No. 12-278

# In the Supreme Court of the United States

MARTIN MARCEAU, ET AL., PETITIONERS

*v.*

BLACKFEET HOUSING AUTHORITY, ET AL.

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

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether a federal agency may be subject to suit for damages in district court by individual Indians based on a theory that the agency's de facto control over Indian housing construction gives rise to common-law trust duties.

2. Whether a claim under the Administrative Procedure Act begins to accrue, and the applicable statute of limitations begins to run, only after a litigant discovers the full impact of the agency's action.

3. Whether the Department of Housing and Urban Development violated applicable law when it failed to provide funding to repair housing deficiencies separate and apart from an Indian tribe's share of the regular annual grant of monies appropriated by Congress.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 168-170) is not published in the *Federal Reporter* but is reprinted at 473 Fed. Appx. 764. The order of the district court (Pet. App. 171-190) is unreported. Prior opinions of the court of appeals (Pet. App. 1-45, 46-91, 92-121) are reported at 540 F.3d 916, 519 F.3d 838, and 455 F.3d 974 respectively. A prior order of the district court (Pet. App. 122-136) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on June 5, 2012. The petition for a writ of certiorari was filed on August 29, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. In the late 1970s, the Department of Housing and Urban Development provided funding under the United States Housing Act of 1937, 42 U.S.C. 1437 *et seq.*, to the Blackfeet Housing Authority, which used the funding to construct houses on the Blackfeet Indian Reservation between 1977 and 1980. Pet. App. 7. The Authority built those houses, including houses now owned by petitioners, with wooden foundations constructed with pressure-treated lumber. *Ibid.* Petitioners allege that those wooden foundations are defective because they are structurally unsound and, because they were treated with toxic chemicals, created a health hazard. *Id.* at 7-8. Petitioners brought this action in 2002 seeking money damages and declaratory and injunctive relief against the Department of Housing and Urban Development and its Secretary (collectively, HUD) and the Blackfeet Housing Authority and its board members (collectively, the Authority). *Id.* at 137-167.

As is relevant here, petitioners asserted a claim under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, seeking a declaratory judgment that HUD improperly required the construction of substandard housing in violation of its own regulations, and injunctive relief mandating either the repair or the replacement of their houses. Pet. App. 23, 156-158. Petitioners also sought money damages for HUD's purported breach of duties allegedly owed to petitioners by the government. *Id.* at 152-156.

The district court granted HUD's and the Authority's motions to dismiss. Pet. App. 122-136. Among other things, the court dismissed petitioners' APA claim because petitioners failed to show that HUD's actions were contrary to law, *id.* at 132-133, and dismissed petition-

ers' damages claim because none of the statutes or regulations that petitioners invoked imposed relevant duties on HUD that might give rise to a cause of action under what the court called the "*Mitchell* Doctrine," *id.* at 124-132; *id.* at 126 (discussing *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo I*); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) (*White Mountain*); and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)).

2. a. The court of appeals affirmed the dismissal of petitioners' claims against HUD but reinstated petitioner's claims against the Authority. Pet. App. 92-121. The court concluded that petitioners' APA claim was barred by 5 U.S.C. 702 because it sought relief that was tantamount to money damages, Pet. App. 113-115, and it held that petitioners failed to show that "a grant of HUD funds," *id.* at 112, to the Authority gave rise to enforceable duties that might support a damages claim, *id.* at 110-113.

b. The panel subsequently granted the Authority's rehearing petition and issued an opinion revisiting all of the issues raised on appeal. That opinion on rehearing (Pet. App. 46-71) adhered to the panel's prior holdings with one exception, reversing course on petitioners' APA claim and remanding that claim for further proceedings. *Id.* at 68-71. Judge Pregerson, who had authored the panel's original decision, dissented from the court's renewed holding that petitioners failed to state a trust claim against HUD. *Id.* at 71-91.

c. Both HUD and the Authority petitioned for rehearing, which the court of appeals denied. Pet. App. 5. In denying rehearing, however, the court replaced its original opinion on rehearing "in its entirety" (*ibid.*) with an amended opinion. *Id.* at 6-25. That opinion

modified the panel's rationale for reinstating petitioners' APA claim, *id.* at 22-25, and again upheld the dismissal of petitioners' damages claim, *id.* at 10-22. The court concluded that the governing "statutes and regulations pertaining to the Blackfeet houses at issue," *id.* at 15, showed that HUD did not have an obligation to construct, maintain, or repair the houses at issue and that, therefore, it did not breach a duty that could give rise to a damages claim, *id.* at 22.

