No. 17-1353

In the Supreme Court of the United States

FORT PECK HOUSING AUTHORITY, ET AL., PETITIONERS

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. 4101 *et seq.*, the U.S. Department of Housing and Urban Development (HUD) annually apportions a lump sum of block-grant funds among hundreds of Indian tribes in accordance with a regulatory formula. After determining that errors in the data furnished by petitioners had caused them to receive excess grant funds, HUD recovered the excess funds through administrative offsets. The district court subsequently held that this method of recapturing the excess grant funds was unlawful and ordered HUD to repay petitioners. The question presented is as follows:

Whether the court of appeals correctly concluded that the district court's remedial orders requiring HUD to repay the excess funds to petitioners from "all available sources," including appropriations other than the appropriations that petitioners claim were wrongfully withheld, constituted an award of "money damages" that falls outside the limited waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. 702.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 10-78) is reported at 881 F.3d 1181. The initial opinion of the district court (Pet. App. 91-103) is not published in the Federal Supplement but is available at 2014 WL 901399. The district court's additional opinion with respect to petitioner Fort Peck Housing Authority (Pet. App. 82-90) is unreported. The district court's additional opinion with respect to ten other petitioners (Pet. App. 107-115) is not published in the Federal Supplement but is available at 2015 WL 232098.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2017, and amended on December 22, 2017. Petitions for rehearing were denied on December 22, 2017 (Pet. App. 1-9). The petition for a writ of certiorari was

filed on March 22, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Through the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA or Act), 25 U.S.C. 4101 *et seq.*, Congress replaced several prior housing-assistance programs for Native Americans with the Indian Housing Block Grant (IHBG) program, which is administered by the U.S. Department of Housing and Urban Development (HUD). Congress annually appropriates a lump sum for the IHBG program, which HUD then apportions among eligible Indian tribes and makes grants in the allotted amounts. 25 U.S.C. 4111(a) (2000) and 25 U.S.C. 4111(f).[1] The Act generally directs that tribes must use the allotted funds "only for affordable housing activities under subchapter II [of the Act] that are consistent with an Indian housing plan approved" by HUD. 25 U.S.C. 4111(g); see 25 U.S.C. 4113(a) (requiring an "Indian housing plan"); 25 U.S.C. 4132 (identifying "[e]ligible affordable housing activities").

To determine each tribe's share of the annual appropriation for IHBG grants, HUD applies a regulatory formula "based on factors that reflect the need of the Indian tribes * * * for assistance for affordable housing activities." 25 U.S.C. 4152(b). Among those factors is a tribe's "Formula Current Assisted Housing Stock (FCAS)." 24 C.F.R. 1000.310(a); cf. 25 U.S.C. 4152(b)(1). A tribe's FCAS consists of all housing units that were developed by the tribe under certain pre-NAHASDA federal programs,

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[1] NAHASDA and its implementing regulations have been amended on various occasions. Unless otherwise noted, all citations in this brief are to the statutory and regulatory versions in effect in 2002, when HUD began recovering excess grant funds from petitioners.

that the tribe owned and operated as of September 30, 1997 (when NAHASDA took effect), and that have not expired from the formula, such as through a transfer away from tribal ownership. 24 C.F.R. 1000.312-1000.318; see 24 C.F.R. 1000.318(a) (specifying that units "shall no longer be considered [FCAS]" if the tribe "no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise"). HUD multiplies the number of a tribe's eligible FCAS units by particular dollar amounts, the sum of which represents the first part of the formula for calculating the amount allocated for the tribe's IHBG grant. 24 C.F.R. 1000.316. HUD then subtracts the FCAS-based calculations from that year's available IHBG appropriations, and divides the remainder of the appropriations according to a weighted formula based on other aspects of a tribe's "need," as established by demographic and economic criteria. 24 C.F.R. 1000.324; see 24 C.F.R. 1000.324(a)-(g) (assigning "weight[s]" to factors, including the number of Native American households that have severe housing-cost burdens or low annual income, that are overcrowded, or that lack kitchens or plumbing). The sums resulting from the FCAS-based calculations and the weighted "need" formula, added together, form a tribe's total annual IHBG grant.

