No. 09-758

In the Supreme Court of the United States

ELOUISE PEPION COBELL, ET AL., PETITIONERS

v.

KENNETH LEE SALAZAR,
SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@USDOJ.gov
(202) 514-2217

QUESTION PRESENTED

Petitioners brought this class action to compel the Department of the Interior to conduct a "historical accounting" of money accounts held in trust for the benefit of individual Indians. The question presented is:

Whether the court of appeals correctly held that 25 U.S.C. 4011(a) does not require the "best imaginable accounting without regard to cost." Pet. App. 7a (citation omitted).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 573 F.3d 808. The opinions of the district court (Pet. App. 18a-84a, 85a-242a) are reported at 569 F. Supp. 2d 223 and 532 F. Supp. 2d 37.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2009. On October 14, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including December 21, 2009, and the petition was filed on December 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, authorizes suits against the sovereign for judicial review of certain types of federal "agency action," including suits brought to challenge an agency's "failure to act," 5 U.S.C. 551(13), by plaintiffs who seek an order to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1). See 5 U.S.C. 702. The APA authorizes such suits "only where a plaintiff asserts that an agency failed to take a *discrete* agency action" that itself is "demanded by law," such as a federal statute or "agency regulations that have the force of law." *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-65 (2004) (*Southern Utah*). If the relevant statute or regulation that demands action leaves an agency discretion to determine "the manner of its action," a reviewing court has authority under the APA only to "compel the agency to act," not "to specify what the action must be." *Id.* at 65; see *id.* at 63-64.

b. This class action challenges the purported failure of the Department of the Interior (Interior) to perform an adequate accounting of money accounts that Interior administers for the benefit of individual Indians. See *Cobell* v. *Norton*, 240 F.3d 1081, 1094-1096 (D.C. Cir. 2001) (*Cobell VI*); cf. Pet. 6; Gov't C.A. App. 2, 28. Those accounts, known as individual Indian money (IIM) accounts, include funds derived from two primary sources. First, IIM accounts may include funds distributed by a Tribe to its members as proceeds of the Tribe's litigation judgments or settlements (judgment IIM accounts) or as proceeds from other tribal revenues (per-capita IIM accounts). Gov't C.A. App. 2282. Second, land-based IIM accounts contain funds derived from revenue-

producing activities on lands that the United States holds in trust for individual Indians. *Id.* at 2284.

In the late nineteenth century, Congress initiated a process that authorized the division of communal Indian property. See Indian General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (enacted 1887). Under the Dawes Act, certain Indian lands were allotted to individual tribal members. *Babbitt* v. *Youpee*, 519 U.S. 234, 237 (1997). Each separate parcel was then either held in trust by the United States for the allottee or owned by the allottee subject to restrictions on alienation. *Ibid.* Over time, as individuals passed undivided interests in allotted land to multiple heirs, the ownership of the allotments became increasingly "fractionated." *Ibid.* Although Congress ended further allotment in 1934, ownership interests in lands previously allotted continued to splinter. *Id.* at 238. When such an allotment is leased for farming, timber, mining, oil and gas exploration and production, or other purposes, the government divides the leasing revenues it receives among the owners of the fractional interests. See Gov't C.A. App. 2284. If the owner of a fractional interest has an IIM account, that person's share of the income from the allotment would be credited to his or her IIM account.

Once the government has collected funds credited to IIM accounts, the Secretary of the Interior has discretionary authority under Section 162a to "deposit" such funds "held * * * for the benefit of individual Indians" in private banks (if certain criteria are met) or to "invest" the "funds of any * * * individual Indian" in certain federal or federally guaranteed debt obligations. 25 U.S.C. 162a(a) (enacted 1938); see 25 U.S.C. 162a(c) (additional "investment" authority added in 1990). Individual Indians, however, need not leave their IIM funds

in the government's possession, where the investment performance of the funds can depend on the Secretary's "deposit" and "investment" decisions. Instead, individual Indians generally now have the unrestricted "right to withdraw funds from their [IIM] accounts." 25 C.F.R. 115.101.[1] And, unless the individual account holder requests that such funds be disbursed only upon his or her request, Interior will normally disburse all funds in an IIM account automatically whenever the balance reaches $15 (or $5 for oil and gas revenue). Gov't C.A. App. 268.

