No. 11-3113

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARVEST INSTITUTE FREEDMAN FEDERATION, LLC;
LEATRICE TANNER-BROWN

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; THE HONORABLE KEN SALAZAR,
Secretary of the Department of Interior of the United States

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF FOR THE APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

This case involves a challenge to the constitutionality of an Act of Congress, and appellants have requested oral argument. Although the United States believes that this case can be resolved on the briefs, if the Court grants appellants' request for argument, the United States wishes to be heard in defense of the statute, and counsel for the United States stands ready to present oral argument.

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STATEMENT OF JURISDICTION

Plaintiffs brought suit in district court seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 & 2202, alleging that the Claims Resolution Act of 2010, Pub. Law No. 111-291, 124 Stat. 3064, is unconstitutional. Record Entry ("RE") No. 2, Complaint. On January 31, 2011, the district court entered an order and a final judgment, dismissing plaintiffs' case for lack of subject matter jurisdiction. RE No. 17, Opinion and Order. Plaintiffs filed a timely notice of appeal on the same day, January 31, 2011. RE No. 19. As discussed in Point I of our

Argument, the district court correctly dismissed this case based on the threshold jurisdictional defect of lack of standing.

STATEMENT OF THE ISSUES

Plaintiffs in this case seek to enjoin a federal statute that facilitates a settlement negotiated by the parties in *Cobell* v. *Salazar*, Case No. 1:96cv01285-TFH (D.D.C.). Their appeal presents the following questions:

1. Whether the district court correctly held that plaintiffs lack standing because they are not injured by the legislation and because a favorable ruling would not redress any injury.

2. Whether, in the alternative, dismissal would be required because plaintiffs' suit does not present a substantial federal question.

STATEMENT OF THE CASE

The Claims Resolution Act of 2010 contains measures necessary to implement the pending settlement of *Cobell* v. *Salazar*, Case No. 1:96cv01285-TFH (D.D.C.), a class action filed in 1996 by individual Indians against the Secretaries of the Department of the Interior and the Department of the Treasury. Plaintiffs in this case seek a declaration that the Act is unconstitutional. They also seek to enjoin the implementation of the statute by the Executive Branch, thus precluding the District Court for the District of Columbia from proceeding with the settlement.

Plaintiffs premise this request for relief on the contention that the United States owes duties to them similar to the duties asserted by the plaintiffs in *Cobell*. They assert that Congress violated principles of equal protection by authorizing the settlement agreement in *Cobell* without enacting legislation that would compensate plaintiffs for the injuries they believe they suffered in the past. The district court dismissed for lack of standing, and plaintiffs have appealed.

STATEMENT OF FACTS

A. Background.

1. The *Cobell* Litigation.

The Department of the Interior administers accounts of funds held in trust for individual Indians, known as Individual Indian Money Accounts (IIM accounts). In 1994, Congress enacted legislation requiring Interior to account for the balances of funds in these accounts which, at the time, totaled approximately $390 million. H.R. Rep. No. 103-778, at 9 (1994). In 1996, present and former beneficiaries of IIM accounts filed a lawsuit, seeking, among other things, to compel a historical accounting of the accounts. *Cobell* v. *Salazar*, Case No. 1:96cv01285-TFH (D.D.C.). The litigation has involved several trials and ten appeals to the District of Columbia Circuit. See *Cobell* v. *Kempthorne*, 455 F.3d 317, 320, 330 (D.C. Cir. 2006) (noting that the court had, at that time, heard eight appeals since Cobell VI, addressing the

historical accounting and collateral matters); *Cobell* v. *Salazar*, 573 F.3d 808 (D.C. Cir. 2009).

In December 2009, the *Cobell* parties announced a settlement. The agreement was contingent upon legislation both to fund the settlement and to provide the district court with jurisdiction over the damages claims that could otherwise be asserted only in the Court of Federal Claims.

The legislation was signed into law on December 8, 2010, as part of the Claims Resolution Act, Pub. Law No. 111-291, 124 Stat. 3064 (2010). Title I of the Claims Resolution Act contains the *Cobell* settlement provisions.

