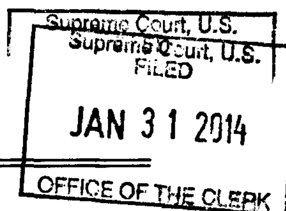

No. 13-794

In The
Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

BRIEF OF PROFESSOR GREGORY C. SISK AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Gregory C. Sisk is the Laghi Distinguished Chair in Law at the University of St. Thomas (Minnesota).[1] Professor Sisk's only interests in this matter are those of a legal scholar and as a concerned citizen affirming social justice for the descendants of the Loyal Mdewakanton who risked their lives and livelihoods to prevent bloodshed and preserve peace with their Minnesota neighbors.

For a quarter-of-a-century, Professor Sisk's scholarly work has focused on civil litigation with the federal government. He has published both a treatise and the only law school casebook on the subject. *Litigation With the Federal Government* (ALI-ABA, 4th ed., 2006); *Litigation With the Federal Government: Cases and Materials* (Foundation Press, 2d ed., 2008). He also has written several law review articles on the Tucker Act, the Court of Federal Claims (CFC),

[1] Pursuant to Rule 37 of the Rules of the Supreme Court, counsel of record for two parties (Petitioners and Respondent United States) received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief, and provided written consent to the filing of this brief. Counsel of record for two parties (Intervenor-Respondents Blaeser, et al. and Lafferty, et al., and Respondents Saul, et al.) received Rule 37 Notice less than 10 days prior to the due date of the Amici Curiae's intention to file this brief, and these two parties also provided written consent to the filing of this brief. Consequently, all parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation and submission of this brief.

and Indian breach of trust claims against the United States, some of which are cited in this brief.

Professor Sisk's scholarly work on the jurisdiction of the Court of Federal Claims, the Tucker Act, the Indian Tucker Act, and Indian breach of trust claims are cited regularly by the federal courts. *See, e.g.*, *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723, 1729 (2011); *United States v. Norwood*, 602 F.3d 830, 834 (7th Cir. 2010); *Collins v. United States*, 564 F.3d 833, 836 (7th Cir. 2009); *Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1123 n.12 (Fed. Cir. 2007); *Navajo Nation v. United States*, 501 F.3d 1327, 1334 (Fed. Cir. 2007); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 511 n.3 (9th Cir. 2005); *McKown v. United States*, ___ Fed. Cl. ___, 2014 WL 106756 (Fed. Cl. 2014); *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 305 n.51 (2013); *District of Columbia v. United States*, 67 Fed. Cl. 292, 305 (2005); *see also* Judge S. Jay Plager, *Money and Power: Observations on the Jurisdiction of the U.S. Court of Federal Claims*, 17 Fed. Cir. B.J. 371, 374 (2008) (referring to a Sisk article as the "definitive piece" on CFC jurisdiction over money claims and saying "it is always refreshing to find a law review article that addresses issues that are relevant to the work of judges and practicing lawyers").

As a former appellate attorney with the Civil Division of the U.S. Department of Justice and as an attorney admitted to the active practice of law, Professor Sisk has litigated cases on behalf of both the

government and private parties that implicate the jurisdictional authority of the CFC. During his service in the Department of Justice, he drafted legislation to encourage early resolution of questions about the respective jurisdiction of the District Court and the CFC. *See Tucker Act Appeals to the Federal Circuit*, 36 Fed. B. News & J. 41 (1989). This legislation, enacted by Congress in 1988, permits an interlocutory appeal by either the plaintiff or the government to the Court of Appeals for the Federal Circuit from an adverse District Court ruling on a motion to transfer the action to the CFC. Pub. L. No. 100-702, Title V, § 501, 102 Stat. 4642 (1988) (codified at 28 U.S.C. § 1292(d)(4)).

SUMMARY OF ARGUMENT

The CFC has exclusive jurisdiction over retrospective claims by Indians and tribes against the federal government that can be adequately remedied by monetary compensation. *See, e.g.,* 28 U.S.C. § 1491 (authorizing non-tort money claims against the United States) (the "Tucker Act"); 28 U.S.C. § 1505 (authorizing money claims by Indian tribes against the United States) (the "Indian Tucker Act"); *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723 (2011) (stating that the CFC is the only judicial forum for most non-tort claims for pecuniary relief).

