[ORAL ARGUMENT SCHEDULED ON FEBRUARY 16, 2012]
No. 11-5205

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Elouise Pepion Cobell, *et al.*,
Plaintiffs-Appellees,

Kimberly Craven,
Objector-Appellant,
v.

Kenneth Lee Salazar, Secretary of the Interior, *et al.*,
Defendants-Appellees.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____

SUPPLEMENTAL BRIEF FOR THE DEFENDANTS-APPELLEES

_____

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

The named plaintiffs-appellees are Elouise Pepion Cobell, Thomas Maulson, James Louis Larose, and Penny Cleghorn. Ms. Cobell passed away on October 16, 2011. They represent two certified classes. The Historical Accounting Class consists of "those individual Indian beneficiaries (exclusive of those who prior to the filing of the Complaint on June 10, 1996 had filed actions on their own behalf stating a claim for an historical accounting) alive on the Record Date [September 30, 2009] and who had an IIM Account open during any period between October 25, 1994 and the Record Date, which IIM Account had at least one cash transaction credited to it at any time as long as such credits were not later reversed." A539 (Settlement Agreement ("SA") ¶ A.16). The Trust Administration Class consists of "those individual Indian beneficiaries (exclusive of persons who filed actions on their own behalf, or a group of individuals who were certified as a class in a class action, stating a [claim concerning the administration of trust funds or lands] prior to the filing of the Amended Complaint [on December 21, 2010]) alive as of the Record Date and who have or had IIM Accounts in the 'Electronic Ledger Era' (currently available electronic data in systems of the Department of the Interior dating from approximately 1985 to the present), as well as individual Indians who, as of the

Record Date, had a recorded or other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM Account and regardless of the proceeds, if any, generated from the Land." A543 (SA ¶ A.35).

The appellant is Kimberly Craven, who was not a party to the proceedings below, but is a member of the two classes and filed an objection to the class settlement agreement approved by the district court.

The defendants-appellees are Ken Salazar, as Secretary of the Interior; Larry Echohawk, as Assistant Secretary of Interior–Indian Affairs; and Timothy Geithner, as Secretary of Treasury, all named in their official capacities.

The Competitive Enterprise Institute and the Indian Land Tenure Foundation, both nonprofit organizations, have filed briefs as *amici curiae* in this appeal.

B. Rulings Under Review.

Ms. Craven has taken this appeal from the July 27, 2011 order entered by Judge Thomas F. Hogan in D.D.C. No. 96-1285, granting final approval to the class settlement agreement, and the final judgment entered on August 4, 2011. The district court's order and judgment are reproduced in the Appellant's Appendix at A784-96 and A837, respectively. The district court's underlying oral ruling is reproduced in the Government Appendix at GA75-139.

C. Related Cases.

1. This case has been before this Court on ten previous occasions: *Cobell* v. *Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (Nos. 08-5500 & 08-5506); *Cobell* v. *Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006) (No. 05-5269); *Cobell* v. *Kempthorne*, 455 F.3d 301 (D.C. Cir. 2006) (No. 05-5388); *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006) (No. 03-5288); *Cobell* v. *Norton*, 428 F.3d 1070 (D.C. Cir. 2005) (No. 05-5068); *Cobell* v. *Norton*, 392 F.3d 461 (D.C. Cir. 2004) (No. 03-5314); *Cobell* v. *Norton*, 391 F.3d 251 (D.C. Cir. 2004) (Nos. 03-5262 & 04-5084); *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004) (Nos. 03-5047, 03-5048, 03-5049, 03-5050 & 03-5057); *Cobell* v. *Norton*, 334 F.3d 1128 (D.C. Cir. 2003) (No. 02-5374); *Cobell* v. *Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (Nos. 00-5081 & 00-5084).

2. The *Cobell* settlement is at issue in three other appeals currently pending in this Court. In three consolidated cases, Nos. 11-5270, 11-5271 & 11-5272, three objectors (Carol Eve Good Bear, Charles Colombe, and Mary Aurelia Johns, respectively) seek reversal of the district court order approving the settlement. Briefing is scheduled to be completed by March 30, 2012, and oral argument is scheduled for May 15. In addition, in No. 11-5158, the Harvest Institute Freedmen Foundation and two individuals appealed the denial of their motion to intervene in

the district court. This Court dismissed the appeal, and a petition for rehearing is pending.

