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 Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This brief addresses the second Question Presented:

Whether, in the absence of clear congressional intent to bar constitutional claims, 28 U.S.C. § 1500 should be construed to preclude Fifth Amendment takings claims and, if so, whether such an interpretation would be unconstitutional.

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INTEREST OF AMICUS CURIAE

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.[1] The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

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1. Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of amicus' intention to file this brief. Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, their members, or their counsel made a monetary contribution to its preparation or submission.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. Because small business owners typically invest substantial assets into acquisition of property for their entrepreneurial endeavors—often including their personal savings—it is imperative to ensure that their property rights are guaranteed meaningful protections, and that they are allowed access to federal courts when their rights have been violated. For this reason, NFIB Legal Center has taken a special interest in property rights cases. This case is important to NFIB Legal Center because section 1500 forces property owners with claims for just compensation and other claims which arise from the same operative facts to choose one form of relief, and abandon the others. Congress cannot limit the self-executing right to obtain just compensation by forcing owners to make this choice.

SUMMARY OF ARGUMENT

> *It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.*
>
> Abraham Lincoln[2]

In no other area of law is President Lincoln's declaration more applicable than takings, because just compensation is a self-executing constitutional imperative. Property owners must have a forum—whether the Court of Federal Claims or another federal court—to press a Fifth Amendment claim, a

2. Cong. Globe, 37th Cong., 2d Sess. app. at 2 (1861) (in remarks advocating for creation of the Court of Claims to have the power to render final judgments).

right not dependent on a waiver of sovereign immunity, and which cannot be limited by Congress. Yet, the Federal Circuit's application of section 1500 does just that, by forcing property to choose between obtaining compensation in the CFC, and obtaining nonmonetary relief in a district court, which is often a necessary step to ripening a claim for compensation.

This petition squarely presents the "substantial constitutional question"[3] left open by this Court in *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011). Namely, whether section 1500's jurisdictional bar can be rigidly applied in takings cases. The question presented here was foreseen in *Tohono* by Justice Sotomayor:

> After today's decision, § 1500 may well prevent a plaintiff from pursuing a takings claim in the CFC if an action to set aside the agency action is pending in district court. This type of plaintiff may face a choice between equally unattractive options: forgo injunctive relief in the district court to preserve her claim for monetary relief in the CFC, or pursue injunctive relief and hope that the statute of limitations on her takings claim, see 28 U.S.C. § 2501, does not expire before the district court action is resolved.

Tohono, 563 U.S. at 323-34 (Sotomayor, J., concurring). That is precisely what happened here to Petitioners, and what will keep recurring until this Court clarifies that the general rule of *Tohono* does not restrict CFC actions for just compensation.

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3. *Ministerio Roca Solida v. United States*, 778 F.3d 1351, 1357 (Fed. Cir. 2015) (Taranto, J., concurring).

Until then, Congress' grant of jurisdiction to the CFC to hear claims for just compensation in excess of $10,000 comes with a severe price tag: in order to pursue such a claim in the CFC, property owners must forfeit their rights to seek all other forms of relief that arise from the same operative facts, whether declaratory, injunctive, or equitable. A statute, however, cannot override the constitutional command to provide just compensation when property is taken, and Congress cannot limit what the Fifth Amendment commands.

Section 1500 should not be read to do so. The statute cannot be applied in a way that deprives property owners of the only forum in which they may seek such damages simply because they may also wish to assert nonmonetary claims, and must split between the CFC and the district courts claims for relief which—but for allocation of jurisdiction between the district courts and the CFC—otherwise could be determined in a single action. Congress did not provide the CFC with jurisdiction to award just compensation, only to condition it on the surrender of the right to pursue other claims for relief.

