No. 15-802

IN THE

Supreme Court of the United States

RESOURCE INVESTMENTS, INC., LAND RECOVERY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

In *United States v. Tohono O'odham Nation*, 563 U.S. 307, 317 (2011), this Court reaffirmed the governing test for determining the Court of Federal Claims' ("CFC") jurisdiction under 28 U.S.C. § 1500: "two suits are for or in respect to the same claim when they are 'based on substantially the same operative facts.'" In its decision here, the Federal Circuit read the word "substantial" out of the test, adopting instead a standard that strips the CFC of jurisdiction whenever there is a single, common operative fact.

The Federal Circuit began its path toward this erroneous conclusion by seizing on this Court's aside in *Tohono* that its reading of § 1500 was supported by historical res judicata principles. Not content to apply these older res judicata tests, the panel then "inform[ed]" its analysis by applying the modern res judicata test, which bars all claims "with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Pet. App. 12a-13a. Presto, the requirement of substantial overlap of operative facts was transmogrified into a "but for" test, where one shared seed fact will now trigger application of this draconian jurisdictional statute.

That ruling simply cannot be defended. So, it's little surprise that the Government does not even attempt to defend the Federal Circuit's revamping of the *Tohono* standard. Instead, the Government turns a blind eye to what the Court actually held. Try as it might, the Government cannot avoid the Federal Circuit's holding. The court of appeals expressly

concluded that the CFC lacked jurisdiction under § 1500 because the claims in the "two actions *relate to the same underlying transaction*." Pet. App. 16a (emphasis added). This Court should grant review to remedy this astonishing deviation from settled precedent.

Further, this Court should grant certiorari to address whether § 1500 can be properly construed and applied to bar constitutional claims. Such an interpretation raises serious constitutional concerns. At a minimum, clear Congressional intent is required before reading the statute to preclude bona fide constitutional claims.

The Government does not dispute that a clear intent is required before reading a statute to preclude constitutional claims; and the generic language and history to which the Government points do not even come close to meeting that standard. The Government resorts instead to arguing that a plaintiff may not necessarily have its constitutional claim cut off by the statute. That is, of course, little solace to property owners such as Petitioners here that have litigated diligently and followed governing authority, only to have their claims thwarted by the Federal Circuit's reading of § 1500.

This case, thus, squarely raises both the wholly improper reading of § 1500 and the unresolved but important issue of whether the statute was intended to, and can, preclude constitutional claims. Thus, the writ should be granted.

ARGUMENT

I. This Court's Review Is Needed To Remedy The Federal Circuit's Transformation Of This Court's "Substantial Overlap Of Operative Facts" Test Into A Much Broader, Draconian Standard.

In *Keene Corp. v. United States*, this Court held that two suits "are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts." 508 U.S. 200, 212 & n.6 (1993). In our cert. petition, we detailed how the Federal Circuit reinterpreted the test set out in *Keene* and reaffirmed in *Tohono*. Cert. Pet. 11-16. Rather than adhere to this Court's straightforward framework, the Federal Circuit embraced a transactional test that inquires whether two claims arise from the same transaction. Pet. App. 12a-16a. That deviation allowed the court of appeals to hold, as it did here, that even if two cases have little in common except a single seed fact, the CFC has no jurisdiction under § 1500.

The Government does not even attempt to defend the transactional test. Instead, its approach is one of denial, claiming Petitioners "significantly misread the court of appeals' decision." BIO 14. But the linguistic contortions the Government employs to arrive at that conclusion prove otherwise.

The Government first asserts that though "the court looked to claim-preclusion principles, it emphasized that the *appropriate* analysis was 'narrower than the modern transactional test.'"

BIO 15 (emphasis added). While the panel acknowledged the older tests are narrower than the modern test, Pet App. 12a, nowhere did it characterize them as being the "appropriate" ones. On the contrary, the court explained that its analysis was "inform[ed]" by applying the *modern* res judicata test. Pet. App. 12a. And this was not some passing, academic rumination. The panel spent four pages discussing the transactional test and analyzing cases applying it. Pet. App. 10a, 12a.-16a.

