No. 10-382

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JICARILLA APACHE NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AND FEDERAL BAR ASSOCIATION – INDIAN LAW SECTION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages. NCAI and its member tribes are dedicated to protecting the rights and improving the welfare of American Indians and tribes. NCAI's interest in this case arises from its long-term commitment to ensuring the fair application of federal law to tribes.

Established in 1920, the Federal Bar Association is a voluntary bar association with approximately 15,660 members who work together to promote the sound administration of justice. The FBA Indian Law Section ("FBA-ILS") is the oldest and largest section of its kind, and is devoted to advancing the field of federal Indian law, assisting in its consistent development, and promoting the interests of those practicing federal Indian law.

The issue here is whether, and under what circumstances, tribes may invoke the fiduciary exception to the attorney-client privilege in light of the United States' statutory trust responsibilities with respect to tribal trust funds. *Amici* submit that the United States and the tribes have a fiduciary relationship with respect to tribal trust funds that warrants application of the fiduciary exception in closely circumscribed contexts, including in this case.

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[1] No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to its filing, and the letters of consent have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States' trust relationship with American Indian tribes and people varies substantially depending on the context in which it arises. It includes a spectrum of obligations and responsibilities, from the "limited trust" to prevent improvident alienation of land in the General Allotment Act, see *United States* v. *Mitchell*, 445 U.S. 535, 542 (1980) ("*Mitchell I*"), to the joint representation of Indian and other federal interests in water under federal law, see *Nevada* v. *United States*, 463 U.S. 110 (1983), to the "fiduciary" obligation to manage timber resources in the tribes' best interests, see *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*"). The general trust relationship between the United States and Indian tribes "'reinforce[es]'" the United States' fiduciary obligations, see *United States* v. *Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*"), but the United States' "specific fiduciary or other duties" to a tribe determine the precise consequences which flow from the United States' legal responsibilities. *Id.* When, as here, federal statutes define a traditional fiduciary trust relationship between the United States and a tribe, the fiduciary exception to the attorney-client privilege applies under Federal Rule of Evidence 501.

In assessing whether the fiduciary exception applies, this Court must first assess the scope and nature of the United States' responsibilities to the Jicarilla Apache Nation ("Jicarilla") in the setting presented here – the United States' obligations in connection with tribal trust funds. Once that relationship is properly understood, it is clear that the fiduciary exception applies to the legal advice the

United States receives in administering tribal trust funds.

1. This current phase of the litigation between the United States and the Jicarilla involves the United States' accounting, management and investment of the Jicarilla's trust funds from 1972 to 1992. App. 25a-26a, 115a-119a. Those claims arise under 25 U.S.C. §§ 161, 161a, 161b, 162a, and the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001 *et seq.* ("1994 Trust Fund Act"), which recognizes and codifies the existing trust relationship. These statutes expressly refer to the United States as "trustee of the various Indian tribes," *id.* § 161, and to the accounts at issue as "tribal trust funds," see, *e.g.*, *id.* § 162a. They also recognize the United States' control and discretion with respect to the management and investment of the funds. The statutes acknowledge "[t]rust responsibilities of the Secretary of the Interior," stating that they "shall include (but are not limited to)" providing "adequate systems for accounting for and reporting trust fund balances." *Id.* § 162a(d). Indeed, the 1994 Trust Fund Act establishes a Special Trustee for American Indians "to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes," *id.* § 4041(1), with a particular focus on tribal trust accounts, see, *e.g.*, *id.* § 4043(b)(2)(A).

These statutory "prescription[s] . . . bear[] the hallmarks of a 'conventional fiduciary relationship.'" *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1558 (2009) ("*Navajo II*"). The United States manages and has control over trust funds, discretion with respect to their investment, and detailed responsibilities to account to the tribal beneficiaries. See also *United*

States v. *White Mountain Apache Tribe*, 537 U.S. 465, 480 (2003) (the statute "expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations, and 'invests the United States with discretionary authority to make direct use of portions of the trust corpus'") (citation and alteration omitted) (Ginsburg, J., concurring). As this Court explained, "[w]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise)." *Mitchell II*, 463 U.S. at 225 (internal quotations omitted). From that determination, certain consequences flow, including application of the fiduciary exception to the attorney-client privilege in appropriate circumstances.