Judge Pregerson again dissented (Pet. App. 25-45) regarding the damages claim, concluding that HUD funding gave HUD "pervasive control over the tribal housing program." *Id.* at 44. In his view, the United States has a trust obligation to provide adequate housing for low-income tribal families. *Ibid.* Judge Pregerson believed that "the government undertook to fulfill its trust responsibility to provide housing for the tribe and did so through a pervasive regulatory structure." *Id.* at 44-45. For that reason, he believed, "the federal government * * * had an obligation to perform [the task] in a manner consistent with its fiduciary duty to the tribe." *Id.* at 45. Based on the allegations in petitioners' complaint, Judge Pregerson concluded that HUD failed to do so. *Ibid.*

d. Petitioners thereafter filed a petition for a writ of certiorari, which this Court denied. 129 S. Ct. 2379 (2009).

3. a. On remand to the district court, petitioners filed a two-count Third Amended Complaint, limited to their claims under the APA. Pet. App. 191-209. The district court granted HUD's motion for summary judgment. *Id.* at 171-190.

i. The first count of petitioners' Third Amended Complaint claimed that HUD acted arbitrarily and ca-

priciously in 1976-1977, allegedly by requiring the use of foundations made of arsenic-treated wood. Pet. App. 202-204. The district court held that the claim was barred by the six-year statute of limitations applicable to suits under the APA. *Id.* at 183-185; see 28 U.S.C. 2401(a). The court held that any procedural challenge petitioners had to HUD's alleged decision to require the use of wooden foundations accrued in November 1977, when construction of petitioners' homes began. Pet. App. 183. Accordingly, the court concluded, the statute of limitations for procedural claims expired in November 1983. *Ibid.* The court further held that any substantive challenge to the construction of their homes accrued "no later than 1980, when construction ended," and "[t]he statute of limitations therefore expired no later than 1986." *Id.* at 184. The applicable limitations periods thus expired years before petitioners brought suit in 2002. *Id.* at 183-184.

The district court rejected petitioners' argument that "the 'discovery rule' operated to toll the statute of limitations until 1997," the year in which petitioners allege they discovered the health injuries caused by the defective wooden foundations. Pet. App. 184; see Pet. 40. The court explained that petitioners had identified no authority for applying the discovery rule to a claim under the APA. Pet. App. 185.

ii. The second count of petitioners' Third Amended Complaint alleged that individual homeowners and the Authority had asked HUD to repair or fund the repair of the allegedly deficient construction. Pet. App. 204-205. In response to each request, HUD allegedly decided that the Authority "would receive no funds outside the Blackfeet share of the regular annual grant of monies appropriated by Congress." *Id.* at 205. Petitioners

claimed that HUD's denial of these funding requests, and its failure otherwise to "fix the problem," was "not in accordance with law" and so actionable under the APA. *Id.* at 206. Rejecting that claim, the district court held that, since 1997, HUD's authority to provide funds to tribal housing authorities has been limited to block grants. *Id.* at 189 (citing 25 U.S.C. 4113). The court also concluded that the only two requests for assistance petitioners identified were not requests for a block grant under the governing statute. *Id.* at 187-188. Thus, HUD had no legal obligation to respond to them. *Ibid.*

b. The court of appeals affirmed in a three-paragraph, unreported opinion. Pet. App. 169-170.

The court held that the six-year statute of limitations barred plaintiffs from pursuing their claim that HUD had acted arbitrarily and capriciously in allegedly requiring the use of wooden foundations. Pet. App. 169. In "the late 1970s, when the agency purportedly decided to require wooden foundations," petitioners "knew about the decision and knew that it affected them." *Id.* at 169-170. That petitioners "may not have immediately grasped the full impact" of HUD's alleged decision "does not mean that they knew too little in 1980 to bring an APA challenge." *Id.* at 170.

The court of appeals also concluded that the district court "correctly rejected [petitioners'] claim that HUD wrongly denied, or failed to respond to, various requests" by homeowners or the Authority to repair the houses. Pet. App. 170. The court reasoned that, although "[a]gency inaction can support a claim under the APA," that is "only where the action is 'legally *required*.'" *Ibid.* (quoting *Norton* v. *S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004)). Here, petitioners iden-

tified "no instances in which HUD failed to comply with a specific obligation imposed by law." *Ibid.*

**ARGUMENT**

Petitioners contend (Pet. 11-38) that the federal government had pervasive control over the construction of their homes by the Blackfeet Housing Authority and that such alleged control imposed common-law trust duties on the government that HUD breached in this case, entitling them to damages. Petitioners further maintain (Pet. 38-43) that the statute of limitations does not bar their claim under the APA for an injunction requiring HUD to repair or replace their homes, and that HUD had a duty to repair petitioners' houses or to fund such repair in response to requests for assistance. The court of appeals correctly rejected each of these claims, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Petitioners' damages claim is premised on the idea that the existence in the United States of some measure of control of property can give rise to duties, the violation of which is the basis for a damages suit by individual Indians against the United States in district court. Petitioners acknowledge that the statutes in the instant case "only establish a mechanism for lending [federal] money to tribal housing authorities." Pet. 37 (citation omitted). They contend, however, that the federal government exercised de facto "pervasive control" over the Authority's construction of their homes. *Ibid.* It is HUD's "'pervasive' role" in that construction, they contend, that defines the "contours of the United States' fiduciary responsibilities" to petitioners. Pet. 12. According to petitioners, "federal control or supervision is the key," Pet. 21, and an agency's exercise of de facto

control gives rise to duties on which a damages claim can be based, even where the pertinent statutory or regulatory provisions do not, Pet. 15-16.

