No. 14-1413

In The

Supreme Court of the United States

MINISTERIO ROCA SOLIDA, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF OF PETITIONER

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RULE 29.6 STATEMENT

Ministerio Roca Solida, Inc., is a non-profit religious organization incorporated in the State of Nevada with 501(c)(3) status. No parent or publicly owned corporation owns 10% or more of the stock in Ministerio Roca Solida, Inc.

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REPLY TO BRIEF IN OPPOSITION

"Government lawyers can and do give sustained attention to contriving technical ways to defeat plaintiffs . . . government counsel, driven by a lawyer's natural desire to win cases, persuade courts to create and maintain technical complexities, which they then use to win more cases."[1] Thus, not surprisingly, the United States has come to use 28 U.S.C. § 1500 "not as a shield to avoid duplicative litigation, but as a sword to escape its statutory and constitutional obligations."[2]

However, as applied in this case, the contorted interpretation of 28 U.S.C. § 1500 the United States attorneys were able to wrestle from the Court in *Tohono*,[3] runs afoul of the constitution. For here, the new interpretation of § 1500 conflicts with explicit, self-executing constitutional rights – rights for which Congress holds no authority to deprive via jurisdictional (or any other) statutes and rights for which this Court must thus now intervene in order to curtail the constitutional carnage resulting from the government using its "sword to escape . . . constitutional obligations."

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[1] Brief for the CATO Institute and The National Association of Reversionary Property Owners as *Amicus Curiae* in Support of Petitioner at 11-12 (quoting Emily S. Bremer and Jonathan R. Siegel, *The Need to Reform 28 U.S.C. § 1500* (2012).

[2] *Id.* at 2.

[3] *United States v. Tohono O'Odham Nation*, 131 S.Ct. 1723 (2011).

Desperate, however, to see its "sword" remain untarnished and unlimited even as against constitutional constraints, the United States in its opposition brief resorts to misdirection in an attempt to divert this Court's attention from the "substantial constitutional question" at issue herein and as identified by the Federal Circuit in its concurring opinion.

SUMMARY OF THE ARGUMENT

The United States' attempts at misdirection come in two common forms: (1) that of baiting the Court with one red herring upon which the United States hopes this court will be "distracted;" and (2) erection of a straw man by which the United States hopes this Court will be "confuted." This Court should not be distracted or confuted and, thus, should instead grant certiorari.

ARGUMENT

I. *CAPPAERT* IS A RED HERRING.

> RED HERRING: 1: a herring cured by salting and slow smoking to a dark brown color; 2: [from the practice of drawing a red herring

> across a trail to confuse hunting dogs]: *something that distracts attention from the real issue.*[4]

As to its red herring of irrelevance, in a relatively short Opposition, the United States devotes several pages of its Statement of the Case to *Cappaert v. United States*, 426 U.S. 128 (1976). The implication apparently being that Petitioner's vested water rights do not exist and therefore its right even to pursue a takings claim is apparently frivolous. Mention of this case, however, is procedurally untimely as well as legally and factually irrelevant.

A. The Issue of Vested Rights is Procedurally Premature, Not on Appeal and Not Currently Relevant.

Whether Petitioner has vested water rights superior to those of the United States is, of course, not even before this Court. As stated by the Federal Circuit in its concurrence below, this Court "must assume on the motion to dismiss . . . [the loss of water] might be a taking of its property." Pet. App. at 15-16.

The case was dismissed solely on jurisdictional grounds. The issue of whether Petitioner's vested water rights are superior to any of those which may or may not be held by the United States was not

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[4] http://www.merriam-webster.com/dictionary/red%20herring (emphasis added) (last viewed October 13, 2015).

raised or addressed below at either the Court of Claims or the Federal Circuit below. Certainly no trial or appellate court below has yet addressed this fact-intensive question. Rather, the case was dismissed below and that dismissal affirmed by the Federal Circuit because the myriad constitutional claims suffered by Petitioner "emerged from the same fact pattern" and, therefore, under *United States v. Tohono O'Odham Nation*, 131 S.Ct 1723 (2011), claims were deemed by the courts below as "the same claim" simply for that reason, all despite the lack of non-overlapping relief sought by Petitioner and/or Petitioner's inability to be made whole absent pursuing multiple claims in more than one federal court.

As discussed further below, even in its own "*strawmanesque*" reformation of the *question presented* as to whether Petitioner can bring the "same takings claim" in two suits against the United States, the issue of whether Petitioner has viable vested water rights is irrelevant to this appeal.

