No. 17-1419

In the Supreme Court of the United States

LUMMI TRIBE OF THE LUMMI RESERVATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
STEVEN J. GILLINGHAM
DAVID A. LEVITT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 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, which tribes must use only for eligible affordable-housing activities. After determining that errors in the data furnished by petitioners had caused them to receive excess grant funds, HUD recovered the excess funds by withholding an offsetting amount of funds from petitioners' future grants. The question presented is as follows:

Whether the court of appeals correctly concluded that petitioners' claims seeking to obtain the withheld funds were not actionable under the Tucker Act, 28 U.S.C. 1491(a)(1), and Indian Tucker Act, 28 U.S.C. 1505, because NAHASDA does not mandate the award of money damages.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Case—Continued: Page

Statutes, regulations, and rules:

Regulations and rules—Continued: Page

In the Supreme Court of the United States

No. 17-1419

LUMMI TRIBE OF THE LUMMI RESERVATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 870 F.3d 1313. The opinion of the Court of Federal Claims (Pet. App. 16-31) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2017. A petition for rehearing was denied on January 5, 2018 (Pet. App. 32-34). The petition for a writ of certiorari was filed on April 5, 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"). If a tribe "fail[s] to comply substantially with any provision of [NAHASDA]," HUD can take various remedial actions, including "terminat[ing]" or "reduc[ing]" future payments; "limit[ing] the availability of payments" to specified projects; or redirecting funds to a "replacement tribally designated housing entity." 25 U.S.C. 4161(a)(1)(A)-(D); see Pet. App. 4.

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, that the tribe owned and operated as of September 30,

[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.

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." *Modoc Lassen Indian Hous. Auth.* v. *United States Dep't of Hous. & Urban Dev.*, 881 F.3d 1181, 1186 (10th Cir. 2017) (citation omitted), petition for cert. pending *sub nom. Fort Peck Hous. Auth.* v. *Department of Hous. & Urban Dev.*, No. 17-1353 (filed Mar. 22, 2018); see also *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. Petitioners are an Indian tribe and three tribal housing entities that qualified for and received annual IHBG funds pursuant to NAHASDA. Pet. App. 4. Beginning in 2001, HUD reviewed its FCAS data and past block grant allocations. *Ibid.* The reviews revealed that HUD had "improperly allocated funds to the [petitioner] Tribes because the formula that HUD applied had included housing that did not qualify as FCAS."

---

[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).

Ibid.[3] HUD then "informed the Tribes of the amount overfunded" and "provided the Tribes with the opportunity to dispute HUD's findings regarding FCAS unit eligibility." *Ibid.* HUD then recovered the excess grant funds through administrative offsets—*i.e.*, by partially reducing the grant amount provided to a tribe in a subsequent year to account for the excess funds that the tribe had previously been granted. *Id.* at 5. HUD then redistributed the offset funds to other tribes that originally should have received them.

2. In 2008, petitioners filed suit in the Court of Federal Claims (CFC) under the Tucker Act, 28 U.S.C. 1491(a)(1), and Indian Tucker Act, 28 U.S.C. 1505, alleging that "HUD improperly deprived them of grant funds to which they were entitled." Pet. App. 5.[4] Petitioners alleged both that HUD had misapplied the FCAS formula and that, in any event, the agency had acted improperly in recovering the excess grant funds through administrative offsets without first conducting a formal hearing. *Ibid.* Petitioners claimed that those alleged violations of NAHASDA entitled them to money damages. The government moved to dismiss the complaint, arguing that the CFC lacked jurisdiction because NAHASDA was not money-mandating. See *United States* v. *Navajo Nation*, 556 U.S. 287, 290-291

---

[3] HUD determined that it had overpaid the Lummi Tribe by $863,236; the Fort Berthold Housing Authority by $249,689; and the Hopi Tribal Housing Authority by $964,699. Pet. App. 5.

[4] Another tribal housing entity, the Fort Peck Housing Authority (Fort Peck), also originally joined as a plaintiff. The trial court dismissed Fort Peck's claims because it had already filed a separate suit in federal district court in Colorado. 99 Fed. Cl. 584, 591-593; see 28 U.S.C. 1500. Fort Peck's claims in that district-court suit are the subject of another pending petition for a writ of certiorari. See *Modoc Lassen*, *supra*.