For the FCAS-based calculations, HUD relies on data provided by the tribes about the number of pre-NAHASDA housing units that continue to count in the formula. HUD requires that tribes report any changes to their FCAS on an annual basis, such as housing units that should be subtracted because the units are no longer owned by the tribe or otherwise fail to satisfy regulatory

criteria.[2] The accuracy of this data is important for ensuring the proper allocation of annual IHBG funds: "[B]ecause HUD allocates funds to all tribes from a finite yearly pool, a tribe that erroneously reports an inflated number of eligible housing units will not only receive an overpayment, but will necessarily reduce the funds available to other eligible tribes." Pet. App. 20 (citation omitted); see *Fort Belknap Hous. Dep't* v. *Office of Pub. & Indian Hous.*, 726 F.3d 1099, 1100 n.2 (9th Cir. 2013) (describing the IHBG program as a "zero-sum game," inasmuch as "[a]ny change in one tribe's allocation requires an offsetting change to other tribes' allocations").

b. Beginning in the early 2000s, HUD reviewed its FCAS data and past block-grant allocations. Gov't C.A. Br. 9-10. The reviews revealed that, for a number of tribes, HUD had incorrectly calculated the FCAS component of the formula because those calculations had failed to exclude housing units that were no longer owned or operated by the tribes or that otherwise no longer qualified as eligible FCAS units. *Ibid.*; see, *e.g.*, Pet. App. 83-84 (describing excess grant payments to Fort Peck Housing Authority (Fort Peck)). HUD notified the affected tribes of the errors and afforded them an opportunity to challenge HUD's findings. See Gov't C.A. Br. 16-18. HUD then recovered the excess grant amounts through administrative offsets—*i.e.*, by partially reducing the grant amount provided to a tribe in a subsequent

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[2] In 2007, HUD issued a regulation mandating that tribes report FCAS changes on a designated "Formula Response Form." 24 C.F.R. 1000.315(a) (2008). HUD also issued a regulation clarifying that "[i]f a recipient receives an overpayment of funds because it failed to report [FCAS] changes on the Formula Response Form in a timely manner, the recipient shall be required to repay the funds within 5 fiscal years." 24 C.F.R. 1000.319(b) (2008).

year to account for the excess funds that the tribe had previously been granted. *Id.* at 18. HUD then redistributed the offset funds to other tribes that originally should have received them under the formula. *Ibid.*

2. Petitioners are eleven Indian tribes or tribal housing authorities that "allegedly inflated their eligible-unit counts," and accordingly "received overpayments," in various years between 1998 and 2001. Pet. App. 20-21; see Gov't C.A. Br. 9-11. After notifying petitioners of the excess grant payments and affording them an opportunity to respond, HUD recovered the excess funds through administrative offsets to petitioners' future grant awards. Pet. App. 21.

Between 2005 and 2008, petitioners and numerous other tribes or tribal housing authorities filed suits in the District of Colorado under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, challenging HUD's authority to recover the excess grant funds through administrative offsets and seeking payment of the funds that HUD had withheld. Pet. App. 92-95.[3] Petitioners argued, *inter alia*, that HUD "lacked authority to recapture the funds without first providing them with administrative hearings." *Id.* at 18.

After extensive proceedings, see Pet. App. 85-87, 92-94 (describing procedural history),[4] the district court en-

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[3] Petitioner Fort Peck also later brought suit in the Court of Federal Claims seeking damages under the Tucker Act, 28 U.S.C. 1491(a)(1), and Indian Tucker Act, 28 U.S.C. 1505. Fort Peck was dismissed from that suit because it had already filed suit in district court in Colorado based on the same allegations. See 28 U.S.C. 1500.