B. *Cappaert* is Neither Factually nor Legally Relevant.

Aside from being irrelevant to the questions on appeal, *Cappaert* is also legally and factually irrelevant as caselaw, generally.

Devil's Hole, the subject matter of *Cappaert*, is a deep cavern (in an altogether different watershed) on federal land in Nevada containing an underground pool inhabited by a different species of desert fish. In

Cappaert, neighboring landowner(s) began pumping *previously* ***unappropriated groundwater*** coming from the same groundwater source as the water in Devil's Hole, thereby physically impacting and reducing the water level in Devil's Hole and endangering said fish. In the instant case, the United States itself diverted the Church's *previously* ***appropriated surface*** *water* to which Petitioner has vested rights away from its historic path and, as previously briefed, subsequently flooded Petitioner with the surface water from that negligently diverted stream.

C. Even if Applied, *Cappaert* Favors Petitioner.

Even if, *arguendo*, this Court were to somehow attempt to apply the facts and law of *Cappaert* to the instant case and at this juncture, it is precedent that could only favor Petitioner. Contrary to *Cappaert*, Petitioner did nothing on their private land which interfered with any groundwater rights the United States may hold.

Rather and to the contrary, the United States made alterations to *its* land, creating a diversion dam that *physically impacted Petitioner's property and surface water* – water which historically flowed across Petitioners fee simple private property, first denying Petitioner access to the water to which it had vested rights and then flooding the Petitioner with said water. It warrants mention that these actions by Respondent were executed: (1) absent compliance

with Army Corps permitting requirement for such actions even at the same time the diversion dam resulted in destruction of a wetland previously on Petitioner's property, a wetland documented to exist as early as 1881 according to the government's own surveys; and (2) absent compliance with FEMA regulations administered by Nye County, Nevada.

The United States' actions with federal land thus affected a "taking" of Petitioner's surface water rights – rights which vested more than a hundred years ago and which pre-existed United States' Fish and Wildlife's occupation of the land now known as Ash Meadows and were never transferred to Respondent by any previous owner.

Even if, contrary to all logic, the facts of *Cappaert* could somehow be likened to those of the instant case in Respondent's favor, it bears repeating that, as a procedural matter, the issue of vested rights is not before this Court as neither the trial court nor appellate court have made any findings or affirmances as to ownership of the vested waters Petitioner alleges to have been taken by the United States.

II. THE STRAW MAN NOW CONCOCTED BY THE UNITED STATES IS NOT NOW NOR HAS IT EVER BEEN THE CRUX OF THIS CASE.

> STRAW MAN: 1: *a weak or imaginary opposition (as an argument or adversary) set up only to be easily confuted*; 2: a person set up

> to serve as a cover for a usually questionable transaction.[5]

Because there is no choice for the United States but to concede that the *Tohono* court's interpretation of 28 U.S.C. § 1500 must be restricted when applied to the facts of this case, the United States has instead reformulated the question presented and mischaracterized this case as one simply relating to the "same takings claim" filed in more than one federal court.

The United States' "strawmanesque" reformation of the question presented as to whether Petitioner can bring the "same takings claim" in two suits against the United States is without merit and is not and has never been the decisive issue (crux) in this case. Uncloaking the straw man that it certainly is may be done easily and for reasons even aside from the fact that at every juncture, the takings claim filed at the Court of Claims has been scrutinized under the *Tohono* rationale that "claims" are the same if they emerge from the same operative facts. This is because the specter of *Tohono* necessarily haunts this case, from its inception and even up to the present.

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[5] http://www.merriam-webster.com/dictionary/straw%20man (emphasis added) (last viewed October 13, 2015).

A. The Takings Claims are Not "the Same."

Like each of the other constitutional claims, the takings claims filed in each of the courts also seek non-overlapping relief. A takings claim under $10,000 would have remained in the district court whereas a claim greater than that amount would have been prosecuted solely in the court of claims.

The Federal Circuit's concurring opinion deemed this the sensible and perhaps only way possible to proceed. "Roca Solida has proceeded in what appears to be a sensible way, perhaps the only way possible under federal statutes, to try to secure complete judicial relief for the water diversion that it claims was unlawful on several grounds, including several constitutional grounds." Pet. App. at 17. Thus, for protection against a running of the statute of limitations on a 2010 government deprivation, Petitioner filed its August 2012 Complaint in the U.S. Court of Federal Claims and therein requested that court to stay those proceedings pending resolution of Petitioner's due process, free exercise, FTCA claims, and declaratory and injunctive relief sought before the U.S. District Court.