c. Petitioners' claims, which allege that Interior failed to perform an adequate accounting of IIM accounts, implicate the American Indian Trust Fund Management Reform Act of 1994 (1994 Act), Pub. L. No. 103-412, 108 Stat. 4239 (25 U.S.C. 161a(b), 162a(d), 4001 *et seq.*). Congress intended the 1994 Act to improve the government's management of Indian trust funds. See H.R. Rep. No. 778, 103d Cong., 2d Sess. 8 (1994) (*1994 House Report*). At the time, Interior was responsible for managing over 300,000 active IIM accounts with roughly $400 million in deposits. *Id.* at 9. In addition, Interior managed approximately 1880 accounts for Indian Tribes with over $1.7 billion in assets. *Ibid.*

Before the 1994 Act, Congress issued a report entitled "Misplaced Trust" that was highly critical of Interior's management of both "the tribal trust fund" and "the individual Indian money [IIM] trust fund" portions of the trust-fund system. See H.R. Rep. No. 499, 102d Cong., 2d Sess. 2, 6-13 (1992) (*1992 House Report*) (brackets in original). The report specifically criticized

[1] Withdrawals from IIM accounts are restricted where the owner is a minor or is incompetent or under other legal disability. See 25 C.F.R. 115.102 and 115.401.

the failure of Interior's Bureau of Indian Affairs (BIA) to conduct "timely reconciliations of the approximately 300,000 accounts in the Indian trust fund to assure they are accurate." *Id.* at 16.

The 1992 House report described the BIA's then-ongoing efforts to complete a two-phase "reconciliation project" for both tribal and IIM accounts, discussed the agency's efforts to reconcile the accounts of Indian Tribes, and separately noted the "substantial difficulties [encountered] in completing any IIM account phase I reconciliations." *1992 House Report* 24-25. With respect to the IIM accounts, the report observed that "BIA is spending a great deal of taxpayer money and other resources administering and maintaining tens of thousands of minuscule ownership interests and maintaining thousands of IIM trust fund accounts with little or no activity, and with balances less than $50." *Id.* at 25, 28. The 1992 report also expressed "concern[]" with "the enormity of [the] cost estimates [($281 to $390 million)] to complete the IIM reconciliations" in the manner planned in 1992, stating that, "[o]bviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders." *Id.* at 25-26 & n.81. "Given that cost and time have become formidable obstacles to completing a full and accurate accounting" using existing methods, the report concluded that "it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts." *Id.* at 26. The report added that, in the committee's view, "as complete an audit and reconciliation as practicable must be undertaken." *Ibid.*

By 1994, Congress deemed legislation on the subject to be appropriate. After noting that the prior trust-fund

report had "detail[ed] multiple problems," the report accompanying the 1994 legislation noted that Interior had made attempts "to address some of the problems" and had begun to "reconcile accounts." *1994 House Report* 10. The report added that the task of reconciliation had been "extremely difficult," and noted that Interior's reconciliation project was "not expected to reconcile all of the tribal accounts" and included no "plan to reconcile any of the [IIM] accounts." *Ibid.*

d. The 1994 Act states that the Secretary's proper discharge of the United States' trust responsibilities includes "[p]roviding periodic, timely reconciliations to assure the accuracy of accounts." 25 U.S.C. 162a(d)(3). It also establishes the Office of Special Trustee for American Indians within Interior, and provides that the Special Trustee "shall 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." 25 U.S.C. 4043(b)(2)(A).

With respect to the Secretary's reconciliation of "tribal trust fund" accounts, Congress directed that the Secretary submit by mid-1996 a report identifying "a balance reconciled as of September 30, 1995" for each such account, including a description of the "Secretary's methodology [used] in reconciling" them. 25 U.S.C. 4044. The 1994 Act does not provide any similar provision directing Interior to complete a "reconciliation" of IIM accounts by a specific date.