This brief argues that application of section 1500 to takings cases forces private property owners into an unconstitutional choice: either they must forfeit their ability to challenge the validity of the regulation, or they must surrender their right to seek just compensation. An action asserting the Government unconstitutionally impacts property must be split between the district courts, which have exclusive jurisdiction to entertain claims that the regulations fail to "substantially advance a legitimate state interest" (due process) or is otherwise invalid, and the CFC, which has exclusive jurisdiction to award just compensation

(but only after the district court has ruled the regulation valid). These two actions arise from a common set of facts, which means that a later-filed action for just compensation must be dismissed. Thus, under the Federal Circuit's reading of section 1500, a property owner would be forced either to forfeit the right to challenge the regulation, or forfeit her constitutional right to seek just compensation.

ARGUMENT

Originally enacted in 1868 to thwart forum shopping and duplicative lawsuits by claimants suing in multiple venues for cotton seized during the Civil War, section 1500 deprives the CFC of subject matter jurisdiction over "any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. In *Tohono*, this Court held that the statute deprives the CFC of jurisdiction when a suit pending in another court is "based on substantially the same operative facts, regardless of the relief sought in each suit." 563 U.S. at 317.

Section 1500 is past its pull date, serves primarily as a trap for the unwary, and causes "problems for a wide variety of plaintiffs with many different kinds of claims, including federal employees, property owners, government contractors, local governments, and Indian tribes." Emily S. Bremer and Jonathan R. Siegel, *Clearing the Path to Justice: The Need to Reform 28 U.S.C. § 1500*, 65 Ala. L. Rev. 1, 6 (2013) ("The rules make § 1500 into a trap for unwary plaintiffs."). Consequently, the statute has been the subject of scathing criticism. For example, CFC judge Eric G. Bruggink wrote that it gives credence to the

belief that "the law is an ass,"[4] one legal scholar called it "a Confederate ghost" haunting the federal courts,[5] and in the leading scholarly analysis of the statute notes that "[s]ection 1500's unfair results are particularly troubling because they serve no good purpose." Bremer and Siegel, *Clearing the Path to Justice*, 65 Ala. L. Rev. at 6.

I. SECTION 1500 WAS DESIGNED AS A SUBSTITUTE FOR PRECLUSION

Section 1500 was adopted "to address a particular res judicata problem arising out of a high volume of claims for restitution for property, mostly cotton, seized by the government during the war." *Id.* at 16 (citing Peabody, *et al.*, *A Confederate Ghost*, 4 Fed. Cir. B.J. at 98-102). The Captured and Abandoned Property Act of 1863, Ch. 120, 12 Stat. 820 (1863), authorized seizure of private property in rebel states, which was sold to finance the Union's war efforts. The Act provided an avenue of relief to "cotton claimants" who could seek restitution from the United States in the court which is now the CFC. To succeed, however, the claimants were required to prove that the seized property had "not been used to aid the Confederacy." Peabody, *et al.*, *A Confederate Ghost*, 4 Fed. Cir. B.J. at 98, *quoted in* Bremer & Siegel, *Clearing the Path to Justice*, 65 Ala. L. Rev. at 16. Many cotton claimants attempted to avoid this requirement by instituting lawsuits against federal

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4. *Vaizburd v. United States*, 46 Fed. Cl. 309, 309 (2000) (citing Charles Dickens, Oliver Twist).

5. Payson R. Peabody, Thomas K. Gump & Michael S. Weinstein, *A Confederate Ghost that Haunts the Federal Courts: The Case for Repeal of 28 U.S.C. § 1500*, 4 Fed. Cir. Bar J. 96, 110 (1994).

officials in other courts on other legal theories, such as tort and restitution. *Id*. At that time, a judgment against an individual federal officer in a district court had no preclusive effect in a CFC action against the United States, and vice versa. These tactics gave rise to the need for a mechanism to prevent the cotton claimants' duplicative litigation, and the specter of double recovery. *Id*.

Congress responded by adopting section 1500, which "forc[ed] the cotton claimants to make an election between the two independent options for seeking restitution," and required them to choose a forum and theory of recovery. *See* Bremer & Siegel, *Clearing the Path to Justice*, 65 Ala. L. Rev. at 17. The purpose of section 1500 was to "provide a substitute for the absent rule of res judicata," not, as some more recent decisions might suggest, simply to prevent duplicative litigation. *Id*. (citing David Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 578 (1967)).