For decades, retrospective claims by Indians and tribes have been wrongly brought and decided in the

United States District Courts (District Courts). *See* Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government,* 88 Ind. L.J. 83, 129-30 (2013). With frequent simultaneous filings in both the CFC and the District Court over claims arising from the same factual background, the stage has been set for a jurisdictional collision.

In harmony with the Tucker Act and the Indian Tucker Act, the Administrative Procedure Act (APA) expressly excludes judicial review in District Court when an "adequate remedy" lies in another court. 5 U.S.C. § 704. When properly enforced, this APA limitation prevents litigants from either bypassing the CFC or filing duplicative lawsuits involving the same or similar issues in multiple venues. Further dissuading duplicative litigation, 29 U.S.C. § 1500 bars a plaintiff from maintaining a suit in the CFC if that plaintiff "has pending in any other court any suit or process against the United States" that is "for or in respect to" the same "claim." Taken together, these statutory requirements should have, but thus far have not, prevented the filing of lawsuits grounded in significant monetary disputes outside of the Court of Federal Claims. *See, e.g., Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996); *Maxam v. Lower Sioux Indian Cmty. of Minnesota*, 829 F. Supp. 277 (D. Minn. 1993).

The Tucker Act's jurisdictional mandate that claims against the federal government that seek or could be remedied by pecuniary relief belong in the CFC has been upheld by a line of cases issued by the

U.S. Court of Appeals for the Federal Circuit. *See, e.g., Consolidated Edison Co. v. United States Department of Energy*, 247 F.3d 1378 (Fed. Cir. 2001) (jurisdiction over costs of decontaminating uranium processing facilities); *Christopher Village, L.P. v. United States*, 360 F.3d 1319 (Fed. Cir. 2004) (jurisdiction over governmental refusal to permit adequate rental increases); *Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116 (Fed. Cir. 2007) (jurisdiction over lender's action to force assignment for reimbursement from government on defaulted mortgage under federal mortgage guarantee program).

In *Tohono O'odham Nation,* 131 S. Ct. at 1727-31, this Court reaffirmed that a plaintiff may not maintain one lawsuit in the CFC while a second lawsuit is proceeding in another court that arises out of the same operative facts, even though the two lawsuits seek different relief. This Court stated that the CFC is the "only judicial forum for most non-tort requests for significant monetary relief against the United States." *Id.* at 1729. This Court's analysis in *Tohono O'odham Nation* confirms that the CFC is the only proper forum for claims by Indians or Indian tribes or bands that either seek or could be adequately remedied by money damages.

By narrowly defining the government's fiduciary trust responsibilities to Indians and strictly construing the language of appropriations statutes, the Federal Circuit denied the Loyal Mdewakanton the "inheritance" that Congress intended be given to "their heirs forever." *See* Act of Feb. 16, 1863, Ch. 37, § 9, 12

Stat. 652, 654. By unduly restricting the claims that may be pursued under the Tucker Act, the Federal Circuit has encouraged future Indian claimants to bypass the CFC by seeking injunctive or other relief in District Court and has undermined the Indian Tucker Act by leaving Indian claimants to again burden Congress with requests for relief.

ARGUMENT

The *Wolfchild* lawsuit seeks recovery for land and revenues wrongly diverted by the federal government from the descendants of the Loyal Mdewakanton, who at great risk to themselves and rejection by their own tribe acted heroically during the Sioux uprising of 1862 to save the lives of white settlers and restore peace in the State of Minnesota. As the Court of Federal Claims correctly concluded, "[a]llowing the Secretary to distribute the funds to the three communities [of other Indians] in lieu of the lineal descendants of the loyal Mdewakanton would defeat Congress' intent to provide for the loyal Mdewakanton and their families, who suffered precisely because they lacked tribal relations." *Wolfchild v. United States*, 96 Fed. Cl. 302, 342 n.50 (2010).

Whether the 1888 to 1890 Appropriations Acts are understood to create an enforceable fiduciary trust in property acquired for the direct benefit of the Loyal Mdewakanton or are recognized as mandating payment of money to the Loyal Mdewakanton,

these statutes confer a right of compensation to the Mdewakanton Band and its individual members under the Tucker Act that falls within the jurisdiction of the Court of Federal Claims. *See* Act March 2, 1889, § 1, 25 Stat. 980, 992-93 (stating that "all of said money . . . shall be so expended that each of the Indians . . . shall receive, as nearly as practicable an equal amount").

