No. 17-1419

In The Supreme Court of the United States

LUMMI TRIBE OF THE LUMMI RESERVATION,
LUMMI NATION HOUSING AUTHORITY,
FORT BERTHOLD HOUSING AUTHORITY,
AND HOPI TRIBAL HOUSING AUTHORITY,

Petitioners,

v.

UNITED STATES,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN FREDERICKS III
Counsel of Record
FREDERICKS PEEBLES & MORGAN LLP
3730 29th Ave.
Mandan, ND 58554
303-673-9600
jfredericks@ndnlaw.com

JEFFREY S. RASMUSSEN
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
303-673-9600
jrasmussen@ndnlaw.com

Counsel for Petitioners

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

ARGUMENT

Under the Native American Housing Assistance and Self-Determination Act (NAHASDA), Congress said the "Secretary [HUD] shall . . . make grants . . . on behalf of Indian Tribes" and "shall provide the grant amounts for the tribe directly to the recipient for the tribe." 25 U.S.C. §4111(a) (2000).[1] Congress also said that "the Secretary shall allocate" the grants "in accordance with the formula" Congress laid out in the statute. 25 U.S.C. §4151. This formula, Congress directed, must be based on several specific factors, the first of which was "the number of low income housing dwelling units owned or operated" by the recipient on the effective date of NAHASDA. 25 U.S.C. §4152(b)(1); *see* 24 C.F.R. §§1000.312, 1000.322. This case is about HUD's failure to pay the grant funds which Petitioners were entitled to under the statute, funds which they needed to maintain the dwelling units they operated, and restitution for grant funds illegally recouped, i.e., exacted, by HUD. Such a case is historically within the jurisdiction of the court of claims. *See*, *e.g.*, *Idaho Migrant Council, Inc. v. United States*, 9 Cl. Ct. 85, 88 (1985) ("The United States, for public purposes, has undertaken numerous programs to make grant funds available to various governmental and private organizations. Many hundreds of grants are made each year to states, municipalities, schools and colleges and other public and private organizations. . . . Obligations of the United States assumed in [grant] programs . . . are

[1] Unless otherwise noted, all references to NAHASDA and its implementing regulations are to the version in effect in 2002, when HUD began illegally recouping the Petitioners' grant funds.

within this court's Tucker Act jurisdiction."); *Kentucky ex rel. Cabinet for Human Resources v. United States*, 16 Cl. Ct. 755 (1989) (and cases cited therein).

Until now, courts have uniformly held that "shall pay" language in statutes like the cited provisions in NAHASDA satisfies the money mandating requirement of the Tucker Act. *Britell v. United States*, 372 F.3d 1370, 1378 (Fed. Cir. 2004) ("This and other courts have repeatedly held that this type of mandatory language, e.g., 'will pay' or 'shall pay,' creates the necessary 'money-mandate' for Tucker Act purposes."); *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 450 (Fed. Cl. 2017) ("Where a plaintiff bases its claims on a statutory or regulatory provision, courts generally find that the provision is money-mandating if it provides that the Government 'shall' pay an amount of money"), *reversed on other grounds*, 2018 U.S. App. LEXIS 16028, *20-22, 892 F.3d 1311 (Fed. Cir. 2018). The court below, however, imposed a novel limitation on settled precedent when it held that, despite the mandate to make the grants i.e. pay money, "strings attached" to the use of the grant funds deprives the court of federal claims (CFC) of its Tucker Act jurisdiction. (App. 11, 12). The lower court, and HUD, cite only one case to support this new jurisdictional limitation, *Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196 (Fed. Cir. 1997) (*NCMS*). That case though, said nothing about the CFC's jurisdiction under the Tucker Act when a statute mandates the payment of money. Instead, *NCMS* was focused on whether jurisdiction existed in the federal district