[4] At an earlier stage of the litigation, the district court had "declar[ed] * * * invalid" HUD's regulation providing that housing units are excluded from FCAS if, *inter alia*, they are no longer owned or

tered judgments in favor of petitioners. The court concluded that HUD had "acted unilaterally and arbitrarily in demanding money from the Tribes" without first conducting a formal "hearing," *id.* at 97, which the court believed to be required by statute or regulation, see *id.* at 95-97 (citing 24 C.F.R. 1000.532 and 25 U.S.C. 4161(a)(1)). Without remanding to the agency, the court then ordered HUD to "make restoration [to petitioners] of the IHBG funds from all available sources, including, but not limited to * * * IHBG funds appropriated in future grant years." *Id.* at 89; see *id.* at 80, 105, 114.[5]

3. A divided panel of the court of appeals affirmed the district court's orders in part, reversed them in part, vacated the judgments, and remanded for further proceedings. Pet. App. 10-78.

a. The panel unanimously concluded that "the district court erred in ruling that [petitioners] were entitled to hearings before the agency could recapture the alleged overpayments." Pet. App. 19; see *id.* at 23-34. The panel agreed that the statutory and regulatory provisions cited by the district court would require HUD to provide administrative hearings in certain circumstances, but it held that those provisions "don't apply to

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operated by a tribe as of the current funding year. Pet. App. 86; see 24 C.F.R. 1000.318. The court of appeals reversed that decision, see *Fort Peck Hous. Auth.* v. *HUD*, 367 Fed. Appx. 884 (10th Cir. 2010), and this Court denied certiorari, see 562 U.S. 897 (2010).

[5] Following entry of those judgments, HUD refunded the full amounts that the district court ordered due to each petitioner, principally by using substitute funds from future-year NAHASDA appropriations. Pet. App. 21 n.3. HUD indicated, however, that it would seek restitution if it succeeded in reversing the district court's orders on appeal. See *ibid.* HUD has since filed a motion for restitution in district court, see 08-cv-2573 D. Ct. Doc. 105 (May 14, 2018), which remains pending as of the date of this filing.

HUD's recapture of" funds following a tribe's mistaken "report of its eligible housing units." *Id.* at 23, 26. A majority of the panel (Judges Moritz and Matheson) concluded, however, that HUD lacked the "authority to recover payments made by mistake," *id.* at 35 (citation omitted), at least in the absence of "a rule or regulation that would allow HUD to recoup overpayments by administrative offset," *id.* at 40 n.9; see *id.* at 34-41. The panel therefore "affirm[ed] the portion of the district court's order that characterize[d] the recaptures as illegal." *Id.* at 19.

A different panel majority (Judges Moritz and Bacharach), however, concluded that the district court's remedial orders were improper. Pet. App. 41-48. The panel noted that the scope of relief available under the APA's waiver of sovereign immunity extends only to "relief other than money damages," 5 U.S.C. 702, and it explained that relief amounts to "money damages" if it is "given to the plaintiff to *substitute* for a suffered loss," rather than "'giv[ing] the plaintiff the very thing to which he was entitled,'" Pet. App. 43 (quoting *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262 (1999)); see *Bowen* v. *Massachusetts*, 487 U.S. 879, 891-901 (1988). The panel observed that the "crux of the Tribes' claims" was that, because of HUD's administrative offsets, petitioners had received smaller IHBG grants in particular years than they allegedly should have received. Pet. App. 41-42. Thus, the "very thing" to which each petitioner claimed entitlement was a greater share of those particular years' grant allocations. *Id.* at 43 (quoting *Blue Fox*, 525 U.S. at 262).

The panel concluded that the district court's remedial orders were inconsistent with those principles. The district court had ordered HUD to pay funds to petitioners

from "all available sources," a phrase it defined as "including * * * funds that were appropriated in future grant years." Pet. App. 42 (citation and internal quotation marks omitted). The district court thus "ordered HUD to pay the Tribes by 'substitut[ing]' *other* funds for the funds to which the Tribes are actually entitled." *Id.* at 43 (citation omitted; brackets in original). The panel recognized that, "to the extent the agency had already redistributed or otherwise expended the recaptured funds," specific monetary relief may not be possible. *Id.* at 19; see *id.* at 43. But the panel explained that this result followed from the limited waiver of sovereign immunity in Section 702, which permits specific relief but precludes substitutionary relief. *Id.* at 43-45. The panel noted that its reasoning accorded with decisions of other courts of appeals that similarly "found the distinction between original funds and substitute funds dispositive in cases involving yearly grant appropriations." *Id.* at 45; see *County of Suffolk* v. *Sebelius*, 605 F.3d 135, 141 (2d Cir. 2010); *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994).