Section 4011(a) separately provides, as relevant here, that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust" for either a Tribe or an individual Indian "which are deposited or invested pursuant to [25 U.S.C.] 162a." 25 U.S.C. 4011(a). Sec-

tion 4011(b) further requires that the Secretary provide a quarterly "statement of performance" to the account holder with respect to whom such funds "are deposited or invested pursuant to section 162a." 25 U.S.C. 4011(b). And Section 4011(c) directs the Secretary to conduct an "annual audit" of all funds held in trust for the benefit of a Tribe or an individual Indian "which are deposited or invested pursuant to section 162a." 25 U.S.C. 4011(c). Section 162a, as noted, governs the Secretary's discretionary authority to "deposit" in private banks "funds held in trust by the United States for the benefit of individual Indians" (or Tribes) or to "invest" in certain debt obligations the "trust funds of any * * * individual Indian" (or Tribe). 25 U.S.C. 162a(a); see 25 U.S.C. 162a(c).

2. a. In 1996, petitioners filed this suit seeking to compel the government to perform trust obligations, including a so-called "historical accounting" of their IIM accounts. In 1997, the district court certified the case as a class action for "all present and former IIM account beneficiaries." See *Cobell VI*, 240 F.3d at 1092-1093. In 1999, the district court issued a declaratory judgment, holding, *inter alia*, that Interior has a judicially enforceable obligation under the 1994 Act to conduct a historical accounting of "all money in the IIM trust held in trust for the benefit of [petitioners], without regard to when the funds were deposited" into the IIM accounts, and that the agency had unreasonably delayed that accounting. *Cobell* v. *Babbitt*, 91 F. Supp. 2d 1, 48, 58 (D.D.C. 1999) (*Cobell V*).

In 2001, the court of appeals generally affirmed the declaratory judgment. *Cobell VI*, 240 F.3d at 1086. The court concluded that Section 4011(a) of the 1994 Act "reaffirms the government's preexisting fiduciary duty

to perform a complete historical accounting of [IIM] trust fund assets," which includes "confirming historical account balances" by "reconciling the [IIM] accounts, taking into account past deposits, withdrawals, and accruals." *Id.* at 1102. The court also concluded that the statute required that the accounting under Section 4011 cover "all funds, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)." *Ibid.* The court determined that the district court permissibly concluded that the government had breached its duty to "provide an accounting," *id.* at 1106, but that the district court's grant of "relief under the APA" had "properly left in the hands of administrative agencies" the "choice of how the accounting would be conducted." *Id.* at 1104, 1107. In so holding, the court of appeals rejected the government's arguments that Congress assigned oversight responsibility for IIM "reconciliation" efforts to the Special Trustee, not the courts, 25 U.S.C. 4043(b)(2)(A); and that Section 4011(a) merely imposed a duty to account for the "daily and annual balance" of those IIM funds which "are" (*i.e.*, prospectively) deposited or invested by the Secretary under Section 162a, see 25 U.S.C. 4011(a), not a retrospective "inquir[y] into the correctness of past transactions" involving IIM accounts. 240 F.3d at 1102.

In September 2003, the district court issued an injunction requiring Interior to undertake historical-accounting activities on a massive scale, at an estimated cost of $6 to $12 billion. *Cobell* v. *Norton*, 392 F.3d 461, 466 (D.C. Cir. 2004) (*Cobell XIII*) (describing the injunction in *Cobell* v. *Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003)). In November 2003, Congress responded to that injunction with legislation that gave Interior temporary relief from any duty to engage in historical accounting

for the IIM accounts. See *ibid.* (discussing Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1263). The relevant conference report specifically "reject[ed] the notion that in passing the [1994 Act] Congress had any intention of ordering an accounting on the scale of that which has now been ordered by the [district c]ourt," explaining that "[s]uch an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources." *Ibid.* (quoting H.R. Conf. Rep. No. 330, 108th Cong., 1st Sess. 117-118 (2003)). "[I]ndividual legislators said in effect that the disparity between the costs of the judicially ordered accounting, and the value of the funds to be accounted for, rendered the ordered accounting, as one senator put it, 'nuts.'" *Ibid.* (citation omitted).