court under the APA, in particular, whether the plaintiffs action was for "money damages" or whether plaintiffs had an "adequate remedy" in the CFC so as to deprive the district court of jurisdiction under the APA, 5 U.S.C. §§702 or 704 respectively. *NCMS*, 114 F.3d at 199. In order to answer these questions, the court in *NCMS* had to analyze this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), something the court below acknowledged. (App. 9). The effect of the lower court's extension of *NCMS* to limit the CFC's jurisdiction under the Tucker Act even when a statute mandates the payment of money imposes limitations that simply do not exist under the Tucker Act. In effect, the lower court used *Bowen* to limit Tucker Act jurisdiction over grant-in-aid statutes, something the late Justice Scalia foresaw in his dissent. *Bowen*, 487 U.S. at 919, 930. The time has come for the Court to clarify what it meant in *Bowen*, and to make clear that the extent of the CFC's jurisdiction continues to extend to the government's failure to make payments required under federal grant-in-aid statutes.[2]

In its opinion in this case, the lower court acknowledged that its holding in this case is contrary to the holding of the United States Court of Appeals for the Tenth Circuit in the companion case, *Modoc Lassen Indian Housing Authority v. HUD*, 864 F.3d 1212 (10th

[2] Nearly every grant-in-aid statute that obligates the government to make grants comes with conditions on eligibility and restrictions on how the money can be spent. HUD does not dispute this but instead simply points out the obvious by studiously reciting the eligibility requirements and conditions on the use of NAHASDA grant funds.

Cir. 2017), *cert. pending sub nom*. *Fort Peck Housing Authority v. Department of Housing & Urban Development*, Sup. Ct. case 17-1353 (hereinafter *Fort Peck*). The Federal Circuit also clearly stated that HUD, as litigant, had created this direct conflict between the circuits because HUD had prevailed on directly contrary arguments to the two circuit courts.

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

App. 14 (emphasis added).

That direct conflict between the decisions of the Tenth Circuit and Federal Circuit on an important issue of law is the primary reason why this Court should grant the writs of certiorari in the two related cases. The Tenth Circuit and Federal Circuit were aware of each other's holdings, and each court refused to change its analysis or conclusion in deference to the other. Only this Court can resolve the conflict.

Further, only this Court, setting both cases for joint briefing, can force HUD to present a single face on the important legal issue presented. HUD's response briefs in this case and the companion case amply illustrate this point. In its response brief in this case, HUD devotes most of its brief to the face that it presented to the Federal Circuit, Resp. at 7-12; but HUD devotes most of its brief in the companion case to the contrary face that it presented to the Tenth Circuit, *Fort Peck* Resp. at 10-15.

Other than the substantial portion of the federal response briefs devoted to contradictory arguments, HUD makes only three points for which a reply is necessary. First, HUD implies that it had legal justification for taking money from Petitioners. Second, it asserts that the Federal Circuit was wrong when that Court determined HUD's arguments in the two appellate courts were contradictory and when it determined that the two appellate court decisions are contradictory. Third, HUD suggests this Court should not grant the writs of certiorari because the Tribes have not discussed which of HUD's two faces provides the correct rule of law. The Tribes will respond to each of those arguments in turn.

1. HUD unlawfully took money from the Tribes and unlawfully failed to pay money to the Tribes.

In their Petitions, the Tribes discussed why, under the procedural posture of these cases, this Court must conclusively assume that HUD took money from the Tribes and unlawfully failed to pay money to the Tribes. Pet. at 7; *Fort Peck* Pet. at 11. Through the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§4101-4243, Congress mandated payment of grant-in-aid funds to tribes. The parties agree that the amount that must be paid to each of the Tribes is capable of exact calculation based upon the number of eligible housing units that each Tribe provided. This case comes to this Court from a decision on an interlocutory appeal after HUD's

motion for summary judgment had been denied. In denying HUD's motion for summary judgment, the Court of Federal Claims held that it would need additional facts before it could determine the number of eligible housing units operated by each tribe. On interlocutory appeal, the Federal Circuit then held that even if the Tribes had already provided the housing for which payments were mandated and even if HUD had taken the Tribes' funds without lawful authority, the CFC lacked jurisdiction to order the Tribes' money returned, and also lacked jurisdiction to order HUD to pay the Tribes the amount due in other years.