Under the Tucker Act, the CFC has exclusive jurisdiction over these claims because these appropriations statutes are "reasonably amenable to the reading that [they] mandate[ ] a right of recovery in damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003). Moreover, far from allowing a strict construction of statutes that direct payment of money, this Court explained that the "'fair interpretation'" rule for evaluating the money-mandating nature of a statute "demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity." *Id.* at 472. When "[a]t bottom it is a suit for money," then "the Court of Federal Claims can provide an adequate remedy, and it therefore belongs in that court." *Suburban Mortgage Assocs.*, 480 F.3d at 1118.

THE COURT OF FEDERAL CLAIMS HAS EXCLUSIVE JURISDICTION OVER INDIAN PROPERTY- OR APPROPRIATIONS-BASED CLAIMS AGAINST THE FEDERAL GOVERNMENT BECAUSE A MONEY JUDGMENT WOULD BE AN ADEQUATE REMEDY.

A. Under the Tucker Act, the Court of Federal Claims Is the Forum Designated by Congress for Claims Alleging Federal Government Conveyance of Trust Lands or Diversion of Congressional Appropriations from the Designated Beneficiary.

The Indian Tucker Act, enacted in 1946, authorized money claims by "any tribe, band, or other identifiable group of American Indians" against the United States. 28 U.S.C. § 1505. Since that time, the CFC has been the designated forum for Native American breach of trust claims alleging the United States government's failure to uphold its fiduciary responsibilities in maintaining Native American funds and resources. This Court's landmark Indian breach of trust rulings were rendered in cases that originated in the CFC or its predecessor. *See, e.g., United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

Breach of trust claims are predicated on a statutory or regulatory fiduciary relationship between the United States government and indigenous peoples. *See, e.g., Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 731-38 (2011) (finding that statutory provisions on investment of tribal funds imposed a

fiduciary duty of prudent investment on the United States); *Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. 629, 669 (2006) (same); *Cheyenne-Arapaho Tribes of Indians of Okla. v. United States,* 512 F.2d 1390, 1392-94 (Ct. Cl. 1975) (same).

This Court has stated that once this statutory-based fiduciary relationship is identified, the statutory "prescriptions need not . . . expressly provide for money damages; the availability of such damages may be inferred." *Navajo Nation*, 537 U.S. at 506. In breach of trust cases, once the fiduciary duty has been identified the "general trust law [is to be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation." *White Mountain Apache*, 537 U.S. at 477 (2003).

Under the 1888-1890 Acts, the express intent of the United States Government was to provide compensation to the Native American Sioux who remained "loyal" to the United States government during the then-recent violent uprisings. Congress authorized this compensation in the form of "agricultural implements, cattle, horses, and lands" (Act of June 29, 1888, 25 Stat. 217 at 228); "lands, agricultural implements, seeds, cattle, horses, food, or clothing" (Act of Mar. 2, 1889, 25 Stat. 980 at 992); and "lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing" (Act of Aug. 19, 1890, 26 Stat. 336 at 349). These appropriations followed on the heels of 1863 statutes that authorized allocation of land to the Loyal Mdewakanton as "an inheritance to said Indians and their heirs forever." Act of

Feb. 16, 1863, Ch. 37, § 9, 12 Stat. 652, 654; *see also* Act of Mar. 3, 1863, Ch. 119, § 4, 12 Stat. 819.

As Professor Sisk wrote in an article on breach of trust claims published after this Court's decisions in *White Mountain Apache* and *Navajo Nation*:

> At each step of the statutory interpretation process, the trust doctrine dominates and influences the analysis. The inevitable conclusion then is that a fiduciary responsibility relating to the most fundamental form of wealth, that is, real property and its resources, is of monetary consequence. . . . [U]nless the Court were to retreat into a artificial construction of each individual statutory embodiment of the general trust relationship, the Court cannot neglect the omnipresent implications of that elaborate bond between the United States and the Indian peoples.

Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity,* 39 Tulsa L. Rev. 313, 339 (2004).