This purpose has been rendered obsolete by the evolution of modern preclusion principles. Claim and issue preclusion now serve the very same function, and prevent plaintiffs from strategically splitting claims and party capacities. Presently, any claims brought against government officials in their official capacities bind the Government itself, as officials and the Government are considered to be in privity with one another. *See*, *e.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402–03 (1940). A court's inherent judicial power to manage the docket also allows it to stay or dismiss duplicative suits. The preclusion doctrines "prevent parties from contesting matters that they had a full and fair opportunity to

litigate" and thereby protect against "the expense and vexation" of duplicative litigation, "conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153 (1979).

II. THE RIGHT TO JUST COMPENSATON IS SELF-EXECUTING, AND IS NOT DEPENDENT ON A CONGRESSIONAL WAIVER OF SOVEREIGN IMMUNITY

In takings cases, section 1500 must be read in light of the just compensation requirement of the Fifth Amendment which is not precatory, but rather a self-executing constitutional provision. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting on other grounds) ("As soon as private property has been taken . . . the landowner has already suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered."). Justice Brennan's dissent in that case was adopted by a majority in *First English Evangelical Lutheran Church v. Cnty of Los Angeles*, 482 U.S. 304 (1987), which held that just compensation must be provided once a taking has occurred. Thus, the right to recover just compensation for property taken by the United States cannot be burdened by procedural limitations on the form of relief. Statutory recognition is not necessary, nor is a promise to pay needed. *See Jacobs v. United States*, 290 U.S. 13, 17 (1933) ("the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest"). Nothing in the Constitution hinges a property owner's ability to bring a claim asserting a violation of a self-executing right

on an antiquated legislatively-created roadblock.

The very purpose of Constitutional rights is that they cannot be legislated away. *Marbury v. Madison*, 5 U.S. 137, 176-77 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act."). That, however, is precisely what has happened to Petitioners here by the Federal Circuit's overbroad view of this Court's holding in *Tohono*.

III. PROPERTY OWNERS SEEKING RELIEF FROM FEDERAL INTERFERENCE WITH PROPERTY MUST SPLIT THEIR CLAIMS BETWEEN THE CFC AND THE DISTRICT COURTS

A. Due Process First, Takings Second

The Due Process and Takings Clauses of the Fifth Amendment protect property owners from deprivations of their property either by governmental action that does not "substantially advance a legitimate state interest," *see Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005), or that is the functional equivalent of an exercise of eminent domain. *See Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978). "Regulatory taking" is an expression of the notion that government's power to adopt and impose regulations impacting on private property operates on a continuum, and when it crosses a line—goes "too far"—it matters not what label the government has attached to the exercise of power, what matters is the impact of the action on the fundamental right of property. *See First English*, 482 U.S. at 316 ("While the typical taking occurs when the govern-

ment acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.").

Prior to *Lingle*, a challenge to the validity of the government regulatory action was part of the "takings" canon. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (a regulation is a taking if it does not substantially advance legitimate state interests). In *Lingle*, however, this Court rejected the *Agins* "substantially advance" formulation as a takings test, and clarified that the heightened scrutiny does not belong in takings analysis, but rather sounds in Due Process. *Lingle*, 544 U.S. at 540 ("We conclude that this formula [the *Agins* substantially advance test] prescribes an inquiry in the nature of a due process, not a takings test[.]"). *See also id.* at 548 (Kennedy, J., concurring) ("This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."); *Williamson Cnty Reg. Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) ("The remedy for a regulation that goes too far, under the due process theory, is not 'just compensation,' but invalidation of the regulation[.]"). Despite the change in nomenclature in *Lingle*, however, the existing procedure has not changed; a property owner who challenges the validity of a regulation (whether under Due Process or some other cause of action) must assert that claim first, before seeking compensation:

> [Questions regarding a] regulation's underlying validity . . . [are] *logically prior to and distinct from the question whether a regulation effects a*