In 2004, the court of appeals vacated the injunction based on the appropriations legislation. *Cobell XIII*, 392 F.3d at 468. But, when that legislation expired, the district court reissued the same injunction. In 2005, the court of appeals again vacated the injunction, explaining that the language of the 1994 Act "doesn't support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." *Cobell* v. *Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) (*Cobell XVI*). The court explained that, although it had construed the 1994 Act in light of "common law trust precepts," the common law did not provide a sound basis for resolving the case because, at common law, "the costs of an accounting" normally "would fall on the trust estate itself" and, thus, would "automatically give private beneficiaries an incentive not to urge extravagance" in accounting expenditures. *Id.* at 1074-1075. Here, in contrast, Congress was "mandat-

ing an activity to be funded entirely at the taxpayers' expense," and "neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between [accounting] exactitude and cost." *Id.* at 1075-1076. "This being so," the court of appeals reasoned, "the district court owed substantial deference to Interior's plan." *Id.* at 1076. "The choices at issue required both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators." *Ibid.*

b. In January 2008, after holding a ten-day trial to evaluate Interior's progress toward completing its historical accounting project, the district court issued a decision concluding that Interior "has not—and cannot—remedy the breach of its fiduciary duty to account for the IIM trust," Pet. App. 240a. See *id.* at 85a-242a. The district court rejected Interior's historical accounting plan, which was estimated to cost roughly $144 million, and held that the 1994 Act imposed accounting requirements for reconciling IIM transactions that would cost billions of dollars to complete. *Id.* at 186a-189a. In reaching that conclusion, the court reaffirmed many of the accounting parameters in its prior injunctions that the court of appeals had vacated. See *id.* at 216a-231a. The district court also indicated that Congress would be "nuts" to appropriate the billions needed to do the accounting that, in the court's view, was required by statute. *Id.* at 238a. The court then concluded that Congress's "refusal to appropriate enough money" had "render[ed] a real accounting impossible," *ibid.*, and reasoned that the court therefore should itself determine "an appropriate remedy." *Id.* at 240a.

In August 2008, after conducting a ten-day trial examining petitioners' claim that funds had been improp-

erly withheld from IIM accounts for more than a century, the district court issued a remedial decision. Pet. App. 18a-84a. The court held that the class was entitled to $455.6 million in equitable "restitution" for funds to "restore the proper balance to the IIM trust." *Id.* at 22a. The court acknowledged that there was "essentially no direct evidence of funds in the government's coffers that belonged in [petitioners'] accounts." *Id.* at 50a. It instead explained that it based its remedial award on an expert's statistical analysis that gave a range of results to reflect uncertainty in the available data. *Id.* at 45a-49a. That analysis produced a 95% confidence interval that "encompasses a zero difference" between the calculated balance and Interior's stated account balances, meaning that Interior's "balance could very well be exactly correct." *Id.* at 49a. But the court concluded that it was appropriate to impose an "evidentiary presumption[]" in favor of the beneficiaries and against the government as trustee, *id.* at 21a, 61a, 79a-80a, and, after adopting a "maximally conservative estimate" of the uncertainty in the foregoing analysis to ensure that "whatever uncertainty [there is] in the data will be credited to the beneficiar[ies]," the court directed $455.6 million in restitution. *Id.* at 80a, 82a-83a. The court did not enter final judgment because it had yet to decide an "appropriate allocation [of the award] to the plaintiff class." *Id.* at 84a. It instead certified its order for interlocutory appeal. See *id.* at 4a.

c. The court of appeals granted permission to appeal and vacated and remanded for further proceedings. Pet. App. 1a-17a. The court of appeals held that the 1994 Act "required a full accounting" but that the district court "erred in holding that [such] an accounting cannot be

conducted" with the appropriated funds made available by Congress. *Id.* at 4a.

The court of appeals concluded that petitioners "are entitled to an accounting under * * * 25 U.S.C. § 4011(a)," and that "Congress afford[ed] courts equitable jurisdiction" to enforce that statutory duty, "draw-[ing] on a tradition of flexibility * * * in equity." Pet. App. 11a. It rejected the district court's conclusion that the government must take multi-billion-dollar efforts to implement "the ideal concept of a complete historical accounting," which the district court understood would be (effectively) impossible and could "not be finished for about two hundred years." *Id.* at 11a-13a (citation omitted); see *id.* at 3a. The court of appeals further agreed with the district court's observation that "[i]t would * * * be 'nuts' to spend billions to recover millions," but the court of appeals, unlike the district court, concluded that a "court sitting in equity may avoid reaching that absurdity." *Id.* at 4a.