The inference that Congress intended monetary relief be provided for the direct benefit of the Loyal Mdewakanton is inescapable. Indeed, it is much more than an inference here, as the congressional purpose was made explicit in multiple statutes. As the dissenting judge in the Federal Circuit below stated, "both history and the law [support the finding] that the United States made certain promises of compensation that were memorialized by Congress in laws

that it passed with the specific intent to create binding obligations to compensate the small band of American Indians." *Wolfchild v. United States*, 731 F.3d 1280, 1295 (Fed. Cir. 2013) (Reyna, J., dissenting).

B. Tucker Act Jurisprudence in This Court and the Federal Circuit Confirms that Exclusive Jurisdiction Is in the Court of Federal Claims When a Money Judgment Is Adequate.

This Court has recognized that an important motivating factor in the establishment of the Court of Appeals for the Federal Circuit was the need for uniformity in the development and application of Tucker Act jurisprudence. *See United States v. Hohri*, 482 U.S. 64, 71-72 (1987) (noting that a "motivating concern of Congress in creating the Federal Circuit was the 'special need for nationwide uniformity' in certain areas of law") (citations omitted). All decisions of the CFC of course are appealable to the Federal Circuit. 28 U.S.C. § 1295(a)(3). Moreover, Congress granted a right to an immediate interlocutory appeal from a District Court order "granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims." 28 U.S.C. § 1292(d)(4). Thus, Congress "ensure[d] uniform adjudication of Tucker Act issues in a single forum," by creating the interlocutory appeal exclusively within the jurisdiction of the Federal Circuit. H.R. Rep. No. 100-889, at 52 (1988).

The Federal Circuit has demonstrated "[r]espect for the exclusive jurisdiction of the Court of Federal Claims" over claims seeking monetary relief against the government. *Christopher Village*, 360 F.3d at 1319. In *Consolidated Edison,* 247 F.3d at 1380-81, nuclear utilities initiated a suit for declaratory judgment and an injunction against the government from continuing to enforce statutory assessments for the government's costs in decontaminating and decommissioning uranium processing plants. The Federal Circuit concluded that the CFC could provide an adequate remedy, and because it was empowered to do so, the District Court was deprived of jurisdiction under § 704 of the APA. *Id.* at 1380, 1382-86 (reasoning also that a retrospective monetary award would serve to relieve prospective obligations). *See also Christopher Village*, 360 F.3d at 1327 (holding that "a litigant's ability to sue the government for money damages in the Court of Federal Claims is an 'adequate remedy' that precludes an APA waiver of sovereign immunity in other courts"); *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1349 (Fed. Cir. 2005) ("[t]he availability of an action for money damages under the Tucker Act or Little Tucker Act is presumptively an 'adequate remedy' for § 704 purposes").

In what the Federal Circuit saw as blatant forum shopping in *Suburban Mortgage Assocs.*, 480 F.3d at 1118-19, the plaintiff filed suit in District Court seeking a declaratory judgment order that HUD accept, under the federal mortgage guarantee program, assignment of a note to and mortgage for a nursing

home that had defaulted. Thwarting plaintiff's attempted "forum shopping," the court held that where the substance of the claim is one for money, then the Tucker Act remedy in the CFC is presumptively adequate. *Id.* at 1124-26.

The very few decisions involving money where the jurisdiction of the District Court is affirmed turn on the particular facts and law before the court, and subsequent decisions affirm that these few cases do not alter firmly rooted Tucker Act and Indian Tucker Act jurisprudence. *See Nebraska Public Power District v. United States*, 590 F.3d 1357 (Fed. Cir. 2010) (en banc) (affirming District Court's jurisdiction in case grounded in nuclear waste legislation which included a specific jurisdictional provision for review in Court of Appeals). *See also Bowen v. Massachusetts*, 487 U.S. 879, 895-900 (1988) (affirming District Court's jurisdiction in dispute under Medicaid statute because the monetary award is not "compensation for the damage sustained," but rather is "the very thing" to which the party is entitled).[2]

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[2] On the Indian breach of trust litigation in *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 24-28 (D.D.C. 1999), *aff'd, sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), see Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 Geo. Wash. L. Rev. 602, 661 (2003) ("[s]omewhat lost in the story of egregious government misconduct and adjudication of high-ranking government officials in contempt is the fact that the jurisdiction of the District Court – rather than the Court of Federal Claims –