The court of appeals' decision did not foreclose all possible monetary relief. The panel noted that the district court could, consistent with the APA, direct the agency to pay withheld funds to petitioners to the extent "HUD had at its disposal sufficient funds from the relevant yearly appropriations." Pet. App. 48. In particular, the panel noted that HUD had "withheld 2008 NAHASDA grant funds" from several tribes, and the district court had "previously ordered HUD to set aside a portion of the 2008 NAHASDA appropriation for the purpose of repaying the Tribes." *Id.* at 42 n.10. The panel therefore "affirm[ed] the district court's order" to the extent it required HUD to pay set-aside 2008 funds to one of the

plaintiffs (the Navajo Housing Authority) whose 2008 grant award had been reduced through an offset, because in that instance the district court's order had indisputably provided specific relief. *Id.* at 48 n.12. The court of appeals otherwise declined to adjudicate the extent to which each plaintiff's judgment constituted substitute or specific relief, but instead "remand[ed] to the district court for factual findings regarding whether, at the time of the district court's order, HUD had * * * relevant funds at its disposal" that the district court could order to be paid to petitioners, consistent with Section 702's limitations. *Id.* at 48; see *id.* at 48-49.

b. Judge Bacharach dissented as to the merits, concluding that HUD had acted lawfully in recovering the excess grant funds from petitioners. Pet. App. 66-78. Judge Bacharach reasoned that NAHASDA "incorporate[s] the longstanding common-law principle that governmental entities can recoup erroneous payments" through administrative offset, *id.* at 67, and noted that this Court has recognized that "the government can recoup overpayments through 'appropriate action,'" *ibid.* (quoting *United States* v. *Wurts*, 303 U.S. 414, 415 (1938)).

c. Judge Matheson dissented in part as to the scope of available relief. Pet. App. 50-66. Judge Matheson opined that the district court's remedial orders did not violate the government's sovereign immunity because, in his view, the substitution of other NAHASDA grant funds for the withheld grant funds remained an award of specific relief. *Id.* at 55. Nonetheless, Judge Matheson observed that "HUD can pay NAHASDA funds to the Tribes only to the extent Congress has authorized HUD to do so," and he suggested that the district court's orders may have violated the Appropriations Clause by

mandating payments in circumstances that Congress did not authorize. *Id.* at 64. He therefore "concur[red] in the majority's decision to vacate the judgments," but indicated that he would "remand for further proceedings on the appropriations issue" only. *Id.* at 65-66.

d. Petitioners and several other plaintiffs filed petitions for panel rehearing and rehearing en banc. The court of appeals granted rehearing "to the extent of the modifications contained in" its amended opinion, Pet. App. 8, but otherwise denied the petitions, see *id.* at 8-9.

ARGUMENT

The court of appeals correctly concluded that the district court's remedial orders, which required HUD to pay money to petitioners from grant appropriations other than those to which petitioners claimed an entitlement, constituted an award of "money damages" inconsistent with the APA's limited waiver of sovereign immunity. 5 U.S.C. 702. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals, and proceedings on remand remain necessary to determine the extent of relief ultimately available to petitioners under the court of appeals' holding. Further review is not warranted, particularly in this interlocutory posture.

1. a. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) (citation omitted). The APA provides a waiver of sovereign immunity for suits challenging the lawfulness of agency action, but only insofar as those suits "seek[] relief other than money damages." 5 U.S.C. 702.

In general, "suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay

a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210 (2002) (citation omitted). In *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), however, this Court explained that an order that has the effect of requiring the government to pay funds to a plaintiff does not constitute an award of "money damages" within the meaning of 5 U.S.C. 702 if it provides the plaintiff "the very thing to which he was entitled" by statute. 487 U.S. at 895. The Court reasoned that a "State's suit to enforce § 1396b(a) of the Medicaid Act, which provides that the Secretary 'shall pay' certain amounts for appropriate Medicaid services, is not a suit seeking money in *compensation*," but rather "is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." *Id.* at 900. But the Court reaffirmed the principle that the APA does not permit a court to compel payment of a "sum of money used as compensatory relief," *i.e.*, as a "*substitute* for a suffered loss." *Id.* at 895.