/s/ Thomas M. Bondy
Thomas M. Bondy

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GLOSSARY

TAC	Trust Administration Class

On February 3, 2012, this Court directed the parties to submit supplemental briefs addressing whether the appellant, Kimberly Craven, has standing to challenge the fairness of the settlement. The Government hereby respectfully responds. As set forth below, Craven has standing to challenge the settlement to the extent she demonstrates that her interests are harmed by it, but she cannot challenge the settlement on the ground that it is purportedly unfair to others.

INTRODUCTION

As a general matter, a class member may raise on appeal claims bearing directly on that class member. Thus, properly before this Court are Craven's fairness claims concerning her acceptance of a $1,000 payment in lieu of an historical accounting and any inadequacy she can establish in her own compensation as a member of the Trust Administration Class ("TAC").

Craven has thus far failed to establish, however, that she is entitled to raise one particular claim presented in her opening brief: that the settlement is unfair because of a purported "intraclass" inequity in payments to TAC members. Br. 23-25. Craven appears to accept the total sum to be paid to the TAC, approximately $1 billion. Br. 23. But she urges that the money will be distributed inequitably among class members, positing that too little money goes to people with large trust activity and too much money goes to people with small amounts of trust activity. Br. 23-26.

The difficulty is that, at least to date, Craven has not asserted, much less demonstrated, that the alleged inequity makes *her* worse off — not even in her reply brief after the Government noted that she may "be before this Court complaining that she is being benefitted at the expense of others." Gov't Br. 43 n.7. Instead, Craven's "inequity" claim reads as an abstract attack on the distribution scheme, not one tied to Craven's own, concrete interests. Indeed, she places substantial focus on a *different* class member, James Kennerly, whom she alleges has been disadvantaged. Br. 25; see also *id.* at 3-4, 9-15. Neither in the district court nor this Court has Craven indicated that she stands in a similar position. Whether as a matter of prudential standing, constitutional standing, or party status, Craven should not be heard to complain that the distribution of funds to the TAC is unfair to *other* class members.

ARGUMENT

Craven Has Not Demonstrated That She Has Standing To Challenge The Settlement On Grounds That It Is Purportedly Unfair To Others.

A. Craven must demonstrate standing to seek this Court's review. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64-65 (1997). And she must make this showing for each issue raised. Standing "is not dispensed in gross." *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996). It "is issue-specific." *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 29 (D.C. Cir. 2000). Because it is Craven's burden to offer "specific, concrete facts" demonstrating standing, *Warth* v. *Seldin*, 422 U.S. 490, 508

(1975), Craven cannot raise an issue concerning the TAC distribution scheme unless she demonstrates how it harms her personally.

1. At a minimum, Craven does not appear to have prudential standing to press her particular claim of intraclass inequity. Even "assum[ing] [Craven] ha[s] satisfied Article III" standing requirements, she has failed to "assert [her] own legal rights and interests, and cannot rest [her] claim to relief on the legal rights or interests of third parties." *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004) (internal quotation marks omitted). The prudential standing doctrine recognizes that "third parties themselves usually will be the best proponents of their own rights," and that "the holders of those rights either [may] not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful." *Singleton* v. *Wulff*, 428 U.S. 106, 113-14 (1976). Craven cannot seek to overturn the settlement on the ground that it harms others who have decided for themselves to accept it.

There are limited exceptions in which a litigant may assert a third-party's interests, such as when the litigant "has a close relationship" with the third-party or when "there is a hindrance" to the third-party's "protect[ing] his own interests," but they do not apply here. *Kowalski*, 543 U.S. at 130 (internal quotation marks omitted). Craven does not purport to be representing those class members, such as Mr. Kennerly, whom she posits will not receive adequate compensation. To the contrary,

their interests may be in direct conflict: she seeks to raise their rights to defeat their recovery. Moreover, nothing hindered those class members from objecting or appealing — indeed, some have done so.[1]

Craven would have this Court resolve an alleged issue of intraclass inequity in which she has not, at least thus far, asserted any direct stake. She seeks to invoke the asserted interests of others — individuals who are also TAC members and could have objected and appealed — as a central element of her claim. That invitation is at odds with basic tenets of prudential standing. See *Warth*, 422 U.S. at 499.

