No. 04-1481

In the Supreme Court of the United States

KEVIN O'ROURKE, PETITIONER

v.

SMITHSONIAN INSTITUTION PRESS, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Smithsonian Institution is "the United States" for purposes of 28 U.S.C. 1498(b), which vests exclusive jurisdiction over copyright claims against "the United States" in the Court of Federal Claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1061-1081) is reported at 399 F.3d 113. The opinion of the district court (Pet. App. 1a-6a) is reported at 296 F. Supp. 2d 434.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2005. The petition for a writ of certiorari was filed on May 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 28 U.S.C. 1498(b), if a copyright is infringed "by the United States" or by "a corporation owned or controlled by the United States, or by a contractor, sub-contractor, or any person, firm, or corporation acting for"

the United States, the copyright holder's "exclusive remedy" is to bring "an action * * * against the United States in the Court of Federal Claims." 28 U.S.C. 1498(b).

2. a. The President of the United States, the Chief Justice of the United States, and the heads of the executive departments "are constituted an establishment by the name of the Smithsonian Institution," 20 U.S.C. 41, which is a "trust instrumentality of the United States," Pet. App. 1064. Established by an Act of Congress in 1846, the Smithsonian was created "for the faithful execution" of the last will and testament of James Smithson, who bequeathed money to the United States "to found * * * an establishment for the increase and diffusion of knowledge among men" (Act of Aug. 10, 1846, ch. 178, 9 Stat. 102); see Pet. App. 1070-1071.

The Smithsonian is managed and largely funded by the federal government. The Smithsonian's affairs are conducted by a seventeen-member Board of Regents. Eight of the regents are *ex officio* high-ranking federal officials: the Vice President, the Chief Justice of the United States, three members of the Senate, and three members of the House of Representatives. See 20 U.S.C. 42. The remaining nine regents are citizens appointed by joint resolution of Congress. 20 U.S.C. 43. The President or, in his absence, the Vice President presides over meetings of the Board. 20 U.S.C. 45.

In addition, the original Smithson trust fund is held and managed by the United States Treasury. Pet. App. 1073. More than two-thirds of the Smithsonian's workforce of 6300 are federal employees, and more than two-thirds of its operating budget is derived from federal appropriations. *Id.* at 1072, 1073. Attorneys from the U.S. Department of Justice represent the Smithsonian when it is sued. *Ibid.* When judgments are entered against the Smithsonian, they

are paid from the United States Judgment Fund, a fund created by Congress to pay judgments entered against the United States. *Id.* at 1073-1074.

b. Congress has authorized "appropriations * * * for" the Smithsonian's "preparation of manuscripts * * * for publications." 20 U.S.C. 53(a). Until it was closed on December 31, 2004, the Smithsonian Institution Press was the publishing arm of the Smithsonian. The Press was not a distinct legal entity, but was an internal division of the Smithsonian. Pet. App. 1065, 1072.[1]

3. Petitioner filed a copyright infringement action in the District Court for the Southern District of New York against the Smithsonian Institution and the Smithsonian Institution Press (together, "the Smithsonian"). Petitioner alleged that he wrote and holds a copyright in a book entitled *Currier and Ives: The Irish and America* (1995), and that the Smithsonian infringed that copyright when it published a book entitled *Currier and Ives: America Imagined* (2001). Pet. App. 2a.

The district court dismissed the case for lack of subject matter jurisdiction. Pet App. 6a. Observing "the close relationship" between the United States and the Smithsonian, the district court concluded that the Smithsonian is "the United States for purposes of Section 1498(b)" and, therefore, that the Court of Federal Claims had exclusive jurisdiction over the action. *Id.* at 3a, 6a (internal quotation marks omitted).

4. The court of appeals affirmed. Pet. App. 1061-1081. The court explained that, although neither Section 1498(b) nor its legislative history expressly mentions the Smithsonian, the Smithsonian's "creation, governance, and

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[1] The Smithsonian now contracts with third parties to produce publications.

operations * * * provide ample indicia that Congress intended § 1498(b)'s reference to 'the United States' to encompass the Smithsonian." Pet. App. 1070. The court rejected petitioner's argument that it should apply the reasoning of *Dong* v. *Smithsonian*, 125 F.3d 877 (D.C. Cir. 1997), cert. denied, 524 U.S. 922 (1998), in which the D.C. Circuit concluded that the Smithsonian was not subject to the Privacy Act. The court explained that, unlike Section 1498(b), which applies to "the United States," the Privacy Act applies only to "agenc[ies]," and therefore that *Dong*, as well as other cases interpreting statutes different from Section 1498(b), provided little aid in determining whether the Smithsonian falls within Section 1498(b). Pet. App. 1075-1080.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. The court of appeals' ruling is the first appellate decision to address whether the exclusive jurisdiction provisions of Section 1498(b) apply to the Smithsonian. Contrary to petitioner's claims, the court of appeals' decision in this case does not conflict with the D.C. Circuit's decision in *Dong* v. *Smithsonian*, 125 F.3d 877 (D.C. Cir. 1997). *Dong* did not involve the question whether the Smithsonian is "the United States" under section 1498(b); the question in *Dong* was whether the Smithsonian is an "agency" under the Privacy Act, 5 U.S.C. 552a. The D.C. Circuit concluded the Smithsonian is not an "agency" because the Smithsonian is not within the Executive branch, is not a corporation, and does not enjoy "substantial independent authority" to "take final and binding action

affecting the rights and obligations of individuals." *Dong*, 125 F.3d at 881. Nothing about that conclusion conflicts with the court of appeals' determination in this case that the Smithsonian is included within the phrase "the United States" as used in Section 1498(b).

