settlement. Pet. App. 11a-12a, 22a, 26a. Out of hundreds of thousands of class members, there were 92 objections, and 1824 individuals—including petitioners Good Bear and Colombe—opted out of the Trust Administration Class. *Id.* at 12a, 41a; C.A. App. 1478 (Tr. 237); see D. Ct. Doc. 3850-1, Ex. A at 3 (Nos. 86 & 104). In June 2011, the district court held a fairness hearing, considering arguments from the parties' counsel and from objectors. Pet. App. 12a. The court rendered an oral ruling, explaining that the settlement was in all respects fair, adequate, and reasonable. *Ibid.*; C.A. App. 1354-1418. A month later, the district court issued a written order approving the settlement. Pet. App. 33a-48a.

b. Petitioners are three IIM account holders who filed timely objections to the settlement; two of them (Good Bear and Colombe) opted out of the Trust Administration Class. D. Ct. Doc. 3850-1, Ex. A at 3 (Nos. 86 & 104). Petitioners appealed from the district court's ruling, raising four objections. The court of appeals affirmed in an unpublished order. Pet. App. 1a-3a. The court of appeals explained that two of petitioners' objections—that the Trust Administration Class lacked commonality and that the Historical Accounting Class was improperly certified as a mandatory class—were "foreclosed," *id.* at 2a, by its published decision in *Craven* v. *Cobell, supra*, see Pet. App. 4a-30a, issued on the same day, which "concluded that the settlement at issue in this case is fair and comports with the requirements of due process and of Federal Rule of Civil Procedure 23," *id.* at 2a. The court of appeals noted that petitioners' remaining "two arguments, that the district court lacked

jurisdiction and that the district judge should have recused himself, are utterly without merit." *Id.* at 2a.[2]

ARGUMENT

The settlement of this litigation, authorized and ratified by an Act of Congress, embodies a welcome and wholly legitimate means of resolving what had become, after years of litigation, an essentially intractable problem. The government's brief in opposition in *Craven* v. *Cobell*, No. 12-234, demonstrates that the court of appeals correctly affirmed the district court's approval of that settlement and that no further review is warranted. Petitioners offer no convincing reason to question that conclusion. The court of appeals' class certification holding is correct, petitioners' arguments to the contrary fail to engage meaningfully with the court of appeals' analysis, and petitioners identify no conflict with a decision of any other court of appeals.

1. a. Federal Rule of Civil Procedure 23 provides that a class action may be maintained if, among other things, "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2) and (b). Petitioners contend (Pet. 11-13) that the court of appeals erroneously affirmed the district court's certification of the Trust Administration Class because neither the court of appeals nor the district court "conducted the slightest inquiry into the commonality required for maintenance of a class action." Pet. 12. Petitioners seek summary reversal from this Court and a remand with instructions to

[2] The petition does not pursue these remaining two arguments, which are thus not before this Court.

dismiss the amended complaint. Pet. 13. Petitioners' contention is without merit.[3]

Petitioners' contention that the courts below failed to consider whether the Trust Administration Class satisfies the requirements of commonality is difficult to comprehend. Both the district court and the court of appeals expressly addressed commonality in their decisions upholding the propriety and fairness of the settlement of this suit. See Pet. App. 25a-27a (court of appeals); *id.* at 37a (district court); C.A. App. 1412 (Tr. 233) (district court). As the court of appeals recognized, "commonality requires that plaintiffs advance a 'common contention' that 'must be of such a nature that it is capable of classwide resolution.'" Pet. App. 26a-27a (quoting *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011)). The court of appeals explained that "[t]he Trust Administration Class satisfies this requirement," because "all of the class members' trust claims revolve around resolution of a single issue—the extent of the Secretary's fiduciary obligation as trustee of the IIM accounts." *Id.* at 27a.

Citing this passage in the court of appeals' opinion, petitioners point out that the Trust Administration Class includes some persons "who do not have IIM accounts at all." Pet. 11; see Pet. 9; Pet. App. 9a. To the extent, however, that petitioners now suggest a lack of commonality between class members with IIM accounts and class members who have an interest in real property held in trust by the United States but do not have IIM

[3] It is unclear whether the two petitioners who opted out of the Trust Administration Class (Good Bear and Colombe) have standing to pursue this point. See *Mayfield* v. *Barr*, 985 F.2d 1090, 1092-1093 (D.C. Cir. 1993). Certiorari is unwarranted in any event, for the reasons set forth in the text.

accounts, petitioners did not raise that objection in the court of appeals and may not do so for the first time in this Court. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first view"). In any event, petitioners focus on a distinction without a difference. As the petition notes, "[t]he terms of some Indian leases provide for lessees to make payment directly to landowners, and those monies never pass through Individual Indian Money (IIM) accounts." Pet. 6-7; see *Cobell XX*, 532 F. Supp. 2d at 77. The claims in this case of mismanagement of assets held by the United States apply to such persons as well as to persons with IIM accounts, see Pet. App. 9a; C.A. App. 710-711, 713, and the petition does not indicate why these two modes of payment would call into question whether the Trust Administration Class was properly certified. See Pet. 11-13. Even if this fact-based point had been properly preserved, it provides no basis for further review.

b. Review of petitioner's commonality question is not merited for a second, fundamental reason. In the Claims Resolution Act, Congress authorized certification of the Trust Administration Class "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure." Claims Resolution Act § 101(d)(2)(A), 124 Stat. 3067. Thus, the requirements of Rule 23 are inapplicable to the certification of the Trust Administration Class, and the only limitations on the certification of that class are those imposed by due process. *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) (Congress "can create exceptions to an individual rule [of civil procedure] as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances."). Petitioners do not contend that the certification of the

Trust Administration Class violated their due process rights.[4] Pet. App. 11a-13a. And because Rule 23 is inapplicable to the Trust Administration Class, this case would not present an appropriate vehicle for considering the application of that rule's commonality requirement.