Petitioners' contentions are without merit and are foreclosed by this Court's decision in *United States* v. *Navajo Nation*, 556 U.S. 287 (2009) (*Navajo II*).

a. As an initial matter, petitioners' damages claim suffers from a fatal jurisdictional defect: United States district courts lack jurisdiction to entertain suits, such as this one, seeking damages in excess of $10,000 that are premised on the United States' violation of a legal obligation to Indian tribes or members.

The doctrinal foundation for petitioners' claim rests on the limited waiver of sovereign immunity in the Tucker Act and Indian Tucker Act, which authorize Indian Tribes and individual Indians to sue the United States for money damages based on certain claims founded upon violations of federal statutes or regulations. 28 U.S.C. 1491(a)(1), 1505; see *Navajo II*, 556 U.S. at 290-291, 293-294 (discussing *United States* v. *Mitchell*, 463 U.S. 206 (1983), and *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003)); see also *White Mountain*, 537 U.S. at 472-473; *Mitchell II*, 463 U.S. at 211-212, 214-218. Petitioners, who are individual Indians and not Tribes, presumably assert their claim under the Tucker Act, 28 U.S.C. 1491(a)(1), which provides a waiver for claims of non-tribal plaintiffs. See *Navajo II*, 556 U.S. at 290; *United States* v. *Mitchell*, 445 U.S. 535, 540 (1980) (*Mitchell I*) (acts provide the "same access" to relief).

But both the Tucker Act and the Indian Tucker Act vest the Court of Federal Claims—not federal district courts—with jurisdiction. See 28 U.S.C. 1491(a)(1), 1505. And, as the court of appeals recognized, the trust

claim pressed by petitioners would be enforceable only through those jurisdictional statutes. Pet. App. 11 n.3; see also *id.* at 115 n.6 ("federal question jurisdiction cannot serve as an alternative basis for jurisdiction" in district court). Nor can petitioners rely upon the Little Tucker Act, 28 U.S.C. 1346(a)(2), as a basis for district court jurisdiction, because they seek more than $10,000 in damages. See Pet. App. 115, 217 (estimating "on a conservative average" that foundation repair would cost $30,000 per home and another $35,000 to $45,000 would be needed for home repairs "beyond the foundation"). Thus, even if petitioners were correct in arguing (Pet. 11-17) that they identified a duty actionable under the Tucker Acts, their damages claim would nevertheless fail for want of statutory jurisdiction.

b. On the merits, this Court in *Navajo II* squarely rejected petitioners' underlying contention (Pet. 37) that de facto "pervasive control" gives rise to duties that can form the basis for a damages claim. *Navajo II* explains that a plaintiff asserting such a claim must cross two distinct hurdles. 556 U.S. at 290. First, the plaintiff "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). The plaintiff must therefore make a threshold showing that the government violated "specific rights-creating or duty-imposing statutory or regulatory prescriptions" in order to state a cognizable claim, and "neither the Government's 'control' * * * nor common-law trust principles matter" when identifying those duties. *Id.* at 301-302; see *id.* at 290-291.

After a plaintiff establishes that the government has violated a duty imposed by a specific statutory or regu-

latory provision, the plaintiff must further show that that substantive provision mandates a damages remedy for the breach. *Navajo II*, 556 U.S. at 290-291, 301. At that second stage of the analysis, "trust principles (including any such principles premised on 'control')" can play a role in "inferring that [a statutory or regulatory] trust obligation [is] enforceable by damages." *Id*. at 301 (citation omitted) (first alteration added). But such common-law trust principles based on "control" will become relevant only *if* the court first holds that a duty has been imposed by specific statutory or regulatory provisions. *Ibid.*

For that reason, *Navajo II* squarely rejected the Federal Circuit's conclusion that "the Government's 'comprehensive control' over [resources] on Indian land gives rise to fiduciary duties based on common-law trust principles." 556 U.S. at 301; see *id*. at 302 (in determining whether the United States has an actionable duty, "neither the Government's 'control' over [property] nor common-law trust principles matter"). That holding forecloses petitioners' arguments here, just as it eclipses the pre-*Navajo II* Federal Circuit decisions upon which petitioners rely. See, *e.g.*, Pet. 19 (relying on *Navajo Nation* v. *United States*, 501 F.3d 1327 (Fed. Cir. 2007), rev'd, *Navajo II*; *Pawnee* v. *United States*, 830 F.2d 187 (Fed Cir. 1987), cert. denied, 486 U.S. 1032 (1988); and *Short* v. *United States*, 719 F.2d 1133 (Fed. Cir. 1983), cert. denied 467 U.S. 1256 (1984)).