In 2011, Plaintiffs attempted to intervene in *Cobell* and to appear in the settlement fairness hearing conducted under Rule 23(e)(2). The district court denied those motions, reasoning that the attempt to intervene fifteen years after the litigation began is "untimely" given that plaintiffs' concerns were known from the beginning of the litigation, and that plaintiffs' claims "have no bearing on this settlement," "intervention is unnecessary to preserve any of [their] rights, and there exist no common questions of law or fact that compel the Court to grant permissive intervention." Order, No. 1:96cv01285-TFH, at 1, 2, 3 (D.D.C. May 25, 2011); see also Minute Order, No. 1:96cv01285-TFH, (D.D.C., May 25, 2011) (denying motion for leave to appear at the fairness hearing).

2. Plaintiffs' Prior Suit.

In 1866, following the end of the Civil War, the United States entered into treaties with five Native American tribes that fought with the Confederacy. The treaties prohibited slavery and served the common purpose of establishing rights for the "Freedmen," former slaves held by these tribes. See, *e.g.*, 14 Stat. 755, 756 (1866) (Seminole Treaty).

Plaintiff, the Harvest Institute Freedman Federation, LLC alleges that it was "formed for the express purpose of seeking redress through courts to compel the United States to perform obligations" owed under these treaties to the Freedmen. *Ibid.* RE No. 2, Compl., at 11.

In 2006, the Harvest Institute filed suit against the United States in the Court of Federal Claims, alleging that the tribes had not allocated land to plaintiffs' ancestors "properly according to the treaties, and therefore the Government did not enforce plaintiffs' rights under the 1866 treaties." *Harvest Institute Freedman Fed'n.* v. *United States,* 80 Fed. Cl. 197, 199 (2008). The court dismissed, holding that the claims were barred by the applicable statute of limitations. The court explained that plaintiff had not asserted timely "continuing claims" because there was no continuing duty by the United States to Plaintiffs. *Id.* at 199-200. The court further ruled that plaintiff had not stated a valid claim for relief because the United States had no fiduciary duty or other "governmental obligation" to Plaintiffs. *Id.* at 200-01. The

Federal Circuit affirmed. 324 Fed. Appx. 923 (Fed. Cir. 2009), *cert denied,* 130 S. Ct. 1147 (2010).

B. The Present Case.

Plaintiffs in this action are the Harvest Institute and an individual, Leatrice Tanner-Brown, who was also named in the complaint as representative of a purported class. Plaintiffs filed this action in district court in 2011 to enjoin implementation of the Claims Resolution Act as an unconstitutional violation of the equal protection guaranty. The complaint alleges that Ms. Tanner-Brown and other members of the purported class are distant descendants of persons who were held as slaves by some of the Indian tribes. RE No. 2, Compl., at 12. Members of these tribes later were given land allotments and eventually IIM accounts. Plaintiffs claim that the United States was obligated by the 1866 treaties to ensure that the Freedmen received property and establish IIM accounts similar to those at issue in *Cobell*. Plaintiffs urge that their ancestors "are also owed fiduciary duties by the United States," *id.* at 7, and thus "it is inequitable and will result in the perpetuation of racial discrimination" to settle the *Cobell* claims, *id.* at 8.[1]

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[1] In one sentence of the complaint, under the heading "Second Claim for Relief – Injunction," plaintiffs state that they "seek damages in an amount equal to the value of land and related benefits denied to Plaintiffs by defendants failure to perform their fiduciary duties." RE No. 2, Compl., at 14. The complaint does not otherwise refer to damages or allege a violation of a fiduciary duty, other than as a backdrop for their (continued...)

The United States moved to dismiss pursuant to Rule 12(b)(1) and 12(b)(6). The district court held that plaintiffs lack standing because they "cannot establish an injury fairly traceable to the" *Cobell* settlement, nor can they establish "that this alleged injury will be redressed by a favorable decision." RE No. 17, Opinion and Order, at 5.

