

No. _____

IN THE
Supreme Court of the United States

CAROL EVE GOOD BEAR, MARY AURELIA JOHNS, and CHARLES COLOMBE,

PETITIONERS

v.

ELOUISE PEPION COBELL, *et al.*, individually and on behalf of a
class of all past and present Individual Indian Trust beneficiaries,

PLAINTIFFS-RESPONDENTS,

and

KENNETH LEE SALAZAR, Secretary of the Interior, et al.,

DEFENDANTS-RESPONDENTS.

**PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION
TO PETITIONER'S APPLICATION FOR EXTENSION OF TIME
TO FILE PETITION FOR WRIT OF CERTIORARI**

This case presents unique circumstances warranting denial of Petitioners' application for extension of time. Petitioners are class objectors seeking review of a landmark \$3.4 billion class action settlement between the United States government and 500,000 Indian Trust beneficiaries. Of those 500,000 class members, only four class objectors appealed the district court's settlement approval and final judgment. Petitioners are three of those four objectors. As explained below, the settlement funds cannot be paid until all appeals in this action are exhausted, and every day of further delay reduces the funds available for the

settlement and irreparably harms the class. In contrast to these serious harms, Petitioners' only basis for the extension request is their counsel's unexplained role last week and this week in "negotiations" concerning an unidentified district court case. In light of the harm to class members, and the failure of Petitioners to demonstrate "good cause," for the extension, the Court should deny Petitioners' application for an extension of time.

FACTUAL BACKGROUND

This lawsuit began more than sixteen years ago when Plaintiffs, representing a class of individual Indians whose land and related natural resources are held in trust by the United States, sued the government to enforce trust duties owed to those beneficiaries, including the duty to provide an historical accounting of individual trust accounts, known as Individual Indian Money ("IIM") accounts.

In December 2009, after years of protracted litigation, the parties reached a landmark settlement in which the United States agreed to pay an unprecedented \$3.4 billion to remedy historical breaches of its trust duties and to improve its management of the Individual Indian Trust. After the parties signed the settlement agreement, Congress enacted and the President signed the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (Dec. 8, 2010), which expressly "authorized, ratified, and confirmed" the settlement and payments to class members. The district court approved the settlement on June 20, 2011, entered a final order on July 27, 2011, and entered final judgment on August 4, 2011.

Petitioners, who had objected to the proposed settlement in the district court, appealed. The Court of Appeals affirmed the district court's final judgment on May 22, 2012 in an unpublished order and judgment, which is attached to Petitioners' application. Notably, the Court of Appeals found all of Petitioners arguments meritless and rejected several as "utterly without merit," "contrary to all precedent and to common sense," and based on a "blatant mischaracterization" of the record.

ARGUMENT

I. GRANTING PETITIONERS' EXTENSION REQUEST WILL CAUSE IRREPARABLE HARM TO THE 500,000 CLASS MEMBERS IN THIS ACTION.

Granting this application for extension of time will cause substantial irreparable harm to the 500,000 class members in this case. Unlike ordinary litigation, the final judgment in this historic \$3.4 billion class action is effectively stayed while the Petitioners prepare their petition for a writ of certiorari—although they have not filed a supersedeas bond or obtained a stay from the lower courts or this Court—because the terms of the settlement and the Claims Resolution Act require exhaustion of all possible appeals before the United States government releases the settlement funds. This *de facto* stay of the judgment causes substantial, irreparable harm to class members in three ways.

First, many class members are poor and urgently need their settlement payments for basic necessities like food, housing, clothing, and utilities. Thus, this case stands in sharp contrast to many large class actions, where individual class members' compensation is minimal and the delay from an appeal would not cause class members significant harm. Here, settlement payments are crucial to the day-

to-day lives of class members. As the district court in this case found, “many of the Indian beneficiaries depend on their IIM trust income for the basic staples of life.” *Cobell v. Norton*, 394 F. Supp. 2d 164, 273 (D.D.C. 2005).

Second, the delay caused by an extension of time will result in substantial financial losses to class members. For example, as is typical in large class action settlements, a third-party claims administrator was retained to handle inquiries from the 500,000 members of the class who have questions or need assistance with issues concerning the settlement. As indicated in the attached declaration submitted to the Court of Appeals, the claims administrator estimates that its staff is devoting thousands of hours each month to inquiries from class members regarding the terms of settlement, at an estimated cost of more than \$2.5 million per year. (Ex. A, Declaration of Jennifer M. Keough ¶¶ 2-3.) These costs reduce the funds available to class members when the settlement proceeds are paid out.