2. Federal Rule of Evidence 501 provides that questions of privilege "shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. In this case, the Court of Federal Claims and the Federal Circuit correctly determined that the United States could not invoke the attorney-client privilege to withhold documents concerning the administration of funds held in trust for the Jicarilla.

At common law, a trust's beneficiaries have the right to documents containing legal advice involving trust administration that is not provided in anticipation of adversarial legal proceedings against him or her. See *Wachtel* v. *Health Net, Inc.*, 482 F.3d 225, 229-32 (3d Cir. 2007) (citing cases). This fiduciary exception to the attorney-client privilege has two bases: first, the fact that the trustee is procuring legal advice for the benefit of the trust (and

hence the beneficiary) and, second, the trustee's duty to disclose information regarding trust administration to the beneficiary. *Id.* at 235-36. Critically, it does not apply when there is litigation anticipated between the trustee and trust beneficiaries. *Id.*

These same considerations form the basis of the fiduciary exception to the attorney-client privilege. That exception has been applied in numerous relationships that, like the federal-tribal relationship, are fiduciary in some but not all contexts – trustee-beneficiary, corporation-shareholder, bank-depositor, union-member, ERISA fiduciary-beneficiary. In each of these relationships, there are contexts where application of the exception is warranted, and contexts in which the exception does not apply. The United States' relationship with the tribes is no different, and the application of the exception varies from context to context. The United States argues that when it has conflicting or competing interests, the fiduciary exception does not apply. But that question is not remotely presented by this case. Here the United States has no competing or conflicting concerns.

Indeed, the United States has a paradigmatic fiduciary relationship with the Jicarilla in its control over and management of the Jicarilla's tribal trust funds. Prior to anticipation of this litigation, the United States' interests in trust administration were identical to the interests of the tribal trust fund beneficiaries, and the United States does not allege that it took any conflicting or competing concerns into account as it administered the Jicarilla's trust funds. App. 18a-19a.

There is no meaningful difference between the traditional trust beneficiary's relationship with a trust lawyer addressing a question related to trust

administration at the behest of a trustee and a tribe's relationship with a United States lawyer addressing a question related to tribal trust fund administration at the behest of the Secretary of the Interior. In both situations, the fiduciary exception clearly applies.

3. The United States' contrary arguments lack merit. First, it claims that it cannot have a duty to disclose privileged documents unless a statute specifies that it must. The Federal Rules of Evidence, like the Federal Rules of Civil and Criminal Procedure, apply to the United States when it litigates in federal courts. See, *e.g.*, Fed. R. Evid. 1101(c) ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings."). No additional federal statute specifically imposing those litigation rules on the Government is required. Moreover, this Court's precedent makes clear that once a trust obligation is established, the common law of trusts "play[s] a role" in fleshing out the United States' duties. *Navajo II*, 129 S. Ct. at 1558. Application of the common law here requires disclosure under the fiduciary exception.

The United States further contends that its lawyers cannot also be the tribe's lawyers because a series of consequences, such as disabling application of the conflict of interest rules, would follow. US Br. 13-30. These are straw man arguments. The *legal advice* provided by Government lawyers in connection with the United States' fulfillment of its fiduciary obligations to administer tribal trust funds is for the benefit of the tribes. The Jicarilla Apache Nation thus is not a client, see *id.* at 23-27, but is instead a beneficiary of that advice. That status entitles it to access to attorney advice given in connection with trust administration under the fiduciary exception.