(2009) (explaining that, "before a tribe can invoke jurisdiction under the Indian Tucker Act," the "relevant source of substantive law" must "'fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]'") (citation omitted; brackets in original).

Following multiple rounds of briefing and several pretrial decisions, see Pet. App. 5-7 (describing procedural history), the CFC rejected the government's jurisdictional arguments, reaffirming its earlier-stated view that "the substantive provisions of NAHASDA" are "money mandating." *Id.* at 22; see *id.* at 16-31. The government then sought and obtained certification of an interlocutory appeal on the question whether NAHASDA was money mandating. *Id.* at 2, 7.

3. The court of appeals vacated the CFC's order and remanded with instructions to dismiss for lack of subject matter jurisdiction. Pet. App. 1-15.

The court of appeals unanimously concluded that NAHASDA was not money mandating. The court explained that, to establish jurisdiction under the Tucker Act and Indian 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.'" Pet. App. 8 (quoting *Blueport Co., LLC* v. *United States*, 533 F.3d 1374, 1383 (Fed. Cir. 2008), cert. denied, 555 U.S. 1153 (2009)). 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" by HUD if the funds are misspent. *Id.* at 11-12. A plaintiff wrongfully deprived of funds thus would have, at most, a claim for a

"nominally greater strings-attached disbursement," *id.* at 11, and not an entitlement to a "'naked money judgment,'" *id.* at 9 (citation omitted). The court relied on a prior decision that had found no Tucker Act jurisdiction because the relevant substantive statute had "require[d] that [a grant recipient] use any money disbursed from the appropriated funds to perform" certain functions specified by statute, as opposed to "us[ing] the funds * * * for any purpose, without restriction." *Id.* at 10 (quoting *National Ctr. for Mfg. Scis.* v. *United States*, 114 F.3d 196, 201 (Fed. Cir. 1997)) (emphasis omitted).[5]

ARGUMENT

The court of appeals correctly concluded that petitioners failed to plead a claim for damages cognizable under the Tucker Act and Indian Tucker Act. The court's decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. The Tucker Act establishes jurisdiction in the CFC over damages claims "founded * * * upon * * * any Act of Congress or any regulation of an executive department * * * in cases not sounding in tort." 28 U.S.C. 1491(a)(1). The Indian Tucker Act extends that jurisdiction to "claim[s] against the United States * * * in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States." 28 U.S.C. 1505.

The Tucker Act and Indian Tucker Act do not themselves "create[] a substantive right enforceable against

---

[5] In accordance with the court of appeals' mandate, on remand, the CFC entered a judgment of dismissal, see CFC Doc. 146 (Jan. 19, 2018), from which petitioners have since appealed, see No. 18-1720 (Fed. Cir.) (opening brief filed June 12, 2018).

the Government by a claim for money damages." *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). Instead, "they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (*e.g.*, statutes or contracts)." *United States* v. *Navajo Nation*, 556 U.S. 287, 290 (2009) (*Navajo Nation II*).

This Court has identified "two hurdles that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act." *Navajo Nation II*, 556 U.S. at 290. First, the claimant "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Ibid.* (citation omitted). Second, "[i]f that threshold is passed, the court must then determine whether the relevant source of substantive law can fairly be interpreted as mandating *compensation* for *damages sustained* as a result of a breach of the duties [the governing law] impose[s]." *Id.* at 290-291 (emphasis added; internal quotation marks omitted; brackets in original); see also, *e.g.*, *United States* v. *Navajo Nation*, 537 U.S. 488, 503 (2003) (*Navajo Nation I*); *White Mountain Apache Tribe*, 537 U.S. at 472; *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983); *United States* v. *Testan*, 424 U.S. 392, 398 (1976).

b. The court of appeals correctly applied these principles in determining that NAHASDA does not "create[] [a] right to money damages." Pet. App. 8. As the court noted, NAHASDA establishes an "annual block grant system, whereby Indian tribes receive direct funding" from the federal government. *Id.* at 3. But those funds are not compensation for damages sustained by tribes. Rather, they are funds made available to tribes to spend

on affordable-housing activities to carry out the federal government's grant purpose.