As this Court subsequently explained in *Blue Fox*, Section 702's limitation on the APA's waiver of sovereign immunity "thus hinge[s] on the distinction between specific relief and substitute relief." 525 U.S. at 262. Where a plaintiff seeks "specific relief"—that is, "'the very thing to which [it] was entitled'" in the first instance—"the suit f[alls] within § 702's waiver of immunity." *Ibid.* (quoting *Bowen*, 487 U.S. at 895). If, however, the plaintiff seeks payment from other sources as a "means to the end of satisfying a claim for the recovery of money," the demanded relief is substitutionary in nature, and the claim remains barred by sovereign immunity. *Ibid.*

b. The court of appeals correctly applied these principles in determining that the district court's remedial orders were not properly limited to specific relief, but instead awarded petitioners substitute relief. As the court of appeals explained, the "crux of the Tribes' claims" was that "HUD wrongfully decreased their NAHASDA funding in various years" in order to recover the excess grant funds provided in past years. Pet. App. 41. Petitioners thus asserted an entitlement to a larger share of the particular yearly appropriations in which HUD had effected its administrative offsets. *Id.* at 43; see, *e.g.*, *ibid.* ("[T]he 'very thing' to which the [plaintiff] Choctaw [Tribe] said it was entitled was additional funding from Congress' 2003, 2004, and 2005 NAHASDA appropriations.") (citation omitted). An order that required HUD to pay to petitioners "the [particular] funding that HUD wrongfully withheld"—*i.e.*, the grant funds that had been offset—would constitute specific relief and therefore would not violate 5 U.S.C. 702. Pet. App. 42.

As the court of appeals observed, however, the district court did not cabin its relief in this manner. It "instead ordered HUD to pay the Tribes by 'substitut[ing]' *other* funds for the funds to which the Tribes were actually entitled." Pet. App. 43 (quoting *Bowen*, 487 U.S. at 895) (brackets in original). Specifically, the district court ordered HUD to pay petitioners "from all available sources, including, but not limited to * * * *funds appropriated in future grant years*." *Id.* at 89 (emphasis added); see *id.* at 80, 105, 114. The court of appeals correctly concluded that this order constituted "substitute relief," and thus an award of "money damages," *id.* at 44, which 5 U.S.C. 702 expressly excludes from the APA's waiver of sovereign immunity.

This conclusion follows from the structure of the IHBG program. Here, Congress has chosen to fund the program through a series of yearly appropriations, each of which forms the basis for a "finite * * * pool" that is separately allocated by regulatory formula. Pet. App. 20. A tribe's grant funding for a particular year is not fixed, but depends, *inter alia*, upon how much funding Congress has chosen to appropriate for that year and upon the relative needs of other tribes. See 25 U.S.C. 4151 (directing HUD, "[f]or each fiscal year," to "allocate any amounts made available for assistance under this chapter for the fiscal year, in accordance with the formula established [by regulation]"); pp. 2-3, *supra*. The court of appeals noted that "'the fungibility [of] money' can easily 'obscure[]' the difference between (1) 'relief that seeks to compensate a plaintiff for a harm by providing a substitute for the loss' and (2) 'relief that requires a defendant to transfer a specific *res* to the plaintiff.'" Pet. App. 44 (quoting *County of Suffolk* v. *Sebelius*, 605 F.3d 135, 141 (2d Cir. 2010)) (brackets in original). Under the IHBG program, however, each year's appropriation of funds retains independent significance as inputs into the "zero-sum game" that HUD must administer. *Id.* at 20 (citation omitted).

As the court of appeals recognized, see Pet. App. 45-47, the IHBG program thus resembles other federal grant programs in which "the distinction between original funds and substitute funds" is meaningful. *Id.* at 45. In *County of Suffolk*, the Second Circuit affirmed a district-court order that declined to award future-year funds to the plaintiff as a substitute for past-year funds that allegedly were wrongfully withheld. The court explained that because the "*res* at issue [wa]s the funds appropriated by Congress for this grant program for FYs 2007

and 2008," claims for funding from other grant years would effectively seek "compensation" rather than "the specific property the plaintiff aims to recover," and would therefore "fall[] outside the scope of the waiver of sovereign immunity arising from § 702 of the APA." *County of Suffolk*, 605 F.3d at 141.