The court of appeals held that, even applying a "muted" version of *Chevron* deference to Interior's implementation of the Section 4011 accounting ordered by the district court, it would reverse the district court. Pet. App. 9a-10a. The court reasoned that the 1994 Act simply contemplates an accounting that "makes [the] most efficient use of limited government resources" by requiring "the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate." *Id.* at 12a. It explained that "[t]here will be uncertainty in any accounting for this trust," and concluded that, in this context, "Interior's job is to minimize that uncertainty with a finite budget." *Ibid.*

The court specifically concluded that the 1994 Act did not require Interior to perform an accounting of IIM

"accounts closed before the 1994 Act was passed," reasoning that such "accounts no longer have daily or annual balances, nor are they deposited or invested," as required to trigger Section 4011(a). Pet. App. 15a-16a. The court also concluded that Interior may in other respects "allocate[] its limited resources in rough proportion to the estimated value of payments due to class members" and use "low-cost statistical methods" to verify the accuracy, for instance, of the small payments for "fractional land interests." *Id.* at 14a. The court noted in this regard that its 2005 decision made clear that statistical sampling could be used. *Id.* at 12a-13a. The court similarly emphasized that "[c]ommon sense should guide the district court's analysis," such that Interior could adopt "a reasonable simplification of accounting for administrative fees" (which "likely amount to a tiny fraction" of deductions from IIM trust funds) to ensure that associated costs do not exceed the potential recovery. *Id.* at 15a (citation omitted).

d. On remand, the parties engaged in settlement talks under the supervision of the district court. In December 2009, the parties announced a tentative settlement. See Pet. 1 n.1. The agreement is conditioned upon the enactment of legislation, *ibid.*, which remains pending in Congress.[2] If appropriate legislation is enacted, the settlement is further conditioned on a sufficient number of class members accepting it and, in addition, requires district court approval. See *ibid.*

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[2] On May 28, 2010, the House passed H.R. 4213 with a provision to implement the settlement. See H.R. 4213, 111th Cong. § 607 (as amended May 28, 2010), reproduced at http://www.rules.house.gov/111/LegText/111_hr4213_txt.pdf (amendment as passed by the House).

ARGUMENT

The court of appeals correctly concluded that the Interior Department may consider cost and time in determining the scope of the historical accounting project at issue here. The court's decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. a. The 1994 Act directs the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian Tribe or an individual Indian which are deposited or invested pursuant to [25 U.S.C.] section 162a." 25 U.S.C. 4011(a). That provision requires an "account[ing]," but it does not specify parameters governing the manner in which the accounting must be performed. The court of appeals correctly concluded that the provision therefore "offers little help in defining the accounting's scope," *Cobell XVI*, 428 F.3d at 1074, and that its "general language doesn't support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." Pet. App. 7a (quoting *Cobell XVI*, 428 F.3d at 1075).

Analogies to common law likewise lend no support to petitioners' cause. At common law, trustees have a duty to give a trust beneficiary information about his trust property "upon his request at reasonable times." Restatement (Second) of Trusts § 173 (1959). But a request for a "historical accounting" with respect to the group of separate IIM accounts here, which have been in existence for a number of years, "would ordinarily be prejudicially late." Pet. App. 78a (citing George G. Bogert *et al.*, *Trusts and Trustees* § 962 (2007)); see *ibid.* ("Beneficiaries who know of the method employed

by a trustee in keeping accounts and do not object over a period of years will not be heard to object later.") (quoting *Trusts and Trustees* § 962).[3] Moreover, a trustee's duty to provide an accounting upon a beneficiary's request would normally reduce the trust corpus to pay for the accounting, thereby providing a strong incentive for beneficiaries "not to urge extravagance" in accounting. *Cobell XVI*, 428 F.3d at 1074-1075; see pp. 9-10, *supra*.

In this context, where Congress has not expressly specified the manner in which Interior should perform an "accounting" and has appropriated limited funds to complete the task, it logically follows that an agency's interpretation of its accounting duties is entitled to deference where it reasonably and efficiently utilizes available resources to perform the task in a reasonable period of time. The court of appeals thus correctly vacated the district court's orders defining Interior's accounting duties under Section 4011(a) to require billions of dollars and hundreds of years to complete. Pet. App. 12a-16a; see *Cobell XVI*, 428 F.3d at 1074-1077; *Cobell XIII*, 392 F.3d at 464-468.