As the court of appeals explained, NAHASDA imposes substantial limitations on the use of grant funds. "Once awarded [block grants], grantee tribes are limited in how and when they may dispense the funds, which can be used only on statutorily specified activities in accordance with program requirements." Pet. App. 4. NAHASDA directs that tribes must use the allotted funds "only for affordable housing activities under subchapter II of this chapter that are consistent with an Indian housing plan approved" by HUD. 25 U.S.C. 4111(g). Certain property acquired with the IHBG funds must be "held in trust" by the Tribes "as trustee for the [statute's] beneficiaries," *i.e.*, households in need of housing assistance. Pet. App. 11 (quoting 2 C.F.R. 200.316); see 24 C.F.R. 1000.26(a) (incorporating 2 C.F.R. Pt. 200 regulations). And as noted, see p. 2, *supra*, a tribe's ability to use funds provided under NAHASDA is expressly conditioned on the tribe's substantial "compl[iance]" with statutory and regulatory requirements. 25 U.S.C. 4161(a)(1). Thus, NAHASDA does not simply award money to tribes, but rather directs funds to them as a conduit for assisting the statute's ultimate beneficiaries, under continuing government oversight.

The court of appeals correctly concluded that these conditions upon the use of NAHASDA grant funds is inconsistent with any interpretation of the statute as "mandating" a "free and clear transfer of money." Pet. App. 12. A tribe whose NAHASDA funding was unlawfully withheld may well possess a claim for the disbursement of the withheld funds. But to award a "naked money judgment" to petitioners, *id.* at 9 (quoting *National Ctr. for Mfg. Scis.* v. *United States*, 114 F.3d 196, 201 (Fed.

Cir. 1997))—the kind of relief available under the Tucker Act—would be inconsistent with the statute's expressly stated conditions. See *id.* at 11. Instead, petitioners' claims must necessarily be ones for "larger strings-attached NAHASDA grants—including subsequent supervision and adjustment—and, hence, for equitable relief." *Id.* at 12; see also *id.* at 11 ("Under NAHASDA, the Tribes are not entitled to an actual payment of money damages, in the strictest terms; their only alleged harm is having been allocated too little in grant funding," such that "the Tribes seek a nominally greater strings-attached disbursement."); cf. *National Ctr. for Mfg. Scis.*, 114 F.3d at 201 (concluding that a federal district court's ability to award relief under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, was not displaced by the Tucker Act because the plaintiff was "not * * * entitled to a monetary judgment that would allow it to use the funds appropriated under the Act for any purpose, without restriction").[6]

c. Petitioners fail to identify any error in this reasoning. Petitioners suggest that the court of appeals mistakenly understood them to be demanding "the types of equitable relief which the [C]ourt of [F]ederal [C]laims cannot provide," Pet. 16, when petitioners were instead

---

[6] Moreover, although HUD's recovery of the excess grant funds did not require a finding of substantial noncompliance and thus was not effected pursuant to the agency's enforcement authority under 25 U.S.C. 4161(a), Congress's understanding that a grant recipient's claims under NAHASDA would be redressed through APA-style review, and not through a Tucker Act suit in the CFC, is underscored by 25 U.S.C. 4161(d), which provides recipients with the right to "petition for review of [HUD's] action" in the federal courts of appeals if HUD "terminat[es], reduc[es], or limit[s] * * * payments" to the recipient under Section 4161(a). 25 U.S.C. 4161(d)(1)(A); see 25 U.S.C. 4161(d)(3)(A)-(B) (articulating APA-like standard of review).

claiming entitlement to a "naked money judgment under the Tucker Act," Pet. 16 n.6. But as the court of appeals explained, NAHASDA does not create any entitlement to a "naked money judgment" in petitioners' favor. Pet. App. 9 (citation omitted). At most, any misapplication of the statute by HUD would entitle petitioners only to a "nominally greater strings-attached disbursement." *Id.* at 11.

Petitioners similarly err in asserting that NAHASDA must be "money mandating" in the relevant sense because the statute provides that HUD "'shall make' [a] grant" to eligible Tribes. Pet. 22; see 25 U.S.C. 4111(a) ("For each fiscal year, the Secretary shall (to the extent amounts are made available to carry out this chapter) make grants under this section on behalf of Indian tribes to carry out affordable housing activities."). But as just explained, although NAHASDA requires HUD to disburse IHBG grant funds to tribes, the statute does not "authorize a free and clear transfer of money." Pet. App. 12. Instead, it provides funds only conditionally and for specified purposes.