Third, a sad consequence of this protracted litigation is that “a good many Indians have died while [*Cobell*] has gone on who should have benefitted from that lawsuit.” 156 Cong. Rec. S6179 2010 (Statement of Senator Dorgan) (July 22, 2010). Elouise Cobell, the lead plaintiff in this historic class action and a woman who selflessly devoted decades of her life to pursuing justice for her fellow Indian trust beneficiaries, is among them. See *Elouise Cobell, A Native American Leader Who Took on Washington and Won*, Wash. Post, Oct. 17, 2011, at B6. The delay caused by a further extension of time will mean that other elderly or infirm class members will pass on without obtaining the justice that they deserve. This human

cost cannot be quantified and it is one that class members should not be forced to endure, particularly where, as here, the D.C. Circuit disposed of Petitioners' meritless arguments in a two-paragraph, unpublished opinion and judgment, noting that many arguments were "utterly without merit" or "contrary to all precedent and to common sense."

The Court of Appeals recognized the harms faced by class members and granted a motion to expedite the appeal to prevent them. This Court also should recognize the harms associated with further delay, and deny Petitioners' application for an extension of time to file the petition for a writ of certiorari.

II. PETITIONERS' APPLICATION FAILS TO DEMONSTRATE "GOOD CAUSE" FOR AN EXTENSION.

Even setting aside the harm an extension would cause to class members, this extension request should be denied because Petitioners have not complied with this Court's rules. "An application to extend the time to file a petition for a writ of certiorari is not favored." Sup. Ct. R. 13.5. The applicant must demonstrate "good cause" for the extension by providing "specific reasons why an extension of time is justified." *Id.*

Here, Petitioners' only basis for the extension is the statement that their counsel is engaged in "current negotiations in the resolution of multi-party, 42-year old, water rights litigation in the Southern District of California" that involves meetings scheduled during the weeks of August 6 and August 13. This is insufficient to demonstrate "good cause."

First, Petitioners do not explain their counsel's role in the negotiations, do not provide any "specific reasons" why those negotiations would prevent Petitioners from timely filing their petition, and do not suggest that these negotiations were unforeseen or unexpected. "[C]ounsel's overextended caseload is not 'good cause shown,' unless it is the result of events unforeseen and uncontrollable by both counsel and client." *Mississippi v. Turner*, 498 U.S. 1306 (1991) (Scalia, J., denying application for extension of time to file petition for writ of certiorari). Indeed, this Court disfavors extension requests based on counsel's workload because "the responsibility of counsel to litigation in this Court should take precedence, on the assumption that the issue sought to be raised here is of such significance as to call for review by this Court." *Carter v. United States*, 75 S. Ct. 911 (1955) (Frankfurter, J., denying application for extension of time to file petition for writ of certiorari). Here, Petitioners do not assert that their counsel will be unavailable during the entire two week period of the "negotiations" in this curiously unnamed litigation, but instead simply assert that counsel has a "role" in those negotiations. But the mere fact that counsel might experience the press of other business during the 90-day period in which to prepare the petition is insufficient to show good cause; "the same reason could be adduced in virtually all cases." *Kleem v. INS*, 479 U.S. 1308 (1986) (Scalia, J., denying application for extension of time to file petition for writ of certiorari).

Second, Petitioners submitted the extension request exactly ten days before the deadline (the final day to do so under the rules, Sup. Ct. R. 13.5), citing

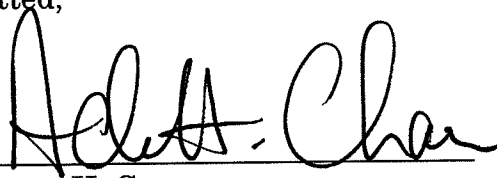
counsel's workload last week and this week. But Petitioners do not explain why they were unable to prepare the petition during the preceding two-and-a-half months of the three month deadline. "[P]etitions for certiorari seldom call for the kind of research which may be demanded for a brief on the merits." *Carter*, 75 S. Ct. at 911. This is particularly true here, where the Court of Appeals opinion and judgment is only two short paragraphs in length, and Petitioners and their counsel are well aware of the underlying facts and legal issues. Because Petitioners do not explain why they were unable to prepare the petition during the bulk of the 90-day time period provided by this Court, the application should be denied.

In sum, Petitioners have not shown "good cause" for an extension of the time to file a petition for a writ of certiorari. The extension would further delay the settlement payments, reduce the total settlement funds available to class members, and prevent many elderly or infirm individual Indian beneficiaries from seeing justice within their lifetimes. In light of these harms to class members, and the complete failure of Petitioners to explain why an extension is necessary, Petitioners' application for an extension of time should be denied.