The Government then points to the panel's references to *Trusted Integration, Inc. v. United States*, 659 F.3d 1159 (Fed. Cir. 2011), as proof that it applied the appropriate test. BIO 15-17. But that citation does not somehow obviate the Federal Circuit's clear adoption of the transactional test. Indeed, were there any lingering uncertainty as to what test the court adopted and applied, the panel made it explicit, holding that "the two actions [at issue] *relate to the same underlying transaction* and § 1500 [therefore] bars the Claims Court action here." Pet. App. 16a (emphasis added); *see also* Wright & Miller, 17 Fed. Prac. & Proc. Juris. § 4101 (3d ed.) (characterizing the Federal Circuit as holding that "*but for* denial of the permit, owners would not have been able to assert claims in either suit") (emphasis added).

Had the Federal Circuit cared about "substantial overlap," it would have identified the relevant operative facts material to both the Administrative Procedure Act ("APA") and the constitutional takings claims and articulated the nature of the substantial

overlap. Of course, it did not do that. Had it done so, Petitioners' claims could not have been dismissed.

There is no escaping the dramatic jurisprudential shift that occurred in this case. This Court should grant review to remedy this plain deviation from precedent and, in doing so, prevent many other valid claims from being dismissed under the Federal Circuit's misguided expansion of the scope of § 1500's jurisdictional bar.

II. This Court Should Grant Certiorari To Review The Constitutional Question Left Open In *Tohono*.

As Federal Circuit Judge Taranto has explained, if § 1500 is read to apply to constitutional claims, the intersection of the jurisdictional and limitations rules will, as they have here, "deprive [property owners] of the opportunity to secure complete relief for what [would] be a taking of its property." *Ministerio Roca Solida v. United States*, 778 F.3d 1351, 1357 (Fed. Cir. 2015) (Taranto, J., concurring). The question of whether the statute should be read to bar substantial constitutional takings claims "raise[s] serious questions concerning [its] constitutionality." *Johnson v. Robison*, 415 U.S. 361, 366 (1974). This Court's review is therefore required.

The Government does not dispute that the question of § 1500's application to constitutional claims was squarely left open by *Tohono*.[1] Instead, it

[1] The Government suggests that *Keene* resolved the question. BIO 20-21. But this Court was not asked to nor did it address that question in *Keene*. The Government acknowledged

responds by claiming to answer the question, asserting that Congress *did* intend to cut off constitutional claims. The Government's flawed merits-based response simply evinces why certiorari review is necessary.

A. There is no evidence, much less clear evidence, that Congress intended to cut off constitutional claims when it enacted § 1500.

The doctrine of constitutional avoidance requires that in the absence of "clear" evidence of Congressional intent, courts should not read statutes to "preclude judicial review of constitutional claims." *Webster v. Doe*, 486 U.S. 592, 603 (1988). The Government asserts in its opposition that § 1500's "broad and unqualified use of the phrase 'any claim'" satisfies the "clear" evidence standard. BIO 19-20. But time and again, this Court has explained that unqualified statutory language on its own does not suffice to demonstrate Congressional intent to bar constitutional claims. In *Johnson v. Robison*, for example, this Court held that a statute barring judicial review of Veterans' Administration "decisions … on *any question of law or fact*" did not apply to constitutional claims because there was no "clear and convincing" evidence of congressional intent to bar such claims. 415 U.S. at 367 (emphasis

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as much in *Tohono* when it explained that this unresolved constitutional question "would raise a number of issues" not presented in the case of statutory claims. Reply Brief of the United States, *United States v. Tohono O'odham Nation*, No. 09-846, 2010 WL 4114158, at *17 (U.S. Sept. 27, 2010).

added). In *Bowen v. Michigan Acad. of Family Physicians*, this Court approved adjudication of constitutional claims notwithstanding statutory language providing that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought." 476 U.S. 667, 679 (1986). And, in *Webster*, it did likewise where the statute conferred upon the CIA Director complete discretion to "terminate the employment of any officer or employee of the" CIA. 486 U.S. at 594. Accordingly, contrary to the Government's argument, such generic statutory language does not suffice to preclude a substantial constitutional claim.