The holding in *Navajo II* also refutes petitioners' contention (Pet. 17-21) that this Court's review is required to resolve a supposed conflict between the Ninth Circuit's decision in this case and Federal Circuit's pre-*Navajo II* decision in *Brown* v. *United States*, 86 F.3d 1554 (1996). In addition, *Navajo II* demonstrates peti-

tioners' mistaken reliance (Pet. 11-12) on the Court's prior decisions in *Mitchell II* and *White Mountain* in support of their contention that de facto control will give rise to duties actionable in a claim for money damages in the absence of specific statutory and regulatory obligations. See *Navajo II*, 556 U.S. at 294 (statute and regulations created the relevant duty in *Mitchell II*); *id.* at 291, 301 (*White Mountain* invoked "principles of trust law" only to determine whether a statutory provision was money mandating); see also *United States* v. *Bormes*, No. 11-192 (Nov. 13, 2012), slip op. 9-10; *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324-2325 (2011).

The court of appeals correctly determined that "[n]o statute has imposed duties on the government to manage or maintain [petitioners'] property."* Pet. App. 21. No further review of that question is warranted.

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* Petitioners identify only one source of law that, they contend, specifically imposes a duty on HUD "to repair the houses that are under its supervision." Pet. 30 (describing 24 C.F.R. 905.270). But the regulation they cite, which was repealed after its authorizing statute was itself repealed, only authorized housing authorities to "apply to HUD for amendment of the development budget to provide for the funds required" to correct deficiencies. 24 C.F.R. 905.270(a) (1995); see Indian Housing Act of 1988, Pub. L. No. 100-358, 102 Stat. 676, repealed by Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 501(a), 110 Stat. 4041.

In addition to relying on Tucker Act cases such as *Mitchell* and *White Mountain* petitioners also rely in passing on the provision in the Federal Housing Act of 1937 stating that the Secretary of HUD may sue and be sued in federal district court. Pet. 20, 21 (citing 42 U.S.C. 1404a). Even assuming that provision applies to petitioners' claim in some respect, petitioners have still failed to identify a specific duty imposed by statute or regulation supporting their claim.

2. a. Petitioners also seek (Pet. 38-41) this Court's review of the court of appeals' conclusion (Pet. App. 169-170) that petitioners' discovery of the alleged health hazards caused by the wooden foundations did not delay the accrual of their APA claim. Petitioners contend that their claim did not accrue, and the six-year statute of limitations did not begin to run, until 1997 when petitioners discovered the allegedly "serious health risks," Pet. 40, created by the chemically treated wooden foundations and when they "grasped the full impact of HUD's decision," Pet. 41. Petitioners identify no disagreement among the circuit courts, nor do they identify any serious conflict with this Court's authority. But see *ibid.* (asserting that court of appeals' decision fails to recognize that "the search for truth" is important in the statute of limitations context) (quoting *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979)). Thus, petitioners seek only error correction, for which certiorari is unwarranted. See Sup. Ct. R. 10.

In any event, petitioners' claim lacks merit, even assuming that a discovery rule delays the accrual of claims under the APA (something no court appears to have held). Under the usual discovery rule, a claim accrues, and the statute of limitations begins to run, "when the litigant first knows or with due diligence should know facts that will form the basis for an action." *Merck & Co., Inc.* v. *Reynolds*, 130 S. Ct. 1784, 1794 (2010). As petitioners explain, on remand they "claimed that the construction of 156 homes did not comply with HUD regulations or with the generally accepted [housing construction] practices *at the time of construction*." Pet. 8 (emphasis added). If, as petitioners contend, HUD mandated the use of wooden foundations, "over the objection of tribal members," Pet. 3 (citation omitted),

then plaintiffs knew (or should have known) at the time of construction all the facts that would have been the basis for their APA action. That petitioners may have learned of other, health-related injuries later, see Pet. 40, does not excuse petitioners' failure to bring suit within the applicable statute of limitations.

b. Petitioners also seek (Pet. 41-43) error correction of the court of appeals' determination that, because petitioners identified "no instances in which HUD failed to comply with a specific obligation imposed by law," the district court properly "rejected [petitioners'] claim that HUD wrongly denied, or failed to respond to, various requests" by homeowners or the Authority to repair the houses. Pet. App. 170. That determination is correct, see n.*, *supra*, and merits no further review.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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