> *taking*, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but rather requires compensation "in the event of otherwise proper interference amounting to a taking." Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Lingle, 544 U.S. at 543 (emphasis added) (quoting *First English*, 482 U.S. at 315 (Fifth Amendment requires both invalidation and just compensation remedies for police power regulations that violate Takings Clause)). *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring) ("[T]he Takings Clause . . . has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional"). In *Eastern Enterprises*, a plurality of this Court rejected the argument that a post-deprivation compensation remedy was the only available claim to a property owner. *See id.* at 522 ("Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award

such equitable relief."). *See also Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond[.]"); *Babbitt v. Youpee*, 519 U.S. 234, 239 (1997) (affirming district court's invalidation of a statute for violation of the Takings Clause because the statute "made no provision for the payment of compensation").

Consequently, a claim seeking Just Compensation is not ripe until any questions regarding the validity of the regulation have been resolved.

B. Federal Jurisdictional Split District Court First, CFC Second

When a state or local government action is alleged invalid under the Due Process Clause or some other limitation, and its impact requires the payment of Just Compensation, the property owner is entitled to bring both claims together in one action. The initial forum for the property owner would be a state court action for compensation as required by *Williamson Cnty Reg. Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The plaintiff would be free to join her due process and other claims in that action and litigate all of her federal constitutional rights in state court, although there is no requirement she do so. *Cf. San Remo Hotel, L.P. v. City and Cnty of San Francisco*, 545 U.S. 323 (2005) (property owner must seek, and be denied, compensation in available state procedures prior to asserting a federal court taking claim). Even were she to choose to

litigate her federal Due Process claim separately in federal court, there obviously would be no section 1500 penalty for doing so, since that statute is not applicable to suits challenging state and local government action.

However, when federal action is similarly alleged to violate the Constitution by impacting property, the jurisdictional split between the district courts on one hand, and the CFC on the other, requires a property owner to litigate those same claims in two fora.[6] A regulatory takings plaintiff, unlike her counterpart suing a state or local government, cannot obtain complete relief in a single suit, but *must* file suit in the district court to obtain declaratory, injunctive, or equitable relief under the Administrative Procedures Act or directly under the Due Process Clause. To obtain just compensation, the property owner must then file a separate action in the CFC under the Tucker Act. *See Richardson v. Morris*, 409 U.S. 464, 465 (1973) (per curiam) (the Tucker Act "has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States."); *accord Cristina Inv. Corp. v. United States*, 40 Fed. Cl. 571, 578 (1998). *See also Eastern Enterprises*, 524 U.S. at 521-22 (recognizing dual forum of CFC and district court for different relief).

The property owner must also seek this relief in a sequence that plays into the trap set by section 1500: only after the validity of the regulation is either

6. Property owners with claims for compensation under $10,000 are not forced to make a similar choice, and may raise all claims arising from the same operative facts in the district courts under the Little Tucker Act.

adjudicated in favor of the Government, or is conceded by the property owner, is a claim in the CFC under the Just Compensation Clause ripe:

> [A] claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance[.] . . . Moreover in situations analogous to this case, we have assumed the lack of compensatory remedy and have granted equitable relief for Takings Clause violations without discussing of the applicability of the Tucker Act. . . . Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.

Eastern Enterprises, 524 U.S. at 521-22. In other words, the district court action must be filed *first*, and the CFC action *second*.

Thus, by properly ripening a claim for just compensation, the property owner would be walking squarely into the jurisdictional ambush set by section 1500. The district court action for administrative, injunctive or declaratory relief clearly would arise from the same operative facts as the later-filed CFC action for just compensation, meaning the CFC case must be dismissed.