SUMMARY OF THE ARGUMENT

Plaintiffs challenge legislation that authorizes a settlement agreement in *Cobell* v. *Salazar*. That class action involves claims arising from the historical accounting of Individual Indian Money accounts and claims relating to alleged mismanagement of deposited funds and the underlying lands held in trust or restricted status. Plaintiffs are not holders of these accounts, are not owners of interests in trust or restricted land, are not parties in *Cobell*, are not members of either of the certified classes in *Cobell,* and were denied the right to intervene in *Cobell* because their claims had no bearing on the *Cobell* settlement. They identify no injury resulting from the legislation or the settlement. They claim only that Congress could not

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[1](...continued)
Equal Protection claim. Plaintiffs did not raise this claim in their opening brief, and, indeed, appear to disclaim any interest in seeking damages. See Pl. Br. 13. Thus, any such claim is waived. The district court would, in any event, have lacked jurisdiction over a claim for damages which could be brought only in the Court of Federal Claims. See 28 U.S.C. § 1491. Indeed, the Harvest Institute has already brought those claims in that court and received an adverse final judgment.

constitutionally facilitate a settlement in *Cobell* without enacting legislation that would compensate them for injuries that they allege are in some respects similar to those claimed in *Cobell*.

The district court correctly dismissed for lack of standing. Plaintiffs' asserted injuries are grounded in treaties between the United States and five Indian tribes signed in 1866. Plaintiffs unsuccessfully sought recovery for those injuries in 2006 before the Court of Federal Claims. The *Cobell* settlement has no bearing on their ability to recover for these injuries and does not constitute an independent cognizable injury. Nor would a favorable ruling here redress any cognizable harm. Enjoining the *Cobell* settlement would not compel Congress to take any action to further plaintiffs' interests.

Even if plaintiffs had standing, they have not presented a substantial question of federal law. Plaintiffs allege that by settling the *Cobell* case, the United States has deprived them of equal protection because the settlement has a "racially disparate" effect. RE No. 2, Compl., at 2. But it is well-established that for there to be an equal protection problem, the Government must have intended to discriminate on the basis of race or created some racial classification. Plaintiffs do not allege that either is the case.

Moreover, the face of the complaint demonstrates that plaintiffs are not similarly situated to the class members in *Cobell*, whatever the merit of their claims.

The Claims Resolution Act facilitates a negotiated settlement in a pending class action. Plaintiffs are not part of the classes in the settled case. Plaintiffs' suit for relief was rejected by the Court of Federal Claims and the Federal Circuit, and their case is closed. Under no theory of equal protection does the wholly proper settlement of a pending action create a constitutional duty to afford relief to individuals whose claims have already been resolved on the theory that if those individuals' claims had succeeded, they would have been given property interests that are the prerequisite for the class claims being settled.

ARGUMENT

I. The District Court Correctly Held that Plaintiffs Lack Standing

Plaintiffs seek to enjoin implementation of the provisions of the Claims Resolution Act that facilitate settlement of *Cobell* v. *Salazar,* 1:96cv01285-TFH (D.D.C.). The district court correctly held that plaintiffs lack standing to challenge the legislation and to collaterally attack the *Cobell* settlement.

To demonstrate standing, a plaintiff "must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted); the injury must be "fairly traceable to the challenged action of the defendant,"*ibid.*

(internal alterations omitted); and it must be likely that the injury will be "redressed by a favorable decision," *id.* at 561 (internal quotation marks omitted).

Plaintiffs apparently believe that Congress should have addressed the claims that they presented to the Court of Federal Claims in 2006, by legislation similar to that which authorizes the settlement in *Cobell*. Relevant to this case, however, is that the *Cobell* settlement causes plaintiffs no injury. As the district court observed, "the claims presented by the *Cobell* plaintiffs are different than the claims asserted by the Plaintiffs in this action. The legislation approving the *Cobell* settlement does not address Plaintiffs' claims." RE No. 17, Opinion and Order, at 5.

Plaintiffs offer the conclusory allegation that the Claims Resolution Act will cause them "immediate grave and irreparable harm." RE No. 2, Compl., at 14; see also Pl. Br. 10. In parts of their complaint, they suggest that their injury is some general "perpetuation of racial discrimination" against them. RE No. 2, Compl., at 8; see also *id.* at 2. A "stigmatizing injury," however, is not sufficiently concrete and particularized to establish standing separate and apart from being "personally denied equal treatment by the challenged discriminatory conduct." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (internal quotation marks omitted).