Alternatively, petitioners suggest (Pet. 22) that the Tucker Act should be construed as allowing jurisdiction over "grant funding claims" even if "Congress impose[d] restrictions on the use of the grant funds after they are awarded." But petitioners cite no authority for the proposition that the Tucker Act vests the CFC with the power to control how a plaintiff spends the monies awarded in its favor. On the contrary, the "Tucker Act * * * does not empower the Court of Federal Claims to grant that kind of equitable relief." *National Ctr. for Mfg. Scis.*, 114 F.3d at 202; see *Navajo Nation II*, 556 U.S. at 291 (explaining that the Tucker Act provides jurisdiction

only where a statute "mandat[es] compensation for damages sustained").[7]

2. In seeking this Court's review, petitioners assert (Pet. 12-23) that the court of appeals' decision conflicts with the Tenth Circuit's decision in *Modoc Lassen Indian Housing Authority* v. *United States Department of Housing & Urban Development*, 881 F.3d 1181 (2017), petition for cert. pending *sub nom. Fort Peck Housing Authority* v. *Department of Housing & Urban Development*, No. 17-1353 (filed Mar. 22, 2018),[8] and with this Court's decision in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). Neither assertion has any merit.

a. In *Modoc Lassen*, the Tenth Circuit addressed claims for declaratory and injunctive relief under the APA brought by various Indian tribes in response to HUD's recovery, through administrative offsets, of excess grant funds similar to those at issue here. The district court had found HUD's withholding of offset funds to be unlawful and ordered HUD to pay the tribes from various sources, including funds "appropriated in future

---

[7] Petitioners also assert that because "[c]ourts routinely grant [monetary] relief under Public Law No. 96-638," money damages should also be awarded here. Pet. 14. But under Public Law Number 93-638—commonly known as the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (25 U.S.C. 450 *et seq.*)—the federal government enters into contracts that the statute explicitly makes enforceable by suits for money damages. See *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 198 (2012) ("Congress expressly provided in ISDA that tribal contractors were entitled to sue for 'money damages' under the Contract Disputes Act upon the Government's failure to pay.") (citing 25 U.S.C. 450m-1(a) and (d) (2012)). NAHASDA contains no similar contracting scheme or enforcement provision.

[8] Petitioners refer to the Tenth Circuit's decision as "*Fort Peck*." See Pet. 4 & n.1.

grant years." *Modoc Lassen*, 881 F.3d at 1196 (citation omitted). Vacating those remedial orders on appeal, the court of appeals explained that the scope of relief available under the APA extends only to "relief other than money damages." 5 U.S.C. 702. The court of appeals concluded that the district court had ordered money damages because it "ordered HUD to pay the Tribes by 'substitut[ing]' *other* funds for the funds to which the Tribes were actually entitled." *Modoc Lassen*, 881 F.3d at 1196 (citation omitted; brackets in original); cf. *ibid.* (explaining 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") (quoting *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262 (1999)). The court of appeals therefore remanded to permit the district court to make additional factual findings about the status of the funds from which disbursements were withheld from the plaintiffs and to order new relief that would be consistent with the APA's requirements. See *id.* at 1198-1199.

Contrary to petitioners' suggestion, that reasoning does not conflict with the court of appeals' decision below. *Modoc Lassen* did not concern claims brought under the Tucker Act and Indian Tucker Act, and it thus did not have occasion to interpret those statutes' requirements. Rather, *Modoc Lassen* held only that a district court cannot, consistent with the APA, award relief that would substitute for the relief to which a plaintiff is actually entitled by statute.

Petitioners note (Pet. 23) that the court of appeals in this case expressed concern about possible "incongruency" between the government's position in *Modoc Lassen* and its position below. Pet. App. 13. But the government's arguments in the two courts of appeals were not

inconsistent. Contrary to petitioners' implications, the government did *not* argue in the Tenth Circuit that petitioners' claims belonged in the Court of Federal Claims. Rather, the government's consistently stated 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 noted, 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 be fairly interpreted as mandating compensation for damages sustained," *Navajo Nation II*, 556 U.S. at 291. 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 consistent not only with one another, but also with settled precedent.