CONCLUSION

The application for extension of time in which to file petition for writ of certiorari should be denied.

Respectfully submitted,



DENNIS M. GINGOLD
THE LAW OFFICE
OF DENNIS M. GINGOLD
607 14th Street, N.W.
9th Floor
Washington, D.C. 20005
202-824-1448

WILLIAM E. DORRIS
ELLIOTT LEVITAS
KILPATRICK TOWNSEND
& STOCKTON LLP
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309
404-815-6500

ADAM H. CHARNES
Counsel of Record
DAVID C. SMITH
RICHARD D. DIETZ
KILPATRICK TOWNSEND
& STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
336-607-7300

KEITH M. HARPER
KILPATRICK TOWNSEND
& STOCKTON LLP
Suite 900
607 14th Street, NW
Washington, DC 20005-2018
202-508-5800

Counsel for Plaintiffs-Respondents

DATED: August 13, 2012

CERTIFICATE OF SERVICE

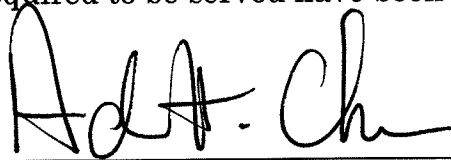
I, Adam H. Charnes, Counsel of Record for Plaintiffs-Respondents and a member of the Bar of this Court, hereby certify that on the 13th day of August, 2012, a copy of this Response in Opposition to Application for Extension of Time in the above-captioned case was mailed, first class postage prepaid, to:

David C. Harrison
LAW OFFICES OF DAVID C. HARRISON
Two Park Square
6565 Americas Pkwy., Suite 200
Albuquerque, NM 87110

Thomas M. Bondy
Michael S. Raab
UNITED STATES DEPARTMENT OF JUSTICE
Appellate Staff, Civil Division
950 Pennsylvania Ave., N.W.
Room 7535
Washington, D.C. 20530

Robert E. Kirschman, Jr.
John J. Siemietkowski
UNITED STATES DEPARTMENT OF JUSTICE
Commercial Litigation Branch, Civil Division
P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044

I further certify that all parties required to be served have been served.



Adam H. Charnes

EXHIBIT A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., as an individual, and on behalf of all others similarly situated,

Plaintiffs,

v.

KEN SALAZAR, Secretary of the Interior, et al.,

Defendants.

) Case No. 1:96 CV 01285 (TFH)

)
) **DECLARATION OF JENNIFER M. KEOUGH REGARDING ESTIMATE OF ADDITIONAL COSTS FOR SETTLEMENT ADMINISTRATION DUE TO PENDING APPEAL**
)

I, Jennifer M. Keough, declare as follows:

1. I am Executive Vice President, Operations, of The Garden City Group, Inc. ("GCG"). The following statements are based on my personal knowledge and information provided by other GCG employees working under my supervision and, if called on to do so, I could and would testify competently thereto.

2. Plaintiffs' Counsel has requested that GCG identify the additional costs resulting from the pending appeal and associated with the administration of the Settlement. These additional costs will result due to the necessity of maintaining the call center and website during the pending appeal process. The driving factors for additional costs are the operation of the call center and

1 other handling of communications with Class Members. Class Member call volume through the
2 course of the Settlement has been averaging over 8,300 hours a month for a total average cost of
3 \$295,000 per month. The below estimates for Class Member communications, while the pending
4 appeal is handled in due course, assume that pace and call volume will continue through November
5 2011, and then decrease. It will require minimal project management and systems time within
6 these 12- 24 months other than what has already been estimated for the original Settlement and
7 Claims administration. If Class Member communication levels increase or decrease, the below
8 estimates would change accordingly. To this end, GCG has prepared below three different interval
9 estimates in anticipation of the extended time and management involved during the pending
10 appeal.
11

12 3. If the appeal period extends the Settlement administration and management time by
13 12 months, the additional cost for Settlement administration is estimated at approximately
14 \$2,595,000 - \$2,795,000. Should the appeal period extend the Settlement administration time by
15 18 months or 24 months, the additional estimated costs for Settlement administration will be
16 approximately \$3,765,000 - \$3,965,000 and \$4,935,000 - \$5,135,000, respectively.
17

18 I declare under penalty of perjury under the laws of the United States of America that the
19 foregoing is true and correct.

20 Executed this 22nd day of August 2011, at Seattle, Washington.

21
22 
23 Jennifer M. Keough
24
25
26
27
28