Finally, the United States claims that the fact that it – rather than trust funds – pays its attorneys' salaries means that it is not subject to the fiduciary exception. *Id.* at 27-28. But, the source of payment of a trustee is not dispositive of whether the fiduciary exception applies. Instead, it is simply one piece of evidence that the exception may apply because the source of payment can indicate whether the lawyer is serving the trust or some personal interest of a trustee. See *Riggs Nat'l Bank of Wash. D.C.* v. *Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976). Here, the United States' fiduciary relationship with the tribes was created by history and statute. Neither suggests that the United States' payment of the salaries of attorneys giving advice about tribal trust fund administration indicates that the United States is protecting its own interests rather than the tribe's. The lower courts correctly refused to draw an inference of conflict from the source of the lawyers' compensation.

The fiduciary exception to the attorney-client privilege applies in limited circumstances, but this case fits comfortably within that exception.

ARGUMENT

I. THE UNITED STATES HAS A TRADITIONAL FIDUCIARY RELATIONSHIP WITH THE JICARILLA WITH RESPECT TO TRUST FUND ADMINISTRATION.

This Court routinely refers to the "general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225-26 (citing numerous cases). That relationship has general consequences: It has been invoked to emphasize the high standard of care the United States must exercise in its dealing with Indians, see, *e.g.*, *United States* v.

Mason, 412 U.S. 391, 398 (1973), to interpret ambiguous treaty language in the tribes' favor, see *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and to preclude unauthorized state jurisdiction over Indian lands and property, *United States* v. *Kagama*, 118 U.S. 375 (1886). The United States appears to frame the dispute in this case as whether its "general trust relationship" with the tribes, standing alone, requires application of the fiduciary exception. But that is not the issue here.

Trust relationships are complex: The same entity or person is often a fiduciary for some purposes and not for others. See, *e.g.*, *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 891 (1996) (employer is an ERISA fiduciary when making benefits determinations but not when making decisions about plan adoption, modification or termination). The United States' trust relationship with tribal nations and their citizens shares this characteristic because Congress has occasionally requireed federal agencies such as the Department of the Interior to pursue conflicting or competing interests. See *Nevada*, 463 U.S. at 128 ("it may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands").

This case presents no such complexities, however, and this Court need not and should not consider what consequences flow solely from the United States' general trust relationship with the Jicarilla or from conflicting United States' responsibilities to different entities. Here, *federal statutes* clearly create a fiduciary relationship *with respect to tribal trust funds*. See *infra* 11-12. The United States' general trust

obligation thus "reinforce[s]" the conclusion that those laws impose fiduciary obligations on the United States. *Mitchell II*, 463 U.S. at 225. Moreover, the United States has no conflicting or competing interests in administering those trust funds. See *Lincoln* v. *Vigil*, 508 U.S. 182, 194 (1993) ("the law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity'") (quoting *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987)).

Specifically, in the current phase of this litigation, the Jicarilla Apache Nation alleges that the United States breached its duty to invest the Jicarilla's trust funds to obtain the maximum return, made unauthorized disbursements of trust funds, delayed in depositing funds in tribal trust accounts, and other similar claims. These claims were alleged to arise under a group of federal statutes that make the United States a traditional fiduciary with respect to tribal trust accounts. "[T]he language of these statutory . . . provisions directly supports the existence of a fiduciary relationship." *Mitchell II*, 463 U.S. at 224.

"The system of trusteeship and Federal management of Indian funds is deeply rooted in Indian-U.S. history." See *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102-499, at 6 (1992) ("*Misplaced Trust*"). The United States first adopted the policy of holding tribal funds in trust in 1820. *Id.* Federal law requires that tribal and individual Indian trust funds "be deposited in the U.S. Treasury or managed in trust by the United States." *Id.* (citing, *inter alia*, 25 U.S.C. § 162a). And, since 1918, the Interior Department has had "the legal authority to invest Indian funds held in

trust." *Id.* "To ensure the safety of these funds, such investments must be unconditionally secured either through Government deposit insurance or through pledging collateral guaranteed by the U.S. Government." *Id.* Congress has also "carefully regulated the disbursement of Indian trust funds." *Id.* at 7.