The Government repeatedly has invoked section 1500 to seek dismissal of a CFC complaint in takings and similar cases when the plaintiff previously filed a related district court action. For example, in *Forsgren v. United States*, 73 Fed. Cl. 135 (2006), a family trust filed suit against United States in

district court alleging that reconstruction of ponds was arbitrary and capricious and denied due process. *Id*. at 137. Later, the trust instituted an action in the CFC seeking just compensation for the temporary taking of its property. *Id*. The Government sought dismissal pursuant to section 1500. *Id*. at 138. The CFC granted the government motion because "the claims filed in the district court and, subsequently, in the Court of Federal Claims, are identical within the meaning of the statute." *Id*. at 140. Similarly, in *OSI, Inc. v. United States*, 73 Fed. Cl. 39 (2006), a property owner first sought an injunction and reimbursement of contamination cleanup costs in the district court. *Id*. at 40. While the district court case was still pending, the property owner filed suit in CFC seeking compensation claiming the Government's actions in depositing hazardous waste on and around its property was an uncompensated taking. *Id*. Considering a motion to dismiss under section 1500, the CFC held that "[b]ecause Plaintiff seeks different monetary relief in the District Court action and the instant action … § 1500 does not divest this Court of jurisdiction over Plaintiff's contamination claim." *Id*. at 41. In other words, "Plaintiff does not and cannot seek under CERCLA the damages for the destruction and diminution in the value of its property claimed as compensation for the taking here." In *Vaizburd v. United States*, 46 Fed. Cl. 309, 310-11 (2000), a littoral property owner sought compensation in the CFC for a physical taking by the U.S. Army Corps of Engineers after it implemented a beach renourishment project. The plaintiff had one week earlier filed an action in the district court seeking invalidation of the program as applied to his property.

A property owner might consider first fully resolving the district court litigation before instituting suit in the CFC, but this approach also has its perils, since Tucker Act claims in the CFC have a six-year statute of limitations, and the unripe CFC case may expire while the district court litigation runs its course. Nor could a property owner avoid this conundrum by filing her claim for compensation in the CFC first, since as noted above, it would be subject to dismissal on ripeness grounds. *See Cristina Inv. Corp.*, 40 Fed. Cl. at 578 n.3 (a takings claimant "must concede the validity of the government action that is the subject of his claim . . . [because] the Fifth Amendment does not empower the court to award just compensation for unauthorized acts of government officials") (citing *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987)); *accord Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998) ("A compensable taking arises only if the government action in question is authorized.").

This application of section 1500 cannot be correct, since it forces property owners to choose between two available remedies, invalidation or compensation. Just compensation, however, is self-executing, and does not rely on a waiver of sovereign immunity. *See First English*, 482 U.S. at 315. As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, 450 U.S. at 654-655, it has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in "the Constitution itself.") (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)). Additionally, if the Tucker Act remedy in the CFC were not available, a

wide range of Government regulations would be subject to invalidation as uncompensated takings by district courts. *See*, e.g., *Presault v. I.C.C.*, 494 U.S. 1, 11-12 (1990) (availability of Tucker Act to obtain just compensation made takings challenge not ripe in district court).

Thus, an overly broad application of section 1500 to takings and related claims takes on a constitutional dimension since it would either deprive property owners of their ability to seek just compensation, or condition their ability to obtain it on their forfeiture of their rights to invalidate the offending regulation. In similar circumstances, this Court has held:

> Under the well settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Ed. of Township High Sch. Dist.*, 391 U.S. 563, 568 (1968)). This concern is even more pronounced here, where property owners and claimants such as Petitioners are not seeking discretionary government benefits, but to secure complete relief for alleged violations of their fundamental rights, a much more important interest. To promote the underpinnings of our judicial system—the right to seek redress from wrongs—if any doubt remains regarding the meaning of section 1500, this Court

should err on the side of keeping open the doors of justice, not slamming them shut.[7]

It is a settled canon of statutory construction that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *accord Edmond v. United States*, 520 U.S. 651, 658 (1997) ("[P]etitioners are asking us to interpret Article 66(a) in a manner that would render it clearly unconstitutional-which we must of course avoid doing if there is another reasonable interpretation available."). As this Court has explained:

> In interpreting statutes, for example, we have long observed "[t]he elementary rule ... that every reasonable construction must be resorted to,

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7. Time and again, this Court and federal and state courts nationwide have cautioned in a variety of contexts against interpreting case law and statutes in a way that would lead to the closing of courthouse doors. *See*, *e.g.*, *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) ("The importance of the Great Writ, the only writ explicitly protected by [Art. I, § 9, cl. 2], along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open."); *Johnson v. Sherry*, 586 F.3d 439, 447 (6th Cir. 2009) ("Given the great, though intangible, societal loss that flows from closing courthouse doors, … a prudent court should carefully scrutinize a party's request before agreeing to close a courtroom."); *People v. Jones*, 391 N.E.2d 1335, 1340 (N.Y. 1979) ("[P]ublic confidence in the administration of justice is enhanced when its doors are open to all[.]"). In enacting section 1500, Congress did not seek to limit justice but rather to make available a specific forum wherein monetary relief could be sought.