As detailed in Petition at 7-11, despite all due diligence by Petitioner, the six-year statute of limitations will now certainly expire in August 2016 prior to the resolution of Petitioner's district court claims (not to mention the Ninth Circuit's appellate process) and is critical to the understanding of the injustice visited upon Petitioners and the substantial constitutional

question raised by the lower courts' *Tohono*-construed application of 28 U.S.C. § 1500.

Because those claims seek non-overlapping relief, except as under the challenged *Tohono* rationale, they are thus not "the same claims."

B. Even if, *Arguendo*, the Takings Claims Were Deemed "the Same," the Substantial Constitutional Question Raised by This Case and Identified by the Federal Circuit Remains and Demands This Court's Granting of Certiorari.

It is only because the United States has argued vehemently and strenuously from the outset that *any* claim arising from the same fact pattern constitutes a claim now barred by § 1500 and the courts below have submissively applied that interpretation of this Court's *Tohono* ruling, that Petitioner cannot now withdraw its takings claim from the District Court without risking $10,000, even though the value of Petitioner's claim has now well exceeded the $10,000 jurisdictional limit of the District Court.

This is because the specter of *Tohono* haunts this case, even up to the moment. Given the decisions and rationale of the courts below, Petitioner would be left with absolutely no relief for the taking if he withdrew the Little Tucker Act claim, 28 U.S.C. § 1346(a)(2), in the District Court, even though that claim has now become grossly undervalued and tragically truncated to an amount not exceeding $10,000.

Given that the United States has argued from the outset that any claim arising from the water diversion project may not be brought in more than one federal court, to withdraw the claim from the District Court at this time because it is now more than $10,000, only to refile it in the Court of Claims, would draw the same scrutiny and objections from the United States that it has to date. That is, *any* takings claim, if emerging from the same fact pattern as its other constitutional claims (or arising from same the water diversion project as in this case), must be brought in the same federal court, irrespective of whether § 1500 as now interpreted by the lower courts' application of *Tohono,* prohibit any one court from adjudicating all those claims and irrespective of whether any single court may make Petitioner whole.

Because the taking complained of in both the district court and court of claims is now more than five years old, it has easily exceeded the jurisdictional amount allowed for in the Little Tucker Act by the U.S. District Court. Absent *Tohono* and the court of claims and Federal Circuits rationales and holdings applying Tohono to its case, Petitioner would have voluntarily dismissed the takings claim in the district court and proceeded with its claim in the U.S. Court of Federal Claims. However, because of the *Tohono* specter, to do so would not only result in being dismissed for the same reasons yet again (under the *Tohono* rationale again justifying that dismissal as the $10,000+ takings claim still must be dismissed insofar as it emerged from the same operative facts

(i.e., the negligent rerouting of the stream to which Petitioner has vested water rights)), but to forgo Petitioner's claim even for the $10,000 which would then be forever lost as the statute of limitation runs.

Although the United States makes mention that there may be alternative theories available to preserve all constitutional claims, counsel neglects to mention that Circuit Court Judge Taranto, in his concurrence, also went on to say that there is no clear path for relief in any of those alternatives.

While the United States also hopes to escape scrutiny on the fact the six-year statute of limitations has not yet and may not run, this Court should see that as the sham for which it is. The District Court, five years and three months after the alleged taking, has not yet even rendered its decision on the cross motions for summary judgment, much less scheduled a trial on the factual issues in dispute. Moreover, the Ninth Circuit's appellate process is, at minimum, eighteen months, thereby fully exposing the United States' non-imminence argument for what it is – a pretense.

CONCLUSION

The United States raises the red herring and strawman argument because it worked very hard to establish the *Tohono* "sword." This sword it uses extensively to dismiss cases that should not be dismissed and hopes to enjoy this panacea of constitutional immunity

going forward by directing the Court's attention away from the substantial constitutional question that this case presents and only this Court may address – whether government may force a client to abandon one constitutional right to vindicate another – an issue repeatedly decided in the negative by this Court but not yet applied in the post-*Tohono* context.

Summarizing, as did the Federal Circuit, "[t]he combination of three statutes – (1) § 1500 as construed in *Tohono*; (2) the Tucker Act's six-year statute of limitations, 28 U.S.C. § 2501, which is jurisdictional and not subject to general equitable tolling; and (3) the Little Tucker Act's $10,000 cap on just-compensation claims in district courts, 28 U.S.C. § 1346(a)(2) – threatens to deprive Roca Solida for what (we must assume on the motion to dismiss) might be a taking of its property" and presents "a substantial constitutional question." Pet. App. at 15-16. For all the aforementioned reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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