Petitioners further err in suggesting that the combined effect of the decision below and in *Modoc Lassen* is to leave no court with jurisdiction to redress the government's allegedly "wrongful withholding or recoupment of federal grant-in-aid funds." Pet. 18; cf. Pet. 13 (mistakenly asserting that this case involves "litigation about where to litigate") (citation omitted); Pet. 18 (mistakenly asserting that each court of appeals has "pass[ed] the buck" to the other). On the contrary, the Tenth Circuit in *Modoc Lassen* recognized that the district court there possessed jurisdiction to adjudicate claims by Indian tribes based on the allegedly unlawful withholding of IHBG funds, and the government has not

disputed that the APA waives sovereign immunity for such suits. See, *e.g.*, Gov't C.A. Reply Br. 3, 8 (reaffirming that the APA "provides [petitioners] th[e] right" to a judicial determination on their claims, including by "rul[ing] on the correctness of HUD's actions allocating grants"). As *Modoc Lassen* explained, however, the APA waives sovereign 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.[9]

b. Petitioners' assertion that the court of appeals' decision "is inconsistent with *Bowen*" is unavailing for the same reasons. Pet. 19 (capitalization omitted). In *Bowen*, this Court interpreted the APA's waiver of sovereign immunity and held 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. *Bowen*, 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

---

[9] Moreover, as explained in greater detail in the government's brief in opposition in *Modoc Lassen*, an Indian tribe that believes that IHBG funds have unlawfully been withheld can ensure that specific relief would remain available under the APA by promptly filing suit and seeking preliminary injunctive relief. Gov't Br. in Opp. at 17-18, *Modoc Lassen*, *supra* (No. 17-1353). In fact, one of the plaintiff tribes in the *Modoc Lassen* litigation followed that very course. See 881 F.3d at 1196 n.10, 1199 n.12. As those facts illustrate, a tribe that claims that it has been improperly deprived of IHBG funds can obtain judicial review of an agency's actions under the APA and obtain appropriate monetary relief.

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. The Court also concluded that a claim for damages under the Tucker Act would not constitute an "other adequate remedy" under 5 U.S.C. 704 because the plaintiff State sought "prospective [injunctive] relief" that the CFC "ha[d] no power" to provide. *Bowen*, 487 U.S. at 905.

As explained above, the court of appeals' decision in this case addressed only claims brought under the Tucker Act, not any claims under the APA. The court therefore had no occasion to address "*Bowen's* * * * distinction between specific relief and substitute relief." *Blue Fox*, 525 U.S. at 262. Indeed, contrary to petitioners' assertion (Pet. 21), the court did not "interpret[] *Bowen*" at all.

3. Petitioners also purport to seek this Court's review of the question whether the court of appeals erred in concluding that the CFC lacked jurisdiction to "enter a judgment on [petitioners] illegal exaction claim." Pet. i. In that claim, petitioners had argued that HUD's recovery of the excess grant funds was unlawful because it did not first hold a formal hearing, which petitioners maintain was required by regulation. Pet. 8. But petitioners do not support their request for review of that question with any argument (cf. Pet. 12-24), contrary to this Court's instruction that "[a]ll contentions in support of a petition for a writ of certiorari shall be set out in the body of the petition," Sup. Ct. R. 14.2, which must contain a "direct and concise argument amplifying the reasons relied on for allowance of the writ," Sup. Ct. R. 14.1(h).

In any event, the court of appeals properly rejected petitioners' "illegal exaction" claim. The "alleged procedural failures associated with HUD's grant decision" (Pet. App. 12) cannot support a freestanding illegal-exaction claim because, as the CFC explained, "[t]here is nothing in the statutory framework which suggests that the remedy for failure to afford procedural rights is, without further proof of entitlement, the payment of money." *Id.* at 22. Petitioners' failure to show that NAHASDA mandates an award of money damages if its "procedural elements" are not satisfied, *ibid.*, is fatal to its claim. See also Gov't C.A. Br. 17-18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
STEVEN J. GILLINGHAM
DAVID A. LEVITT
Attorneys

JULY 2018