> in order to save a statute from unconstitutionality."

United States v. Int'l Business Machines Corp., 517 U.S. 843, 868 (1996) (citing *Hooper v. California*, 155 U.S. 648, 657 (1895); *United States* ex rel. *Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.")).

IV. SECTION 1500 SHOULD NOT FORCE PROPERTY OWNERS INTO AN UNCONSTITUTIONAL CHOICE

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court concluded that the Government could not require the owner of a private marina to open it for public navigation without first instituting condemnation procedures and paying just compensation. *See id.* at 180 ("Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation. …"). The case arose when the Government sued Kaiser Aetna in the District of Hawaii. *Id.* at 168 ("In 1972, a dispute arose between petitioners and the Corps concerning whether … petitioners were precluded from denying the public access to the pond because, as a result of the improvements, it had become a navigable water of the United States. The dispute foreseeably ripened into a lawsuit by the United States Government against petitioners in the United States.") (footnote omitted).

Kaiser Aetna did not seek compensation under the Tucker Act in a separate CFC action, but supposing it had done so while the case wound its way up from the District of Hawaii to the Ninth Circuit to this Court, it would have been subject to dismissal under section 1500 since it arose from the same facts as the Corps' action. Even if Kaiser Aetna had, after successful termination of the litigation in this Court in late December 1979, instituted a CFC action for compensation, it very well might have been met by a Governmental claim that the statute of limitations had run, since, as this Court noted, "[i]n 1972, a dispute arose," meaning that the six-year limitations period arguably expired one year earlier. Thus, in a situation where this Court affirmed that the Government was unconstitutionally taking property, the property owner's claim for compensation in the CFC very well might have been thwarted by a restrictive reading of section 1500.

Similarly, in a situation also involving navigable waters arising two decades later, the CFC rejected the Government's interpretation of section 1500. In *United States v. Alameda Gateway, Ltd.*, 213 F.3d 1161 (9th Cir. 2000), the Government sued a San Francisco Bay property owner who refused to remove its piers when they became "obstructions to navigation" under the Rivers and Harbors Act of 1899 after the Corps of Engineers redrew harbor lines in order to transform the formerly legal structures into illegal "obstructions" which must be removed at owner expense. When the property owner refused to comply, the Corps demolished the piers and filed suit for reimbursement. After an adverse ruling in the district court, the property owner instituted an action in the CFC seeking just compensation. *See*

Alameda Gateway, Ltd. v. United States, 45 Fed. Cl. 757 (1999). In an unreported order, the CFC rejected the Government's claim that section 1500 deprived it of jurisdiction. Eventually, the CFC held that the property owner was entitled to recover just compensation from the Government for a partial taking, even as the Ninth Circuit held that the property owner was liable to the Government to for reimbursement for the cost of demolishing its own piers. These cases settled after Alameda Gateway sought this Court's review of the Ninth Circuit's opinion.

In both of the above situations, the interpretation of section 1500 adopted by the Federal Circuit would have barred the property owners from obtaining compensation, even though the property owners had not instituted the district court actions that triggered section 1500. The statute was designed to prohibit forum shopping and to make claimants choose a single forum in which to seek monetary damages from the Government. It cannot be read to bar all other claims merely because they may arise from the same transaction as a claim for just compensation, and certainly cannot be read to force a claimant to choose the monetary remedy exclusively.

CONCLUSION

This Court should grant the petition and review the judgment of the Federal Circuit.

Respectfully submitted.

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