The principal statutory provisions recognizing the United States' trust responsibilities with regard to Indian trust funds are codified at 25 U.S.C. §§ 161, 161a and 162a. These sections are entitled in relevant part "Deposit in Treasury of trust funds," 25 U.S.C. § 161, "Tribal funds in trust in Treasury Department; investment by Secretary of the Treasury," *id.* § 161a, and "Deposit of tribal funds in banks; . . . investments," *id.* § 162a. Section 161 requires the United States to deposit in the Treasury and pay interest on such funds when "the best interests of the Indians will be promoted by such deposits, in lieu of investments." As this Court observed in *Mitchell II*, these statutes give the Secretary of the Interior "authority to invest tribal . . . funds held in trust in banks, bonds, notes or other public debt obligations of the United States if deemed advisable and for the best interest of the Indians." 463 U.S. at 223 n.24 (citing 25 U.S.C. § 162a). The statutory text – and the obligations it imposes on the United States – recognize and govern the traditional fiduciary relationship between the United States and tribes in connection with the trust funds at issue here.

Congress further addressed the United States' administration of tribal and individual Indian trust funds in the 1994 Trust Fund Act. See Pub. L. No. 103-412, 108 Stat. 4239 (codified at 25 U.S.C. §§ 161a(b), 162a, 4001 *et seq.*). In that Act, Congress explicitly acknowledged both the existence and the

fiduciary nature of the United States' responsibilities and sought to address serious deficiencies in the government's management of Indian trust funds. See, *e.g.*, *Misplaced Trust*, at 1-8; H.R. Rep. No. 103-778, at 8 (1994).

Indeed, the 1994 Trust Fund Act described its provisions as a "*recognition*" of existing trust responsibility with respect to tribal and individual Indian trust funds. See 1994 Trust Fund Act, Pub. L. No. 103-412, tit. I, 108 Stat. at 4240 (capitalization omitted; emphasis supplied). It provided that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust" for a tribe or an individual Indian "which are deposited or invested pursuant to [25 U.S.C. § 162a]." 25 U.S.C. § 4011(a). It further required the Secretary to conduct an "annual audit" of all funds held in trust for the benefit of a tribe or individual Indian "which are deposited or invested pursuant to section 162a." *Id.* § 4011(c).

The 1994 Trust Fund Act also amended 25 U.S.C. § 162a, adding a subsection (d) which specified that the Secretary of the Interior's "proper discharge of the trust responsibilities of the United States shall include (but are not limited to)" a series of accounting, auditing, management and disclosure obligations with respect to tribal and individual Indian trust funds. See *id.* § 162a(d).

Finally, the 1994 Trust Fund Act established an Office of Special Trustee for American Indians within the Interior Department to address problems with Indian trust funds. *Id.* § 4042(a). Congress took this action "to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes and individual Indians . . . to oversee and coordinate

reforms within the Department of practices relating to the management and discharge of such responsibilities," and "to ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians." *Id.* § 4041(1), (3).

Congress requires the Special Trustee to "monitor the reconciliation" of both "tribal and Individual Indian Money trust accounts" to ensure that account holders receive a "fair and accurate accounting of all trust accounts." *Id.* § 4043(b)(2)(A). And, Congress specifies that the Trustee must ensure that policies, procedures and systems are created to allow proper accounting for and investing of all trust fund monies. *Id.* § 4043(b)(2)(B). See also *id.* § 4044 (requiring, with respect to the Secretary's reconciliation of "tribal trust fund" accounts, a report to Congress identifying "a balance reconciled as of September 30, 1995" for each tribal account by mid-1996, including a description of the Secretary's methodology).[2]