2. Because Craven appears to lack prudential standing, it is not necessary for this Court to address the question of core, Article III standing. See *Kowalski*, 543 U.S. at 129. This is arguably a closer question. But if this Court considers it, Craven appears to lack Article III standing as well, at least as she has described her claim.

"At bottom, 'the gist of the question of standing' is whether [a party] ha[s] 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Massachusetts* v. *EPA*, 549 U.S. 497, 517 (2007).

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[1] Cf. *Zablocki* v. *Redhail*, 434 U.S. 374, 380 n.6 (1978) (named defendant cannot raise due process claims of absent defendant class members); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804-05 (1985) (stressing that defendant could assert plaintiff class members' personal jurisdiction claims because it is in defendant's "own interests" that the entire class with claims against it be bound).

Craven's claim asserting intraclass inequity appears to engage in a generalized debate about the TAC without any concrete factual context other than the asserted interests of James Kennerly. But "[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986).

Craven's argument reflects the absence of a properly adversarial presentation. For example, she posits that James Kennerly has been undercompensated. Yet Mr. Kennerly did not opt out of the TAC and did not object to the settlement. Standing "reflects a due regard for the autonomy of those most likely to be affected by a judicial decision." *Id.* at 62. Thus, "the decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome.'" *Ibid.* Here, it appears that "[t]he decision to seek review" of the TAC distribution formula has essentially been made by a "concerned bystander[]," who wishes to use it "as a vehicle for the vindication of value interests." *Arizonans*, 520 U.S. at 64-65 (internal quotation marks omitted). Craven's invitation to decide if the settlement is unfair to *others* is inconsistent with the Article III "notion that federal courts may exercise power only 'in the last resort, and as a necessity.'" *Allen* v. *Wright*, 468 U.S. 737, 752 (1984).

To be sure, if the district court's approval of the settlement were held to be an abuse of discretion on any ground, this Court's *remedy* would apply to the entire class: the entire settlement would be rejected. *Evans* v. *Jeff D.*, 475 U.S. 717, 727

(1986).[2] But the fact that a *remedy* applies to the entire class does not establish Article III standing. Were it otherwise, the remedy of vacating an entire settlement could be used as a lever for lodging any objection at all: a member of one sub-class would be able to assert that a different sub-class was paid too little. In this case, even a class member who opted out of the TAC would then presumably be able to object to the TAC distribution scheme in an effort to overturn the entire settlement. But it is clear that a class member lacks standing to challenge a settlement from which he opted out. See *In re Vitamins*, 215 F.3d at 28-29; *Mayfield* v. *Barr*, 985 F.2d 1090, 1092-93 (D.C. Cir. 1993). Here, the alleged intraclass inequity does not appear to be an "injury" that Craven has "personal[ly]" suffered. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992). And "the conduct complained of," the TAC distribution method, *id.* at 560, is not the cause of Craven's asserted injuries: "the line of causation" between the asserted undercompensation of others and Craven's asserted injury is "too attenuated." *Allen*, 468 U.S. at 752.

3. Presumably because objectors tend to raise only their interests, there is little case law on the precise question whether appellants can claim that a class action settlement is unfair to others. But at least some courts have either held or suggested

[2] Here, unlike in the mine run of class actions, the parties now could not easily modify the agreement. Congress authorized jurisdiction over the TAC for purposes of this settlement only. Claims Resolution Act of 2010 § 101(a)(8) & (c)(2), Pub. L. No. 111-291, 124 Stat. 3064.

that an "objector only has standing to raise objections as to itself." *Allapattah Services, Inc.* v. *Exxon Corp.*, No. 91-0986, 2006 WL 1132371, *2 (S.D. Fla. 2006). For example, in *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922 (8th Cir. 2005), the court held that an appellant "lack[ed] standing to object" that the settlement improperly released other class members' claims, even though, presumably, the remedy would require invalidating the settlement. *Id.* at 931 n.7.[3]

In her reply brief, Craven quotes *Devlin* v. *Scardelletti,* 536 U.S. 1 (2002), to the effect that a non-named class member's "complaint clearly falls within the zone of interests of the requirement that a settlement be fair to all class members." Reply Br. 13 n.9. *Devlin*, however, did not address the particular question at issue here — whether a class member has standing to assert claimed legal error or unfairness that does not harm her directly, but which, if accepted by a court, would vacate a class judgment. Indeed, in *Devlin*, the petitioner had argued that the settlement "ha[d] a very substantial negative financial effect on approximately 400" class members *including* himself. Brief for Petitioner at 5, *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002) (No. 01-417). *Devlin* addressed the general question that had divided the Courts of

[3] By contrast, the same appellant had standing to challenge the compensation of a certain category of class members, to which the appellant may not have belonged, only because the appellant asserted that the compensation structure coerced it into continuing a harmful business relationship. See *In re Wireless*, 396 F.3d at 934 & n.8.