HUD wisely does not contest the Tribes' discussion of these mandatorily presumed facts. But, while it does not contest the Tribes' legally correct analysis, it creates two significant and false impressions of fact. First, it creates the impression that it is not accused of unlawfully taking money from the Tribes, that instead it had only failed to pay money to the Tribes. *E.g.*, Resp. at (I) (misstating the question presented, to limit it to "withheld funds"). Second, HUD repeatedly and incorrectly asserts that its failure to pay the Tribes was consistent with NAHASDA's mandate. *Id.* (misstating that the question presented is based upon HUD's "determination that errors" by the Tribes had caused HUD to overpay); Resp. at 4 (creating a false impression by asserting that HUD's "reviews revealed that HUD had" overpaid).

HUD is accused of both unlawfully taking funds and unlawfully withholding funds, and under the

mandatorily presumed facts, HUD committed both of those wrongs. HUD's reviews did not "reveal" overpayments. Instead, HUD incorrectly asserted that it had overpaid the Tribes, and HUD then wrongly took money from the Tribes and wrongly refused to pay other moneys to the Tribes. The facts for purposes of this Petition are that HUD wrongly and unilaterally failed to pay for housing units for which Congress, through NAHASDA, had mandated federal payment.

2. As the Federal Circuit expressly recognized, HUD arguments were contradictory and the appellate court decisions were contradictory.

As discussed at the beginning of this Reply Brief, this Court does not need to rely upon the arguments of the Tribes to determine if the appellate court decisions in these two companion cases are contradictory. The Federal Circuit itself, in its opinion in this case, already reviewed that issue and concluded that HUD's claims in the two courts were contradictory; and it concluded that its own decision was contrary to the Tenth Circuit's decision in the companion case.

In its response briefs, HUD fails to respond to the Federal Circuit's pivotal conclusion. Instead, HUD ignores the Federal Circuit's characterization of its own decision and seeks to reframe the issue as mere differences between the Tribe and HUD in their interpretation of the Federal Circuit's decision. *E.g.*, Resp. at 13-15. Here, HUD's assertion that its arguments to the two appellate courts are consistent is the same one it

made in the courts below and that the Federal Circuit rejected. In fact, when questioned at oral argument in the Federal Circuit, even HUD's own attorneys could not maintain the implausible position they asserted. App. at 14. As the Federal Circuit noted, HUD appeared to admit at oral argument that its arguments in the two circuits were contradictory. *Id.*

Further analysis of this point is likely unnecessary. The Federal Circuit's own conclusion that its decision and the Tenth Circuit's decision are contrary should by itself carry the day. Any attorney can readily determine that HUD is asserting contrary arguments and that the result was inconsistent appellate court decisions. Both appellate courts base their decisions on their interpretations of this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). They reach contrary interpretations of the legal holding from that case leaving the Petitioners with a right but no remedy. As the Tribes discussed in their Petition, appellate courts and scholars have been disagreeing about how to interpret *Bowen* since this Court issued its three opinions in that case. Those disagreements about the jurisdictional divide between the CFC and the district courts arise most acutely in the current and frequently recurring fact-scenario at the dividing line: a party seeking grant-in-aid money based upon a congressional mandate to pay that grant money to the plaintiff.

In the Federal Circuit, HUD argued that even if it had unlawfully taken money from the Tribes, the claims for return of that money were not claims for

money damages. In the Tenth Circuit, HUD argued those exact same claims, based upon the exact same facts, were claims for money damages. HUD won in both appellate courts. The Federal Circuit Court was correct that the decisions by the two appellate courts in these two companion cases are contradictory. The Court should grant certiorari to resolve the conflict.

3. HUD's complaint that the Tribes have not stated their view on the merits of this case is misguided for both legal and factual reasons.

As the Tribes discuss above, the primary reason this Court should grant certiorari is because the appellate courts are divided on an important issue of law. Unless this Court resolves that conflict, numerous future litigants will spend years litigating to determine which federal trial court will hear their claims, and many will end up on the same jurisdictional Flying Dutchman upon which the Tribes in these companion cases are stuck. HUD will be able to continue to make and often to prevail upon contradictory arguments, creating a wholly irrational gap in the jurisdictional fabric. And as the Tribes discussed in their Petitions, the impact will be particularly large in the CFC, which will be deprived of what was heretofore a large part of its caseload—claims related to grant-in-aid funding.