These detailed provisions confirm what has been true at least since the original enactment of the law now codified in §§ 161, 161a and 162a – that the United States has a traditional fiduciary relationship

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[2] If more were needed, the Departmental Manual of the Department of the Interior, Part 303 Indian Trust Responsibilities, states "Principles for Managing Indian Trust Assets," and explains that "[i]t is the policy of the Department of Interior to discharge, without limitation, the Secretary's Indian trust responsibility with a high degree of skill, care, and loyalty," including its trust responsibility to "[a]ccount for and timely identify, collect, deposit, invest, and distribute income due or held on behalf of beneficial owners." Dep't of Interior, *Department Manual*, pt. 303, ch. 2, § 2.7(H) (Oct. 31, 2000), *available at* http://elips.doi.gov/app_dm/dm.cfm (table of contents). *See id.* ch. 6 (Sept. 5, 2003) (describing responsibilities with respect to "Indian Fiduciary Trust Records").

with tribes and Indians for tribal and individual Indian trust funds. The United States administers the trust, including accounting for the funds and making discretionary investment decisions. Where, by statute or regulation, the United States is vested with "control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise)." *Mitchell II*, 463 U.S. at 225 (internal quotations omitted). This is true "even though nothing is said expressly in the authorizing or underlying statute . . . about a trust fund, or a trust or fiduciary connection." *Id.* (internal quotations omitted). In this case, of course, the statutes speak explicitly and repeatedly of a trust relationship and recognize the United States' traditional fiduciary responsibilities with respect to tribal trust funds. See also *Misplaced Trust*, at 8 (the Bureau of Indian Affairs' "fiduciary responsibilities are not dissimilar to the duties performed by many private trustees").

The United States' fiduciary responsibilities with respect to tribal trust funds reach far beyond the "limited" or "bare" trust found insufficient to support monetary damages under the General Allotment Act, see *Mitchell I*, 445 U.S. at 542; *Mitchell II*, 463 U.S. at 224. Indeed, the duties imposed by statute here create a "conventional fiduciary relationship" under *all opinions* in *White Mountain Apache*, 537 U.S. at 473. See *id.* at 475 (in addition to expressly creating a "trust" relationship, the statute provided the United States with "control at least as plenary as its authority of the timber in *Mitchell II*").

Justice Ginsburg concurred in the *White Mountain Apache* majority's determination that the United States had fiduciary duties because "the Act

expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations," and because the "plenary control the United States exercises under the Act as sole manager and trustee, . . . places this case within *Mitchell II*'s governance." See *id.* at 480, 481 (Ginsburg, J., concurring). Justice Thomas dissented because no federal statutes or regulations gave the United States "'pervasive'" control over the property at issue, the Act created only a "'bare trust.'" *Id.* at 484, 485 (Thomas, J., dissenting). By contrast, here, the United States' control of the trust funds is "pervasive." Accordingly, under the framework of every opinion in *White Mountain Apache*, the statutes here create a fully realized traditional fiduciary relationship with the correlative duties that relationship imposes.[3]

As we show in Part II, the fiduciary relationship at issue is identical to those that support the common law fiduciary exception to the attorney-client privilege.

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[3] In demonstrating that a traditional fiduciary relationship exists here, *amici* rely on this Court's cases addressing when the United States has taken on statutory obligations sufficient to give rise to money-mandating obligations under the Indian Tucker Act (*e.g.*, *Navajo I*, *Navajo II*, *Mitchell I*, *Mitchell II*, *White Mountain Apache*). These cases delineate when the United States has assumed fiduciary responsibilities as a first step to determining whether damages can be imposed. However, fiduciary responsibilities that are *not* money-mandating may also warrant application of the fiduciary exception to the attorney-client privilege. For example, where Indians seek and laws authorize equitable relief, such as an accounting or restitution, the United States may act as a traditional fiduciary. *See* App. 44a. The applicability of the fiduciary exception turns on the nature of the relationship.

II. THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO THE FIDUCIARY RELATIONSHIP IN THIS CASE.

Federal Rule of Evidence 501 tells the courts to apply common law rules to decide questions of evidentiary privilege. The common law rule at issue is the fiduciary exception to the attorney-client privilege. It applies in narrow circumstances when a beneficiary seeks to discover legal advice about trust administration. Because the United States and the Jicarilla are in a conventional fiduciary relationship with respect to the tribal trust funds and all other conditions for application of the fiduciary exception are met, that exception should apply to legal advice the United States obtained to administer the trust.

A. The Premises And Purposes Of The Fiduciary Exception Are Served By Its Application Here.

The fiduciary exception to the attorney-client privilege originated in 19th century England. "Under English common law, when a trustee obtained legal advice relating to his administration of the trust, and not in anticipation of adversarial legal proceedings against him, the beneficiaries of the trust had the right to the production of that advice." *Wachtel*, 482 F.3d at 231 (citing *Talbot* v. *Marshfield* (1865), 62 Eng. Rep. 728 (Ch.)).

United States courts began to recognize the common law fiduciary exception in the 1970s. See, *e.g.*, *Riggs*, 355 A.2d at 712 (requiring disclosure to beneficiaries of a legal memorandum on matters of trust administration that had been prepared for trustees). The exception has been acknowledged in numerous circuits. See *Wachtel*, 482 F.3d at 233

(citing cases). It has been considered not only in cases involving common law trusts, *Riggs*, 355 A.2d at 709, but also in disputes between corporations and shareholders, see *Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970); labor organizations and union members, *Cox* v. *Administrator*, 17 F.3d 1386, 1415 (11th Cir.) (citing cases), *revised*, 30 F.3d 1347 (11th Cir. 1994); and ERISA fiduciaries and beneficiaries, *Wachtel*, 482 F.3d at 233-34.

Significantly, the exception applies only to legal advice related to administration of the trust or the fiduciary relationship. It does not apply when the trustee is not acting in a fiduciary role. See *Lockheed Corp.*, 517 U.S. at 891 (employer is an ERISA fiduciary when engaged in discretionary acts of plan administration, but not when engaged in adoption, modification, or termination of a benefit plan); *In re Long Island Lighting Co.*, 129 F.3d 268, 272-73 (2d Cir. 1997) ("privileged consultation on non-fiduciary matters does not defeat the fiduciary exception . . . on fiduciary matters" (emphasis omitted)). And, it does not apply when the advice is obtained in anticipation of adversarial litigation against the trustee, see App. 47a; *Talbot*, 62 Eng. Rep. at 730; *Riggs*, 355 A.2d at 711; *United States* v. *Mett*, 178 F.3d 1058, 1063-64 (9th Cir. 1999). In sum, the fiduciary exception has a defined range of applications; it applies most comfortably to legal advice procured by a trust for purposes of trust administration at times when the trustee is not anticipating litigation.[4]

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[4] The United States and respondent dispute whether the fiduciary exception applies when a fiduciary is making decisions about trust funds while he or she has lawfully conflicting or competing interests. US Br. 41-42; Resp. Br. 23-24. That question plainly is not presented here because the United States

Courts recite two basic reasons for applying the exception in these limited circumstances: First, in traditional fiduciary relationships, a trustee has a duty to disclose information about trust administration to trust beneficiaries. *Riggs*, 355 A.2d at 711. That information would include legal advice about trust administration issues. Second, trust beneficiaries are the real beneficiaries of the trust's attorneys' advice because the advice about trust administration is obtained for their benefit, not the trustee's. See *Wachtel*, 482 F.3d at 232 ("of central importance in both *Garner* and *Riggs* was the fiduciary's lack of a legitimate personal interest in the legal advice obtained"). These bases for the fiduciary exception explain why it has not been applied when the trustee is anticipating litigation against him or herself (*e.g.*, for a breach of fiduciary duty). In that circumstance, the conflict displaces the inference that the advice was obtained for the beneficiary's benefit.