Appeals, "whether nonnamed class members who fail to properly intervene may bring an appeal of the approval of a settlement." 536 U.S. at 6. In answering that question in the affirmative, the Court briefly addressed standing only to reaffirm that the issue before the Court — "whether nonnamed class members who fail to properly intervene may bring an appeal of the approval of a settlement," *ibid.,* was not itself an issue of standing. See *id.* at 6-7.[4]

B. Alternatively, Craven's objection may be thought of in terms of whether she is a proper party-appellant with respect to her fairness claim. *Devlin* created an exception to "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 303 (1988) (per curiam). In *Devlin*, the Supreme Court held that an absent class member who had not intervened to become a party in district court must nevertheless be treated as a party on appeal for the specific purpose of "preserv[ing]" his "*own* interests in a

[4] In her reply brief, Craven also cites two inapposite cases. See *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 731 (3d Cir. 2001) (collateral issue of attorneys' fees); *In re GMC Engine Interchange Litig.*, 594 F.2d 1106, 1122 (7th Cir. 1979) (appeal by named class representatives). To the extent that Craven believes that *dicta* in these cases may be read as implying that an appellate court must consider any possible claim of unfairness, regardless of whether the claim concerns the appellant, any such implication would be inconsistent with the Supreme Court precedent described above. Although Rule 23(e) may require district courts to consider the interests of all class members prior to approving a settlement, it does not and cannot allow a class member to invoke this Court's jurisdiction to consider claims affecting only other class members.

settlement that will ultimately bind [hi]m," and "protecting him*self*" from "a disposition of *his* rights" that he finds unacceptable, even though in many other "context[s]" the class member would not be considered a "party." 536 U.S. at 10-11 (emphases added). The Court carefully circumscribed this rule, however, providing that an absent class member "will only be allowed to appeal that aspect of the District Court's order that affects *him*," limiting the matters that could be raised on appeal to those pressed in Devlin's objection. *Id.* at 9 (emphasis added).

As noted, Craven's TAC inequity claim does not appear to concern her "own interests," *id.* at 10, but rather the interests of other class members. It is not enough that Craven is bound by the *Cobell* settlement as a whole. *Devlin* distinguished between a class member's "interests" and the fact that "a settlement * * * will ultimately bind him." *Ibid.* The Court explained that a class member must be treated as a party to "protec[t] himself." *Id.* at 11. And the Court made clear that the petitioner would be treated as a party only to press those claims raised in his own objection. *Id.* at 9. If the mere fact of being covered by a settlement was enough to confer party status, failure to object would be addressed by waiver rules.[5] *Devlin* did

[5] To be sure, Craven raised her TAC inequity point in her district court objection. But it would be implausible to read *Devlin* as conferring party status to raise any claim on appeal, no matter how unrelated to the appellant. The Supreme Court's description that the "aspect of the District Court's order that affect[ed]" Mr. Devlin was "the District Court's decision to disregard his objections" appears to contemplate that properly filed objections address only matters affecting the objector. Indeed, the

not license objecting class members to assume the role on appeal of representatives for other members of the class. Cf. *Nat'l Ass'n of Chain Drug Stores* v. *New Eng. Carpenters Health Ben. Fund*, 582 F.3d 30, 39 (1st Cir. 2008) (Boudin, J.) (on appeal a "class member other than a named plaintiff is not a representative" and "is free to pursue his own interest").

CONCLUSION

For the foregoing reasons, Craven has not demonstrated that she has standing to challenge the settlement on grounds that it is supposedly unfair to others.

Respectfully submitted,

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Court cited for that proposition an earlier portion of its own opinion describing the matter at issue, 536 U.S. at 9 (citing *id.* at 4), a matter that bore directly on Mr. Devlin's monetary interests, see *Devlin* Brief for Petitioner at 5.

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2012, I filed and served the foregoing Supplemental Brief For The Defendants-Appellees with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. Participants are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Brian P. Goldman
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