Similarly, in *City of Houston* v. *HUD*, 24 F.3d 1421 (D.C. Cir. 1994), the court considered a plaintiff city's claim that its Community Development Block Grant (CDBG) funds had been unlawfully offset and reallocated to other jurisdictions. The district court had refused to award relief on the ground that the relevant funds were no longer available. The city appealed, "suggest[ing] that HUD does in fact have funds available from sources other than the 1986 appropriation from which it could pay the monies the city seeks." *Id.* at 1428. But the court of appeals upheld the district court's ruling, noting that "[a]n award of monetary relief from any source of funds other than the 1986 CDBG appropriation would constitute money damages rather than specific relief, and so would not be authorized by APA section 702." *Ibid.*

2. In seeking further review, petitioners fail to identify any error in the court of appeals' application of these principles. In particular, petitioners present no argument that the district court's orders compelling the payment of monies from future grant-year appropriations constituted an award of specific rather than substitute relief. Instead, petitioners premise their request for further review solely on an asserted conflict with *Lummi Tribe of the Lummi Reservation* v. *United States*, 870 F.3d 1313 (Fed. Cir. 2017), petition for cert. pending, No. 17-1419 (filed Apr. 5, 2018). No such conflict exists.

In *Lummi Tribe*, the Federal Circuit held that the Court of Federal Claims lacked jurisdiction under the

Tucker Act, 28 U.S.C. 1491(a)(1), and Indian Tucker Act, 28 U.S.C. 1505, to entertain claims for money damages brought by the Lummi and other tribes in response to HUD's recovery, through administrative offsets, of similar IHBG excess grant payments. That court explained that, to establish jurisdiction under the Tucker Act, "a plaintiff must identify a separate source of substantive law" that can "fairly be interpreted as mandating *compensation* by the Federal Government for . . . *damages sustained*." *Lummi Tribe*, 870 F.3d at 1317 (emphasis added; citation omitted). The court concluded that NAHASDA did not "entitle[] [the Tribes]" to such a "free and clear transfer of money," because the statute mandates that IHBG funds must be used only for specified purposes and may be "later reduced or clawed back" if misspent. *Id.* at 1318-1319. A plaintiff wrongfully deprived of funds thus would have, at most, a claim for a "nominally greater strings-attached disbursement," *id.* at 1318, which the Tucker Act does not permit.

Contrary to petitioners' repeated suggestions, that reasoning does not conflict with the court of appeals' decision below. *Lummi Tribe* did not concern claims brought under the APA, and it thus did not have occasion to interpret the scope of relief available under Section 702's limited waiver of sovereign immunity. Rather, the *Lummi Tribe* court held only that NAHASDA creates no right to money damages enforceable under the Tucker Act, and accordingly rejected the tribes' demand for a "naked money judgment" (Pet. 12 n.1).

Petitioners emphasize (Pet. 18) that the Federal Circuit expressed concern about possible "incongruency" between the government's position in *Lummi Tribe* and its position in this litigation. 870 F.3d at 1319. But the government's arguments in the two courts of appeals

were not inconsistent. Contrary to petitioners' implications (Pet. 18), the government did *not* argue in the Tenth Circuit that petitioners' claims belonged in the Court of Federal Claims. Cf. Gov't C.A. Br. 64-69. Rather, the government's consistently expressed position has been that neither the APA nor the Tucker Act permits a federal court to award substitute or compensatory monetary relief for an alleged deprivation of IHBG grant funds. As explained, the APA permits only "relief other than money damages," 5 U.S.C. 702, and the Tucker Act provides jurisdiction for damages claims only in cases where another statute "can fairly be interpreted as mandating compensation for damages sustained," *United States* v. *Navajo Nation*, 556 U.S. 287, 291 (2009) (citation omitted). And because "most statutes do not" qualify as "money-mandating," *Adair* v. *United States*, 497 F.3d 1244, 1250 (Fed. Cir. 2007), it is often the case that there is no available waiver of sovereign immunity that would allow a plaintiff to pursue a claim for compensatory monetary relief against the federal government. The government's arguments in the respective courts of appeals were thus consistent not only with one another, but with settled precedent.