Elsewhere, plaintiffs urge that their real injury is what they label "racially disparate treatment." RE No. 2, Compl., at 2. This injury appears to mirror the claims asserted in plaintiffs' Court of Federal Claims suit. See, *e.g.*, *id.* at 13 (alleging that

the United States violated a "fiduciary duty owed to the freedmen" and did not "cause * * * land conveyances to occur" from Native American tribes to Plaintiffs' ancestors or establish IIM accounts for those ancestors). "[B]ecause plaintiffs seek declaratory and injunctive relief," however, "it is insufficient for them to demonstrate only a past injury." *Friends of Tims Ford* v. *TVA*, 585 F.3d 955, 970-71 (6th Cir. 2009) (internal quotation marks omitted). Nor is an injury to their ancestors an injury that the plaintiffs have "personally suffered." *White* v. *United States*, 601 F.3d 545, 556 (6th Cir. 2010) (quoting *Lujan*, 504 U.S. at 563); see also *Warth* v. *Selden*, 422 U.S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise protect against injury to the complaining party . . . . A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury.") (internal quotation marks omitted). A "wrong to the ancestor is not a wrong to the descendants." *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 759 (7th Cir. 2006) (Posner, J.).

Importantly, plaintiffs do not explain how the *Cobell* settlement legislation causes a present injury. Plaintiffs claim that "it is a violation of the Fourteenth Amendment" to "settle claims with Native American slave masters based on the continued existence of trust responsibilities and on the other hand deny the existence of trust responsibility to the descendants of their slaves, when these trust obligations both have their roots in the same 1866 Treaties and subsequent legislation." Pl. Br.

32. This legal contention does not identify particularized, concrete injury of the type required to demonstrate standing. Plaintiffs assert at most an abstract injury shared by any person who feels that they – or their ancestors – are owed some kind of compensation by the United States.

Equally clearly, plaintiffs have not alleged that their "injury" would be redressed by enjoining the Claims Resolution Act. "The real value of the judicial pronouncement – what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*." *Friends of Tims Ford,* 585 F.3d at 971 (quoting *Hewitt* v. *Helms*, 482 U.S. 755, 761 (1987)); see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement").

The relief plaintiffs seek would serve only to hinder the settlement of claims in *Cobell*. It would not in any way advance plaintiffs' own interests and would not require Congress to pass legislation to afford plaintiffs' the relief they failed to obtain in their Court of Federal Claims action.

Finally, in addition to "constitutional limitations on federal-court jurisdiction" there are also "prudential limitations on its exercise." *Warth,* 422 U.S. at 498. "Prudential limitations dictate that the plaintiff must be a proper proponent, and the

action a proper vehicle, to vindicate the rights asserted." *Lac Vieux Desert Band of Lake Superior Chippewa Indians* v. *Michigan Gaming Control Bd.*, 172 F.3d 397, 403 (6th Cir. 1999) (internal quotation marks omitted). If, as plaintiffs allege, they are injured by the *Cobell* settlement, then the proper vehicle for vindicating their rights is the *Cobell* case. See *Nat'l Ass'n of Chain Drug Stores* v. *New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 42 (1st Cir. 2009) (Boudin, J.) (noting that "impacted non-parties can seek to intervene" in a class action "or otherwise express their views in litigation that may affect their practical interests" through Fed. R. Civ. P. 23(e)(2)). Plaintiffs' failed intervention in *Cobell* highlights their lack of standing here. It also highlights the prudential reasons that this Court should not serve as a venue for collaterally attacking decisions by the district court in *Cobell,* the Court of Federal Claims, and the Court of Appeals for the Federal Circuit.

II. Plaintiffs have Not Raised a Substantial Question of Federal Law

Even assuming that plaintiffs' allegations were sufficient to confer standing, dismissal on jurisdictional grounds would be appropriate because plaintiffs have failed to raise a substantial federal question. Alternatively, if the Court were to conclude that jurisdiction exists, it would be appropriate to dismiss for failure to state a claim. See *Southwest Williamson County Community Ass'n* v. *Slater*, 173 F.3d 1033, 1036 (6th Cir. 1999) ("[T]his court can affirm the district court on alternate grounds supported by the record.").