The court of appeals decision is consistent with the repeated admonitions of Congress. The report that preceded the 1994 Act stressed that "cost and time ha[d] become formidable obstacles to completing a full and accurate accounting of the Indian trust fund" and that it

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[3] Since at least the early 1930s, Bureau of Indian Affairs superintendents were required to "furnish a statement of account to any Indian at any time upon request of the party in interest." Gov't C.A. App. 2892. Although petitioners now assert that account information was "hidden" from account holders, Pet. 6, their witness admitted at trial that individual Indians "got statements if they specifically asked for them." Gov't C.A. App. 1026.

"[o]bviously" made "little sense to spend" from $281 to $390 million to do an accounting for roughly $440 million in IIM accounts. *1992 House Report* 26. The report therefore explained that "a range of sampling techniques and other alternatives" should be explored before Interior proceeded with a full accounting. *Ibid.*; see pp. 5-6, *supra*. In 2002, after Interior advised Congress of the cost of its plan to conduct a full reconciliation of current and former accounts to satisfy "the broad parameters described by the [district c]ourt," the House Committee on Resources objected to that "enormously complicated, complex, controversial, and costly initiative," which "would cost, in 2002 constant dollars, more than $2.4 billion and take ten years." Gov't C.A. App. 2921. "Given the length of time required to complete the broad accounting outlined in [Interior's] Report, as well as the costs associated with such an activity, which are likely to come at the expense of other key Indian programs," the committee asked that the Secretary "promptly consider ways to reduce the costs and the length of time necessary for an accounting." *Ibid.* And when, in 2003, the district court issued an accounting injunction that would have cost billions to implement, Congress suspended Interior's accounting obligations and "reject[ed] the notion that in passing" the 1994 Act, "Congress had any intention of ordering an accounting on the scale of that which has now been ordered by the Court." H.R. Conf. Rep. No. 330, 108th Cong., 1st Sess. 117-118 (2003); see p. 9, *supra*.

Petitioners simply ignore the factual premises of the very Act on which they base their claims and the broader legislative context surrounding an accounting, which show that Congress had no intent to mandate an accounting that the district court itself recognized would

be "irrationally expensive." Pet. App. 77a. That accounting would likely take "about two hundred years, generations beyond the lifetimes of all now living beneficiaries." *Id.* at 13a (quoting *Cobell XVI*, 428 F.3d at 1076).

b. Petitioners' assertion (Pet. 17-20) that a multi-billion dollar accounting project is required by the "plain language" of the 1994 Act is meritless. Petitioners rely exclusively on Section 4011(a), which requires the Secretary to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian Tribe or an individual Indian which are deposited or invested pursuant to the [25 U.S.C. section 162a." 25 U.S.C. 4011(a). But even assuming that this forward-looking duty entails an obligation to examine past IIM account activity to some extent, Section 4011(a)'s unelaborated text does not specify such an accounting's scope. *Cobell XVI*, 428 F.3d at 1074. It certainly does not mandate the parameters set by the district court. Petitioners have not contested, for instance, the court of appeals' conclusion that the district court erred in requiring Interior to examine activity in accounts that were closed before passage of the 1994 Act. Pet. App. 15a-16a; cf. *id.* at 226a-228a. Other aspects of the district court's order are equally flawed, including its requirement that Interior to examine transactions dating back to 1887, see *id.* at 216a-219a & n.16; examine transactions in land and other assets in addition to the funds in the accounts, see *id.* at 228a-231a; and account for "administrative fees" and "unrestored *Youpee* interests" that, the district court acknowledged, are "not reflected as specific IIM account transactions" and "likely amount to a tiny fraction of the monies that pass through the IIM trust." *Id.* at 222a-

224a. The text of Section 4011(a) provides no basis for these requirements, and the court of appeals properly made clear that they are not required. See *id.* at 13a-16a (rejecting several of these requirements).[4]