Here, as shown above, the United States and the Jicarilla Apache Nation have a traditional fiduciary relationship with respect to tribal trust funds. The beneficiary seeks to discover legal advice provided to a trustee (the United States) about matters of trust administration at a time when the trustee did not anticipate litigation. Indeed, in its role as fiduciary of tribal trust funds, the United States does not have (and did not even assert that it has) any conflicting or competing concerns on matters of trust fund administration. App. 19a.

The fundamental problem with the United States' position is that it treats the question of whether the

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never identified competing interests in the courts below. App. 19a.

fiduciary exception applies to its relationships with tribes as an all-or-nothing proposition – *i.e.*, that the fiduciary exception is *never* appropriate unless it is *always* appropriate. Cf. US Br. 35-36 (describing variations of trust relationships). There is virtually no traditional fiduciary-beneficiary relationship in which the exception *always* or *never* applies. In many, if not most, fiduciary relationships there will be times when the exception plainly applies and other times when the trustee is pursuing its own, distinct interests. Privilege determinations are made on a case-by-case basis, so courts will examine the individual contexts in which the fiduciary exception arises and determine whether its application is appropriate. If any unique governmental interest bears on the application of the fiduciary exception, courts will take it into account. Cf., *e.g.*, *Cobell* v. *Salazar*, 573 F.3d 808, 813, 815 (D.C. Cir. 2009) ("scope of the accounting must also be balanced" to allow "Interior to concentrate on picking the low-hanging fruit" (emphasis omitted)); Fed. R. Civ. P. 26(b)(2) (authorizing courts to set limits on equitable discovery).

The United States' trust relationship with Indian tribes is no different than other fiduciary relationships except that its history is deeper, and its subject matter is more variable. Where, as here, aspects of the relationship mirror a traditional fiduciary relationship (and other conditions for invocation of the exception exist), the fiduciary exception applies. See *Nevada*, 463 U.S. at 142 ("where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States").

B. The United States' Contrary Arguments Distort The Fiduciary Exception.

The United States makes three arguments that the fiduciary exception does not apply here. None withstands scrutiny.

First, the United States asserts that because there is no statute that gives the United States a duty to provide the tribes with privileged documents, the United States has no duty. US Br. 30-41. The United States is confusing the requirements for the creation of compensable fiduciary relationships with the rules of evidence that govern the conduct of litigation. Federal Rule of Evidence 501 governs the application of privilege rules and their exceptions in federal court litigation. See Fed. R. Evid. 1101(a) ("[t]hese rules apply to the United States district courts"); *id.* 1101(c) ("[t]he rule with respect to privileges applies at all stages of all actions, cases, and proceedings").

A rule of evidence does not impose a disclosure obligation independent of litigation on the United States; along with other federal rules of civil and criminal procedure, it sets the terms of federal court litigation. It binds the United States just as other procedural rules do. See, *e.g.*, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949) ("[i]t ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants"); *Mattingly* v. *United States*, 939 F.2d 816, 818 (9th Cir. 1991) (affirming Rule 11 sanctions against the government, stating "when the United States comes into court as a party in a civil suit, it is subject to the Federal Rules of Civil Procedure as any other litigant").

Moreover, the United States' argument that "only a specific statutory or regulatory mandate" can create "judicially enforceable obligations" (US Br. 31) cannot be reconciled with *Navajo II*, *White Mountain Apache* and *Mitchell II*. In those cases, which address when the United States must respond in money damages to violations of fiduciary and other duties to Indians and Indian tribes, this Court has explained that the United States has duties that are not strictly defined.