The Supreme Court has explained that "general subject-matter jurisdiction is lacking when the claim of unconstitutionality is insubstantial." *McLucas* v. *DeChamplain*, 421 U.S. 21, 28 (1975). Although the line between an insubstantial claim and merely meritless claim cannot, as Judge Friendly observed, be described with "mathematical precision," *Green* v. *Bd. of Elections*, 380 F.2d 445, 448-49 (2d Cir. 1967), a claim is insubstantial and thus a court may dismiss for lack of jurisdiction when that claim is "obviously without merit or clearly concluded by this Court's previous decisions." *McLucas*, 421 U.S. at 28. Although the threshold is low for finding that a legal claim is substantial, see *Metro Hydroelectric Co., LLC* v. *Metro Parks*, 541 F.3d 605, 610-12 (6th Cir. 2008), it cannot be met when a plaintiff fails even to allege facts that are necessary to establish his constitutional claim. See, *e.g.*, *Kalson* v. *Paterson,* 542 F.3d 281, 289-90 (2d Cir. 2008) (Calabresi, J.); *Simkins* v. *Gressette,* 631 F.2d 287, 295 (4th Cir. 1980).

The Claims Resolution Act is a racially-neutral law and could not violate equal protection in the absence of an intent to discriminate on the basis of race. *See Washington* v. *Davis*, 426 U.S. 229, 238-39, 245 (1976). "'Discriminatory purpose' * * * implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker * * * selected * * * a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects on an identifiable group." *Wilson* v. *Collins*, 517 F.3d 421, 432 (6th Cir. 2008) (internal quotations

marks omitted) (quoting *Hernandez* v. *New York*, 500 U.S. 352, 360 (1991) (quoting *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979))).

Plaintiffs have not alleged that the Claims Resolution Act has a discriminatory purpose and claim that the Act is unconstitutional only because of its "racially disparate treatment," RE No. 2, Compl., at 2. Any argument that the Act is unconstitutional because it has a disparate racial impact is clearly foreclosed by the Supreme Court. See *Davis*, 426 U.S. at 238-39; see also *Nixon* v. *Adm'r. of Gen. Servs.*, 433 U.S. 425, 471 n. 33 (1977) ("[M]ere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment, even if the law disadvantages an individual or identifiable members of a group.") (citations omitted).[2]

Plaintiffs likewise do not and cannot argue that the Claims Resolution Act creates any racial classification or lacks a rational basis. The legislation merely

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[2] Plaintiffs quote a law review article for the proposition that "reliance on decisions made in the distant past, when discrimination was more widespread and virulent, should be scrutinized." Pl. Br. 3. Certainly, reliance on old racial classifications may, in some instances, evidence discriminatory purpose or itself constitute a racial classification. Likewise, implementation by contemporary officials with no racial animus of a law passed with a discriminatory purpose may violate equal protection. But the Supreme Court has clearly foreclosed a constitutional theory of disparate impact. See *Davis*, 426 U.S. at 239-240. Here, Plaintiffs do not allege that the law at issue – the Claims Resolution Act – has a discriminatory purpose, only that it compensates particular classes with particular property interests.

settles a case brought by plaintiff classes – those who have or had IIM accounts in the relevant period or a demonstrable interest in trust or restricted land – of which the plaintiffs in this case are not members.

In sum, because plaintiffs have failed to state a substantial question of federal law, dismissal for lack of jurisdiction would be appropriate even if they had met their burden of demonstrating standing. Alternatively, if the Court concluded that jurisdiction exists, it would be proper to dismiss for failure to state a claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JUNE 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the type-volume limitation in Rule 32(a)(7)(B). The portion of the brief subject to the type-volume limitation contains 3,583 words, and is presented in proportionally spaced 14-point Times New Roman typeface. The brief was prepared using WordPerfect X4.

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2011, I filed and served the foregoing Brief by means of this Court's ECF system, thereby causing a digital copy of the Brief to be served upon:

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