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[4] Although the premise of the lower courts' decisions in this litigation has been that Section 4011(a) requires a "historical" accounting, see *Cobell VI*, 240 F.3d at 1102, that premise is itself incorrect. Section 4011, by its own terms, addresses Interior's *prospective* accounting obligations concerning those IIM account funds that the Secretary elects to "deposit" in banks and "invest" in pertinent federally guaranteed debt obligations under 25 U.S.C. 162a. See 25 U.S.C. 4011(a); pp. 3-4, 7, *supra*. That accounting obligation is linked to the Secretary's obligation to provide a quarterly "statement of performance" for funds so "deposited or invested," 25 U.S.C. 4011(b), and thus focuses only on those IIM funds that the Secretary invests for growth under Section 162a. See also 25 U.S.C. 4011(c) (requiring annual audit of the funds "deposited or invested pursuant to [25 U.S.C.] 162a"). The investment-focused provisions in Section 4011 concern funds that are already "held in trust * * * for the benefit of * * * an individual Indian" and subsequently "*are* deposited or invested" by the Secretary. 25 U.S.C. 4011(a) (emphasis added). They thus impose only prospective obligations intended to allow the beneficiaries of affected IIM accounts to monitor the Secretary's investment decisions and the resulting performance for relevant IIM funds.

As such, Section 4011(a) does not provide a grant of "equitable jurisdiction" to direct and oversee a broad historical accounting for IIM accounts generally (Pet. App. 11a). Congress addressed tribal and IIM reconciliation projects separately in Subchapter III the 1994 Act. See 25 U.S.C. 4043(b)(2)(A), 4044. Congress understood that the reconciliation projects would require major reforms of Interior's trust fund systems. See 25 U.S.C. 4043(a); Pet. App. 96a-170a (describing these reforms). It therefore vested oversight responsibility in the political Branches, by charging the Special Trustee with the task of monitoring Interior's reconciliation work and requiring that he report the results of the tribal (but not IIM) reconciliation projects to Congress. See 25 U.S.C. 4043, 4044; cf. *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (explaining that parties "cannot seek *wholesale*

Petitioners' other asserted justifications for the district court's decision are unavailing. For example, although petitioners suggest that the district court's conclusion that an accounting would be impossible rested on "the deplorable condition of IIM trust records," Pet. 3, the district court stressed that it had given "little weight" to petitioners' impossibility model and that its "impossibility" ruling emerged as a "*conclusion of law*." Pet. App. 238a n.19. The district court recognized that Interior has "located and centralized *43 miles* of Indian records potentially relevant to the accounting at the National Archives and the American Indian Records Repository," a "state of the art, climate-controlled, organized, and sizable facility suitable to the storage and research obligations of the Interior Department." *Id.* at 103a, 125a-126a (emphasis added).

Similarly, while petitioners insist that "the history of the IIM trust is replete with the loss, dissipation, theft, waste, and wrongful withholding of trust funds," Pet. 5, the district court found "essentially no direct evidence of funds in the government's coffers that belonged in [petitioners'] accounts." Pet. App. 50a. Interior has spent more than $120 million on historical accounting work since 2003. *Id.* at 186a. The reconciliations completed by 2007 reveal that "*less than one percent* of the reconciled transactions have differences," Gov't C.A. App. 2310—*i.e.*, discrepancies between the actual transaction posted to an account and the amount expected to be posted based on contemporaneous records. *Id.* at 2307. "Further, *less than one-tenth of one percent* of the

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improvement of [an agency] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.") (quoting *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 891 (1990)).

dollars reconciled is in error." *Id.* at 2310. Interior found "no bias in the observed differences," meaning that "underpayments and overpayments occur about equally and the dollar values are about equal." *Id.* at 2311.

Those findings are consistent with an earlier study of the accounts of the named plaintiffs and their predecessors in interest. The accounting firm Ernst & Young conducted a transaction-by-transaction analysis of 37 accounts using 160,000 pages of historical documents dating back to 1914. Pet. App. 112a-113a. The firm found supporting documentation for 86% of the 12,617 transactions reviewed, representing 93% of the total dollar value of the transactions, *id.* at 113a, and found only one posting error of $60.94 where funds were deposited to an incorrect account with a similar account number. Gov't C.A. App. 2315, 2776. The net underpayment difference rate was 0.02% of the dollars reconciled. *Id.* at 2315. Moreover, the study showed that "although documents necessary to complete adequate accountings are available, the accounting process is extremely expensive, often dwarfing the dollar amounts reflected in beneficiaries' accounts." Pet. App. 113a.