The Government nonetheless posits that because § 1500 was a "robust response" to the "problem first presented by the cotton claimants," the "Congress that enacted Section 1500's predecessor would not have intended the statute to allow cotton claimants to pursue constitutionally grounded claims while simultaneously pursuing related claims in other courts." BIO 20. But the Government's argument is contrafactual. Those historic claims were statutory and tort claims, not constitutional claims. *See Johns-Manville Corp. v. United States,* 855 F.2d 1556, 1561 (Fed. Cir. 1988) (recognizing that the civil war-related claims were tort claims and claims arising under the Abandoned Property Act). Thus, there is no reason to think the original drafters had constitutional claims in mind, let alone expressed a clear intent to bar a plaintiff from any forum to adjudicate a substantial constitutional claim.

The requirement of a clear intent is even more important here where the statute is being employed

to extinguish substantial constitutional takings claims. Indeed, it is questionable whether Congress even has the power to thwart such constitutional claims by restricting subject-matter jurisdiction. *See Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) ("while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as … to take private property without just compensation").

With no indicia of clear intent to preclude constitutional claims, the Government leaps to a policy argument in favor of barring constitutional takings claims, saying that doing so furthers the statute's goal against redundant litigation. BIO 20. Such naked policy arguments do not however come close to satisfying the *Webster* "clear intent" standard. It also lacks any factual foundation. The takings litigation in the CFC here was not redundant with the APA action. The issues were distinct, the operative facts were distinct (even accepting the one seed fact of the denial of a permit), and the record in each case was very distinct. Cert. Pet. 15 n.9.

Thus, none of the Government's arguments can withstand scrutiny. The question of whether § 1500 reaches constitutional claims, absent clear intent, is a vital issue. It is plainly presented by this case, impacts other claimants with takings claims, and requires this Court's prompt resolution.

B. Petitioners have been involuntarily deprived of their right to pursue their takings claim and similarly situated litigants will face the same threat going forward.

Having little defense of a construction of the statute to thwart constitutional takings claims, the Government contends there is no real threat. BIO 21-24. That is puzzling given that Petitioners have no recourse available to them to recover on their substantial constitutional takings claim due to the expiration of the statute of limitations. The Government does not contest this point, nor could it. Instead, it claims Petitioners may have avoided the import of the Federal Circuit's decision if it pursued a different path twenty years ago. BIO 22-23.

To be clear, the Government never claims—and cannot claim—that Petitioners have done anything but litigate their claims diligently pursuant to governing law at the time, namely *Loveladies Harbor, Inc. v. United States,* 27 F.3d 1545, 1548-1549 (Fed. Cir. 1994) (en banc). BIO 8. The reason the claims have been thwarted today is due to the Federal Circuit's deviation from *Tohono*'s "substantial overlap" test, not anything Petitioners did wrong. So, the Government's finger-pointing is not only inappropriate but irrelevant to the question of whether § 1500 should be construed to reach constitutional claims.

The Government's assertion is also quite ironic given that, even with the benefit of hindsight, the Federal Circuit and the Government still cannot

agree on the precise paths that were available or would have been potentially successful in preserving the takings claim. The Government "continues to maintain that *Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943 (Cl. Ct. 1965) should be overruled" and thus disavows the Federal Circuit's conclusion that filing first in the CFC would have saved Petitioners from the trap that is § 1500. BIO 24. Having eschewed *Tecon*, the Government nonetheless identifies other options. It claims Petitioners should have waited to file until after the APA action concluded or dismissed and refiled the CFC action at that point. BIO 22-23. But, as we have explained, Petitioners were appropriately concerned the Government might argue their statute of limitations already expired. Cert. Pet. 5 n.4, 26-27 n.14. In any event, even if these were available options, under governing law at the time, so too was the one Petitioners pursued. It is then utter fiction to suggest Petitioners were not involuntarily deprived of their constitutional right when the Federal Circuit deviated from *Tohono* to treat the two distinct claims as the same for the purposes of § 1500.

