

No. 18-155

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

NATIONAL VETERANS LEGAL SERVICES PROGRAM; NATIONAL
CONSUMER LAW CENTER; and ALLIANCE FOR JUSTICE;
for themselves and all others similarly situated,

Plaintiffs-Petitioners,

v.

UNITED STATES OF AMERICA,

Defendant-Respondent.

**RESPONSE TO PLAINTIFFS' PETITION FOR PERMISSION FOR
INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)**

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On the government's motion, the district court certified its summary judgment order for interlocutory appeal. Because the summary judgment order rejected the positions taken by both parties, both sides filed timely 1292(b) petitions in this Court. Although the government does not agree with plaintiffs' position on the merits, the government does not object to this Court's consideration of plaintiffs' petition. On the contrary, this Court should consider all of the controlling legal issues now—including the threshold question of Little Tucker Act jurisdiction—to avoid the unnecessary expenditure of resources on further proceedings.

We note that plaintiffs' petition incorrectly states (at 5) that the government should be treated as an "appellee" before this Court. Pursuant to 28 U.S.C. § 1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure, the government filed a petition in this Court within 10 days of the certification order. Thus, if this Court grants the petition, the government will be an appellant. In arguing to the contrary, plaintiffs mistakenly rely on *Tristani ex rel Karnes & Richman*, 602 F.3d 360, 366 (3d Cir. 2011). That case concerned Rule 5(b)(2), which provides that a respondent may file a cross-petition within 10 days of being served with a petition. The Third Circuit held that the cross-petition requirement in Rule 5(b)(2) is not jurisdictional, *see id.* at 365-66 & n.5, but noted that its "holding with respect to our jurisdiction under § 1292(b) should not be understood to imply that cross-appeals may be omitted with impunity," *id.* at 366 n.6. That analysis has no bearing on these proceedings because the government filed a timely petition under Rule 5(a).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with Federal Rule of Appellate Procedure 5(c)(1) because it contains 273 words. The response was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Alisa B. Klein

Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2018, I filed the foregoing response using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

s/ Alisa B. Klein

Alisa B. Klein