For example, once federal law imposes a "'conventional fiduciary relationship'" on the United States vis-à-vis an Indian tribe, "then trust principles (including any such principles premised on 'control') could play a role in 'inferring that the trust obligation [is] enforceable by damages.'" *Navajo II*, 129 S. Ct. at 1552 (emphasis omitted; alteration in original) (quoting *White Mountain Apache*, 537 U.S. at 473, 477). See also *White Mountain Apache*, 537 U.S. at 477 (concluding that "the trust relationship [may be] considered when *inferring* that the trust obligation was enforceable by damages" (emphasis supplied)). Similarly here, the United States and the tribes have fiduciary relationships with respect to tribal trust funds, and thus common law trust principles – including those relevant to assessing the application of the fiduciary exception – apply.

Second, the United States argues that its lawyers cannot be treated as the tribe's lawyers and therefore that the fiduciary exception never applies to legal advice it receives in connection with trust administration. US Br. 13-27. The "real client" formulation, however, is no aid to the United States. It is only a shorthand that is intended to convey that, with respect to "fiduciary" decisions, the trustee is obligated to serve the best interests of trust beneficiaries, and therefore that the trust's interest

in receiving legal advice related to trust administration is identical to the beneficiary's interest. That is, a fiduciary's duties are such that it is legitimate to treat *both* the fiduciary seeking advice about trust administration and the beneficiary of that trust as recipients of the legal advice given by the trust lawyer.

This does not impose on the United States' lawyers the conundrum the Solicitor General imagines. Just as entities and persons who are fiduciaries are not always acting as fiduciaries (*e.g.*, the employer who is both an ERISA fiduciary and a trust settlor), government lawyers are sometimes providing legal advice to the United States as a fiduciary and sometimes (more frequently) providing legal advice to the United States in other capacities and for other purposes. Strict application of ethics rules governing conflicts of interest does not follow a determination that a trust's lawyer is providing legal advice that benefits both the trust and its beneficiaries.

Finally, the United States contends that the fact that Interior Department lawyers are paid by the Government, not by the tribal trust funds, makes the fiduciary exception inapplicable. US Br. 27-29. The United States correctly notes that courts have treated a trust's payment for legal advice as some evidence that the trust (not the fiduciary) is the "real client" of a lawyer providing advice, and conversely that a trustee's personal payment for legal advice is some evidence that the trustee is protecting his or her own interests. *Id.* See also *Restatement (Second) of Trusts* § 173 cmt. b (1959) (the fiduciary exception may not apply when a trustee obtains advice "at his own expense and for his own protection").

Payment, however, is relevant to, but not dispositive of, the question whether a lawyer is

providing advice related to the administration of the trust for the beneficiaries. See *Barnett Bonds Trust* v. *Compson*, 629 So. 2d 849, 851 (Fla. Dist. Ct. App. 1993) (per curiam) (declining to apply the fiduciary exception even though the trust paid for the legal advice). That is what the lower courts did here, ultimately concluding that the United States' payment of its attorneys' salaries was not determinative. Indeed, any settler of a trust could provide that the trustee's expenses would be paid from a separate account to avoid burdening the beneficiaries; doing so would raise no inference that the trustee was not acting for the trust's beneficiaries.

In any event, the situation presented here is not comparable to either scenario described above. The United States has recognized and defined by statute its fiduciary trust responsibilities with respect to tribal trust funds. As creator of these trusts, it did not require tribal or individual Indian trust funds to contribute to administrative costs such as attorneys' fees. The United States' statutory assumption of certain trust expenses pursuant to its trust relationship with tribes does not make it any less a fiduciary, and does not alter its lawyers' duties when advising the United States regarding its fiduciary responsibilities in administering tribal trust funds. In other words, the United States is not choosing to pay for legal advice "for [its] own protection" as against beneficiaries when it seeks its attorneys' guidance on trust administration matters.

The United States is a traditional fiduciary with respect to tribal trust funds. It makes little sense to say – as the Government would have it – that the United States should nonetheless be treated as adverse to its beneficiaries (or lacking mutuality of

interest with its beneficiaries) simply because it pays its lawyers' salaries.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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