2. a. Federal Rule of Civil Procedure 23(b)(2) provides that a class action may be maintained if certain threshold prerequisites are met and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This Court held in *Wal-Mart* that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Wal-Mart*, 131 S. Ct. at 2557. Petitioners contend (Pet. 13-15) that certification of the Historical Accounting Class was improper under these principles

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[4] Nor could they plausibly do so. In the class action context, "[w]here money damages are sought, due process requires: (1) adequate notice to the class; (2) an opportunity for class members to be heard and participate; (3) the right of class members to opt out; and (4) adequate representation by the lead plaintiff(s)." Pet. App. 26a (citing *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-812 (1985)). Class members here received elaborate notice of the proposed settlement; they were afforded ample opportunity to be heard and to participate at the fairness hearing in district court; and members of the Trust Administration Class enjoyed full opt-out rights—indeed two of the three petitioners in this case actually elected to opt out, see p. 9, *supra*. See Pet. App. 8a-11a, 26a. Petitioners do not call any of these propositions into question, nor do they overtly challenge the adequacy of their representation; petitioners allege no conflicts of interest among class members, or between class members and the named class representatives. See *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 625 (1997); *Hansberry* v. *Lee*, 311 U.S. 32, 44 (1940).

because the settlement provides for payment of "money damages," Pet. 13, to class members.

As the court of appeals noted in the *Craven* decision, "[t]his argument mischaracterizes the Historical Accounting Class." Pet. App. 16a. The settlement provides for a uniform payment of $1000 to each member of the Historical Accounting Class. *Id.* at 10a. That per capita payment is consideration for the release of the class members' claim seeking to compel the Interior Department to prepare and distribute to each class member a historical statement of each class member's IIM account. *Ibid.* It is not a damages payment for individualized harm; the historical accounting claims in this case were not claims for money damages. See note 1, *supra*. Congress could have amended the 1994 Act to eliminate altogether whatever obligation to conduct a historical accounting that it might ultimately have been construed to require and that Congress had been willing to fund. Congress's enactment of the Claims Resolution Act approving and implementing the settlement of this case thus confirms the nature of the settlement of the historical accounting claims and reinforces the appropriateness of class certification. Nor does the payment resolve any claims of actual mismanagement; the separate and additional payments to the Trust Administration Class serve those purposes. See Pet. App. 10a, 13a; C.A. App. 1412 (Tr. 231).

In any event, as the court of appeals also explained, even "[a]ssuming that the $1,000 *per capita* settlement payment monetized the requested injunctive relief" for a historical accounting, "certification of the Historical Accounting Class as a Rule 23(b)(2) class was nonetheless appropriate because of the unusual circumstances surrounding this litigation." Pet. App. 17a. As the court

of appeals noted, "Interior had performed a fairly extensive accounting in the course of the litigation but found only minor discrepancies." *Ibid.* For that reason, "[a]t trial, the district court observed that 'one permissible conclusion from the record would be that the [Secretary] has not withheld any funds from plaintiffs' accounts.'" *Ibid.* (quoting *Cobell XXI*, 569 F. Supp. 2d at 238).

The court of appeals' decisions in this case had also "placed significant limits on the Secretary's accounting duty, clarifying that Interior need only provide 'the best accounting possible . . . with the money that Congress is willing to appropriate.'" Pet. App. 17a-18a (quoting *Cobell XXII*, 573 F.3d at 813). "All of this suggest[ed]" to the court of appeals "that the information produced from an historical accounting is not likely to be worth significantly more to some class members than to others, and thus the $1,000 settlement payment is properly viewed as nonindividualized and does not run afoul of *Wal-Mart*." *Id.* at 18a. Petitioners do not address the court of appeals' reasoning, and they provide no explanation for why they believe it is mistaken. See *id.* 13a-15a.

b. In addition, this case would provide a poor vehicle for consideration of the second question presented, as it does with the first. Petitioners contend that the court of appeals erred in certifying the Historical Accounting Class under Rule 23(b)(2). Pet. 13-15. But the district court certified that class under both Rule 23(b)(2) and under Rule 23(b)(1)(A). Pet. App. 38a; C.A. App. 1411 (Tr. 229); see Fed. R. Civ. P. 23(b)(1)(A) (class action may be maintained if separate actions would "create a risk" of "inconsistent or varying adjudications with respect to individual class members that would establish

incompatible standards of conduct for the party opposing the class"). Petitioners nowhere challenge the district court's certification under Rule 23(b)(1)(A). Thus, even assuming that Rule 23(b)(2) provided an inadequate basis for the certification of the Historical Accounting Class, Rule 23(b)(1)(A) provides an independent basis for the class's certification. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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