As to the impact on other litigants, the Government asserts that "a litigant who promptly pursues APA review … can normally be expected to complete the litigation before the CFC's six-year limitations period expires." BIO 22. That some litigants may be able to pursue their takings claim seriatim after the APA case (and all its appeals) is over is pure speculation. And even if that were the "norm" (though the Government supplies no proof), there will be a significant number of litigants that diligently pursue their APA claim and, due to no fault of their own, do not receive final resolution within

that six-year period.[2] Appeals, case reassignments, and slow judicial case management can, as here, add up quickly, without the plaintiff being at fault.

Even, assuming arguendo, that the government is right and only a minority, of such constitutional claims are precluded by § 1500, the question remains whether Congress intended the statute to preclude *any* substantial constitutional claim. This Court should grant review and resolve that important issue.

III. This Case Presents An Appropriate Vehicle For Resolving The Questions Presented.

This case presents a highly suitable vehicle for addressing the questions presented. The Government does not dispute that the issues here were clearly raised and addressed below. Nor does it dispute that the vehicle problems it identified in *Ministerio Roca Solida* are absent in this case. Moreover, the very nature of the claims here—being unique to actions

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[2] For example, in *Ministerio Roca Solida, Inc. v. United States*, plaintiffs explained that they were in jeopardy of forfeiting their constitutional claim because the statute of limitations under the Tucker Act would expire in August 2016 and their equitable action had not yet concluded. Petition for Writ of Certiorari, No. 14-1413, 2015 WL 3466000 (U.S. May 27, 2015), *cert. denied*, 136 S. Ct. 479 (2015). That remains the case today, as the district court recently denied the parties' summary judgment motions. *Ministerio Roca Solida, Inc. v. United States Dep't of Fish and Wildlife*, No. 12-cv-1488, Dkt. 69 (D. Nev. filed Mar. 30, 2016). A status conference is now set for May 27, 2016. *Id*. at Dkt. 70 (filed Apr. 19, 2016). Needless to say, plaintiff in that case will not have time to pursue any requisite appeal. Soon, it will be forced to make an election, unless this Court resolves the questions presented here.

filed in the CFC—means there is no possibility of a circuit split developing. The Government offers up instead a couple alternative arguments, none of which counsels against review.

There is no merit to the Government's contention that the only claim in Petitioners' original complaint was a permanent takings claim and that claim "lost all vitality" once the permit denial was vacated. BIO 18. Petitioners' CFC complaint also stated a temporary takings claim: "Even in the event the Corps' action is overturned by the federal courts, *plaintiffs have suffered a temporary taking of property which requires compensation*." A86 (emphasis added). And because Petitioners' temporary takings claim was included in their original complaint, it was properly filed within the governing statute of limitations. The only thing precluding that substantial constitutional claim today is the Federal Circuit's application of §1500 to bar jurisdiction.

Oddly, the Government also suggests that Petitioners' efforts to obtain discovery outside the administrative record during the APA proceeding somehow renders this case a poor vehicle. BIO 19. That contention is puzzling given that the district court rebuffed those efforts. Indeed, the Government's contention only underscores Petitioners' point that the litigation in the two actions was not redundant. *See supra* § II.A.

This case properly tees up the issues of the correct construction of § 1500 and the fundamental question of whether it should be read to apply to substantial constitutional takings claims. Property owners who

have been subject to the denial of a federal permit or otherwise been deprived of use of their land need this Court's guidance to prevent further deprivation of constitutional rights based on a misconstruction of both the statute and this Court's precedent.

CONCLUSION

Accordingly, this Court should grant certiorari and address both of the questions presented.

Respectfully submitted,

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