2. The court of appeals correctly concluded that the Court of Federal Claims has exclusive jurisdiction over claims that the Smithsonian violated a copyright held by another.

a. Since its establishment in 1846, the Smithsonian Institution has been functionally a part of the federal government. The Treasury holds and manages the Smithsonian's original trust fund. The Vice President and the Chief Justice of the United States, as well as six members of Congress, are members of the Smithsonian's Board of Regents. Two-thirds of the Smithsonian's budget derives from federal appropriations, and two-thirds of the Smithsonian's workforce of 6300 are federal employees. Moreover, the Smithsonian is represented in litigation by the U.S. Department of Justice, and judgments against the Smithsonian are paid from the United States Judgment Fund. 20 U.S.C. 41-43, 45; Pet. App. 1072-1074.

Under these circumstances, the court of appeals correctly concluded that the Smithsonian is part of "the United States" and, accordingly, that the sole recourse for an individual claiming a copyright violation by the Smithsonian is to bring a suit against the United States in the Court of Federal Claims. See *Dolmatch Group, Ltd.* v. *United States*, 40 Fed. Cl. 432, 436 (1998) (treating contract actions against the Smithsonian as claims against "the United States" for purposes of the Tucker Act, 28 U.S.C. 1491(a)); see also *Johnson* v. *Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999) (treating the Smithsonian as a "federal agency" for purposes of the FTCA); *Genson* v. *Ripley*, 681

F.2d 1240, 1241-42 (9th Cir.) (same), cert. denied, 459 U.S. 937 (1982); *Expeditions Unlimited Aquatic Enter.* v. *Smithsonian Inst.*, 566 F.2d 289, 296 (D.C. Cir. 1977) (same), cert. denied, 438 U.S. 915 (1978).

The court of appeals' conclusion also accords with the purpose of Section 1498(b). Under Section 1498(b), only the United States can be sued for copyright violations committed by its employees, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the United States. 28 U.S.C. 1498(b). Thus, Section 1498(b) protects from liability all persons engaged in the production and publication of creative works "for the benefit of the Government." S. Rep. No. 1877, 86th Cong., 2d Sess. 3 (1960) (quoting H. R. Rep. No. 624, 86th Cong., 1st Sess. (1960)). As the court of appeals recognized (Pet. App. 1073), the Smithsonian's publishing operations are performed at the behest of, and for the benefit of, the government. See 20 U.S.C. 53(a). Accordingly, the court of appeals' conclusion that Section 1498(b) encompasses the Smithsonian is entirely consistent with the Congressional purpose underlying the provision.

b. Petitioner nonetheless contends (Pet. 2) that the phrase "the United States" in Section 1498(b) excludes federal trust entities like the Smithsonian, citing a provision in Section 1498(b) authorizing "the head of the appropriate department or agency" to settle copyright infringement claims before litigation. 28 U.S.C. 1498(b). According to petitioner, because this settlement provision applies only to agencies and departments, Section 1498(b)'s reference to "the United States" must also be deemed to include only agencies and departments. Therefore, petitioner contends, because the Smithsonian is neither a department nor an

agency, it does not fall under Section 1498(b)'s jurisdictional provision.

As an initial matter, petitioner did not raise this argument in the district court, and the court of appeals did not address it. This Court should not pass on it in the first instance. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

In any event, petitioner's argument lacks merit. By its terms, Section 1498(b)'s jurisdictional provision is not limited to claims for copyright violations committed by agencies and departments; the provision authorizes suits against the United States for infringement committed by any part of "the United States." Had Congress wished to limit the jurisdictional grant to violations committed by agencies and departments, it would have expressly done so, as it did in the settlement provision. See *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2754 n.9 (2004). Under petitioner's reading, moreover, the United States could be sued for copyright infringement committed by any contractor, subcontractor, person, firm, or corporation "acting for the Government," 28 U.S.C. 1498(b), or by any of its agencies or departments; but it could not be sued for violations committed by other governmental entities. Petitioner offers no explanation for that improbable result.

3. Finally, review is inappropriate because the question whether Section 1498(b) applies to the Smithsonian arises only infrequently; apart from this litigation, only one unpublished district court case addresses the issue. See *Brundin* v. *United States*, No. 95-Civ.-2689, 1996 WL 22370, at *7-*8 (S.D.N.Y. Jan. 19, 1996) (concluding that Section 1498(b) includes the Smithsonian). In addition, given the Smithsonian's unique structure and mission, it is unlikely that resolving whether the Smithsonian is covered

by Section 1498(b) would provide significant guidance for determining the applicability of Section 1498(b) to other government entities. Accordingly, the question presented does not warrant this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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