"Since the inception of the Cobell case," Congress has "appropriated hundreds of millions of dollars for litigation and accounting activities." H.R. Rep. No. 187, 110th Cong., 1st Sess. 80 (2007). "[T]hese funds would have been better used to fund greatly needed health care, law enforcement and education programs in Indian country." *Ibid.* The court of appeals correctly concluded that Section 4011(a) does not compel the government to undertake the absurdly expensive accounting effort that the district court held the statute to require.

2. Petitioners identify no sound reason for certiorari. Petitioners assert (Pet. 9, 11-12, 16) that the decision below conflicts with *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), and *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) (*Apache*). But *Mitchell II* and *Apache* concern the requirements for a Tribe's damages claim against the United States in the Court of Federal Claims under the Indian Tucker Act, 28 U.S.C. 1505, and their holdings therefore do not apply here.

Moreover, petitioners proffer a now-discredited understanding of the holdings in those cases. This Court recently rejected petitioners' assertion (Pet. 12) that *Mitchell II* and *Apache* allow Indian plaintiffs to sue the United States for breaching duties derived from common-law trust principles. See *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1551-1552, 1558 (2009) (*Navajo II*). The Court made clear in *Navajo II* that Indian plaintiffs must prove that the government violated "specific rights-creating or duty-imposing statutory or regulatory prescriptions" by identifying a source of statutory or regulatory law that itself "establishes [the] specific fiduciary or other duties" purportedly breached by the government. *Id.* at 1552, 1558 (quoting *United States* v. *Navajo Nation*, 537 U.S. 448, 506 (2003) (*Navajo I*)). The Court explained that "principles of trust law might be relevant 'in drawing the inference that Congress intended damages to *remedy* a breach,'" but that such considerations apply only at the "second step of the analysis," *after* the plaintiff has established the violation of a specific statute or regulation that imposes concrete obligations on the government. *Ibid.* (quoting *Apache*, 537 U.S. at 477) (emphasis added); see *id.* at 1558 (explaining that "common-law trust principles [do

not] matter" unless the government violates a particular "statute or regulation").

Petitioners are equally mistaken in their assertion (Pet. 9, 15-16) that the decision below conflicts with *Loudner* v. *United States*, 108 F.3d 896 (8th Cir. 1997). In *Loudner*, Congress directed that a portion of a class-action settlement fund was to be paid to yet unidentified individual Indians who met certain criteria and directed the Secretary of Interior to prepare a roll of eligible persons. The Secretary established a five-month deadline to apply for payment and attempted to notify potential beneficiaries by posting a notice at BIA offices and publishing the notice in the Federal Register, press releases, and various newspapers. *Id.* at 899, 902. After a number of beneficiaries failed to receive actual notice, the Eighth Circuit concluded that the Interior had breached its "common-law obligations as trustee" by "failing to provide beneficiaries with adequate notice" and establishing "an unreasonably short time period" to apply for funds. *Id.* at 903.

Loudner does not conflict with the decision below because *Loudner* did not address accounting claims under the 1994 Act. Moreover, *Loudner*'s approach to the duty at issue there is consistent with that reflected in the court of appeal's decision. Although petitioners emphasize (Pet. 16) *Loudner*'s statement that the government cannot "evade the law simply by failing to appropriate enough money" and "may not avoid its trust duties on the grounds that [its] budget and staff * * * are inadequate," 108 F.3d at 903 n.7 (dicta), *Loudner*'s actual interpretation of the government's obligations in that case lends no support to the "irrationally expensive" (Pet. App. 77a) measures that petitioners request. *Loudner* simply concluded that Interior's "minimal ef-

forts" to notify beneficiaries were inadequate, 108 F.3d. at 903, emphasizing that "[i]t would have been simple to . . . provide concentrated notification procedures in [the] areas where" Interior knew potential beneficiaries to reside. *Id.* at 902; see *ibid.* (explaining that Interior "should at least have held a meeting" on the relevant reservation). The Eighth Circuit's conclusion that Interior should have used "the best means of notice *reasonably* practicable," *id.* at 903 (emphasis added), is thus fully consistent with the D.C. Circuit's view that the government must provide "the best accounting possible, in a reasonable time," with available funds. Pet. App. 12a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys

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