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Primarily addressing the question of duplicative, parallel litigation, this Court in *Tohono O'odham Nation* recognized no distinction between the relief requested in the District Court and in the CFC when analyzing whether the two suits were for and in respect to the same claim. This Court ultimately affirmed jurisdiction in the District Court under § 1500: "[r]eading the statute to require only factual and not also remedial overlap makes sense in light of the unique remedial powers of the CFC. . . . The CFC is the only judicial forum for most non-tort requests for significant monetary relief against the United States." *Tohono O'odham Nation,* 131 S. Ct. at 1729. The Court observed that the plaintiff "could have filed in the CFC alone and if successful obtained monetary relief to compensate for any losses caused by the Government's breach of duty." *Id.* at 1730-31. This analysis thus provides guidance on the underlying question of the proper forum for claims that ultimately seek or could be satisfied by a money judgment under the Tucker Act in the CFC. *See* Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government,* 88 Ind. L.J. 83, 140-42 (2013).

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over the entire matter was doubtful and only possible through a generous reading of the *Bowen v. Massachusetts* decision").

The *Wolfchild* claimants bring forward precisely the type of claim that justly calls on the remedial authority of the Court of Federal Claims. The existence of an enforceable fiduciary responsibility by the United States toward a group of Indians is often a complex question, requiring a searching examination of statutory and regulatory provisions for rights-creating or duty-imposing language. An appropriations statute rarely commands the expenditure of funds for the direct benefit of an individual or group of individuals. In this exceptional case, however, the congressional purpose to honor a heroic group of indigenous people and recognize their sacrifices is manifest in both the history of the episode and the plain language of the statutes enacted by Congress.

In the long, sorry, and tragic history of the relationship between the United States and the indigenous peoples on this continent, this solemn commitment by Congress toward a group of Indians who had loyally maintained their allegiance to this country was a shining moment. To betray that commitment by denying compensation to the heirs of that loyal band cannot be justified as a matter of law.

CONCLUSION

Three important legal and policy concerns support the grant of certiorari in this case.

First, when the United States Government has acted formally through multiple congressional enactments to provide assistance to a vulnerable band of Indians who nobly and sacrificially affirmed their loyalty to that Government, that solemn commitment should not lightly be set aside. The Appropriations Acts of 1888-1890 were intended to compensate the Loyal Mdewakanton for loss of land, life, agricultural implementations and livestock – the essential elements to support their lives. The flagrant actions of the federal government in re-directing this property and revenue to other groups of Indians, most of whom do not descend from the Mdewakanton Band, is a breach in a moral as well as legal sense of that congressional promise.

Second, this requested compensation is inherently pecuniary, such that a claim under the Tucker Act and the Indian Tucker Act is properly brought in the one forum that Congress designated to uniformly interpret, apply and award fair compensation under Indian trust and statutory law. By narrowly defining what qualifies as a breach of trust or money-mandating statute claim, the Federal Circuit effectively discourages resort to the CFC and invites new efforts by Indian claimants (and others) to bypass the Tucker Act and instead seek alternative administrative remedies in the District Courts. Just as the door

to duplicative and detoured litigation was closing in the aftermath of *Tohono O'odham Nation*, the *Wolfchild* decision may throw it wide open again.

Third, the Indian Tucker Act was enacted precisely to ensure the availability of the Tucker Act remedy and the CFC venue for Native American tribal claimants. As this Court has explained, the Indian Tucker Act was designed to avoid the "vast and growing burden" on Congress in responding to requests for legislative redress of injuries to tribes and bands of Indians. *United States v. Mitchell*, 463 U.S. 206, 214 (1983) (quoting H.R. Rep. No. 79-1466 (1945)). In words that were almost prescient for this present case, the House sponsor of the legislation stated that it should "never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the future." 92 Cong. Rec. 5313 (1946) (statement of Rep. Jackson). *See generally* Gregory C. Sisk, *Litigation With the Federal Government* § 4.07(a), at 280 (4th ed., 2006).

The *Wolfchild* claim of "misappropriations" of property and revenues "by Federal officials" perfectly fits the Indian Tucker Act. If this type of claim is mistakenly excluded from the scope of the Indian Tucker Act, the inevitable result will be a return by growing numbers of Indian tribes and bands to Congress for redress and thus a renewal of the burdens

on the national legislature that the Indian Tucker Act was intended to remove.

Respectfully submitted,

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