HUD's criticism that the Tribes failed to provide more analysis of the Tribes' position on the merits is misplaced for two reasons. First, the Tribes did provide

their view on the merits. *Bowen* held that there is not a gap between CFC and district court jurisdiction over grant-in-aid suits; and it held that the jurisdictional dividing line is based upon whether the plaintiff seeks equitable remedies. In grant-in-aid suits that are on or very near that dividing line, a plaintiff, as the master of his or her complaint, can structure that complaint to fit within either the CFC or the District Court's jurisdiction. Petitioners correctly did that in these cases. The Tribes and other tribes initially brought their claims for their money in the district court, but when that court held that the claims were on the other side of the dividing line, the Petitioners in *Lummi*, represented by the exact same attorney who had brought claims for some of the tribes in the companion case in the district court, filed their claims for recovery of the funds in the CFC. The claims in the CFC did not request equitable relief outside of the CFC's authority.

Second and more significant for current purposes, contrary to the United States' view, the Tribes properly focused their Petition on whether this Court should grant certiorari. That is the current legal issue. How this Court will decide the merits of these cases raises very difficult and complex legal issues. The six experienced judges in the courts of appeals in these two companion cases could not agree on those issues. The Federal Circuit panel disagreed with the analysis of three senior CFC judges on the question presented, does NAHASDA mandate the payment of money? This Court, in *Bowen*, had difficulty arriving at a decision,

and cases since *Bowen* have amply illustrated that *Bowen* created more questions than answers.

The Tribes' primary interest at this time is not in how this Court resolves the difficult legal issue. The Tribes' primary interest is to have this Court agree to resolve the issue one way or the other. Similar to many other litigants who would otherwise be on the jurisdictional Flying Dutchman, the Tribes do not have a strong preference whether their claims proceed in the district court or in the federal court of claims. The Tribes do have a strong interest in having the claims proceed in *some* federal court, so that the Tribes can recover the money that HUD unlawfully took from them and so that the Tribes can get the additional grant-in-aid funds that were required to be paid under Congress' mandate in the NAHASDA.

The time for providing a detailed analysis of how this Court should resolve the difficult merits issues is in merits briefing, not in briefing on the Petition for a Writ of Certiorari. The Tribes look forward to being able to provide this Court with that merits briefing. The Tribes' briefs will draw upon insights the Tribes have gained in their many years wrestling with these jurisdictional issues in this case. The Tribes believe that after receipt of that merits briefing, this Court's decision will provide the needed clarity. The Tribes asks this Court to grant certiorari so that this Court can provide that clarity.

Finally, with regard to Petitioners' illegal exaction claim, as pointed out on page 21 of their Petition, the

Court in *Bowen* clearly stated that jurisdiction in the CFC would lie after the grant funds had been distributed and then recouped. 487 U.S. at 906-07. That is exactly what happened in this case. The lower court's dismissal of the Petitioners' exaction claim is inconsistent with this aspect of *Bowen*.[3]

CONCLUSION

For the reasons stated in the Tribes' Petition and in this Reply Brief, the Tribes request that this Court issue the writ of certiorari.

Respectfully submitted,

JOHN FREDERICKS III
Counsel of Record
FREDERICKS PEEBLES
& MORGAN LLP
3730 29th Ave.
Mandan, ND 58554
303-673-9600
jfredericks@ndnlaw.com

JEFFREY S. RASMUSSEN
FREDERICKS PEEBLES
& MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
303-673-9600
jrasmussen@ndnlaw.com

Counsel for Petitioners

[3] The lower court did not even address the issue certified by the CFC for interlocutory appeal, but instead based its dismissal on the clearly erroneous factual statement that the funds HUD recouped were never in the Petitioners' possession. App. 12-13. An assertion neither raised nor argued, and one which is defied by the court record.