Petitioners further err in suggesting that the combined effect of the decisions below and in *Lummi Tribe* is to leave no court with jurisdiction to redress the government's allegedly "wrongful withholding or recoupment of federal grant in aid funds." Pet. 14; cf. Pet. 11 (mistakenly asserting that this case involves "litigation about where to litigate") (citation omitted); Pet. 15 (mistakenly asserting that each court of appeals has "pass[ed] the buck" to the other). On the contrary, the court of appeals in this case recognized that the district court possessed jurisdiction to adjudicate petitioners' claims,

and the government has not disputed that the APA waives sovereign immunity for suits relating to HUD's recovery of NAHASDA grant funds. But the APA waives immunity only to the extent that a plaintiff seeks specific, not substitute, relief. Petitioners' dilemma is not the lack of an appropriate forum, but rather, a desire for forms of relief that go beyond what federal law authorizes.

Contrary to petitioners' assertion (Pet. 14), these principles do not "insulate [HUD] from liability for wrongful withholding or recoupment of federal grant in aid funds." It is true that if a plaintiff unduly delays in challenging HUD's allocation of a particular year's IHBG grant funds, it may prove difficult or impossible for a court to craft specific monetary relief that comports with Section 702's limitations. See Pet. App. 42 (recognizing that specific relief would be unavailable if HUD already "distributed all of the [relevant] funds"). But a grant recipient can ensure that specific relief remains available by "fil[ing] * * * suit before the relevant appropriation lapses [or is fully expended]" and by "seek[ing] a preliminary injunction preventing the agency from disbursing those funds." *County of Suffolk*, 605 F.3d at 142 (quoting *City of Houston*, 24 F.3d at 1427). If a plaintiff's APA claim ultimately succeeds, the court can then order repayment from the set-aside funds.

In fact, one of the plaintiffs in this litigation followed that very course. Pet. App. 42 n.10, 48 n.12. After determining that it had provided excess grant funds to the Navajo Housing Authority, HUD notified the tribe that it would withhold part of its 2008 funding as an administrative offset. When the tribe brought suit, it also obtained a preliminary order requiring HUD to set aside

sufficient remaining funds from the 2008 grant cycle in the event that the tribe prevailed on its claims. *Id.* at 42 n.10. The district court's final judgment ultimately required HUD to disburse the set-aside funds to the tribe, and the court of appeals properly "affirm[ed] the district court's order" to that extent because it constituted specific rather than substitute relief. *Id.* at 48 n.12. As these facts illustrate, recipients who claim that they have been improperly deprived of annual grant funds can obtain judicial review of an agency's actions under the APA and ultimately obtain appropriate monetary relief.

3. In addition to the lack of any conflict among the courts of appeals, the interlocutory posture of this case makes it an unsuitable candidate for further review. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (recognizing that the interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari); see also *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari).

The court of appeals' opinion did not bring an end to this litigation. It instead remanded for the district court to make further findings about whether funds remained available from the relevant appropriations and then to order appropriate relief accordingly. See Pet. App. 48 (remanding "for factual findings regarding whether, at the time of the district court's [judgment], HUD had the relevant funds at its disposal"). Petitioners contended below that, at the time the district court entered the judgments in their favor, HUD may have possessed funds

from relevant past appropriations that it could have used to reimburse the tribes. See, *e.g.*, Pets. C.A. Br. 77. Although the government disputes that any funds other than FY 2008 appropriations remained available, see 08-cv-2573 D. Ct. Doc. 98, at 9-12 (Mar. 30, 2018), the district court has not yet had the opportunity to resolve this factual dispute. If petitioners are ultimately unsuccessful in obtaining monetary relief through the proceedings on remand, they may seek further review at that time.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Moreover, the government has consistently opposed petitioners' arguments that HUD acted "unlawfully" (Pet. 13) in recovering the excess grant funds through administrative offsets. As noted, the panel majority credited petitioners' arguments in this respect, see Pet. App. 34-41, over Judge Bacharach's dissent, *id.* at 66-78. Although HUD maintains that the panel erred in holding unlawful its recovery of the excess grant funds, the government has not cross-petitioned for review of that aspect of the court of appeals' decision. To the extent that this Court considers the lawfulness of HUD's offsets to be a "predicate to an intelligent resolution of the question presented," *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996) (citations and internal quotation marks omitted), however, that threshold merits inquiry may further render this case an unsuitable vehicle for addressing the remedial question on which petitioners seek review.