No. 09-846

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

TOHONO O'ODHAM NATION,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether 28 U.S.C. § 1500 strips the Court of Federal Claims of jurisdiction over a claim against the United States for money damages if the plaintiff has pending in district court a suit against the United States seeking different relief.

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INTEREST OF AMICUS CURIAE

National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the shelter industry.[1] As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 175,000 members are home builders and/or remodelers, and its members construct about 80 percent of the new homes built each year in the United States.

The organizational policies of NAHB have long advocated that a property owner must be compensated when government acquires his or her land or reduces its value by regulation. NAHB's members frequently face state action that eliminates the economically viable use of their property, and NAHB supports the application of the Fifth Amendment's Takings Clause to legislative, executive, and judicial action.

NAHB is a vigilant advocate in federal and state courts, and it frequently participates as a party litigant and amicus curiae to safeguard the property

[1] All counsel of record consented to the filing of this brief, and received notice of the intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus made a monetary contribution toward the preparation or submission of this brief.

rights and interests of its members. For example, NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007), and also participated in many other cases before this Court as amicus curiae or of counsel. A large number of those cases involved landowners and other parties aggrieved by overzealous regulation under a wide array of statutes and regulatory programs.[2]

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[2] Cases in which NAHB has appeared as an amicus curiae or of counsel before this Court include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Rapanos v.*

(Continued on following page)

NAHB is participating in this case in support of the Respondent Tohono O'odham Nation (Nation) to elucidate the consequences of the Government's position in this case on regulatory takings cases. For that reason, NAHB participated as an amicus in *Keene Corp. v. United States*, 508 U.S. 200 (1993), the previous case in which this Court considered the scope of section 1500, and *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994) (en banc), the case in which the Federal Circuit applied *Keene Corp*. and which provided the rule of decision for the panel decision now under review. This case is of the upmost interest to NAHB and its members because a ruling in favor of the Government will, for some property owners, close the door to the United States Court of Federal Claims (CFC), the *only* available forum in which they may recover money damages from the federal government. Adopting the Government's interpretation of section 1500 will thus prevent some regulatory takings plaintiffs from obtaining the just compensation to which they are entitled.

United States, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 552 U.S. 130 (2008); *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Summers v. Earth Island Inst*., 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Protection Agency*, 129 S. Ct. 1498 (2009).

SUMMARY OF ARGUMENT

In the Government's view, Congress' broad waiver of sovereign immunity in the Tucker Act comes with a high price tag: In order to pursue money damages against the Government in the CFC, claimants must effectively forfeit their rights to seek all other forms of relief that could be "associated" with that claim, including declaratory, injunctive, and other equitable relief.

That is the sweeping reading of the phrase "any claim for or in respect to" in 28 U.S.C. § 1500 (2006) that the Government urges this Court to adopt when it argues that the Nation's CFC suit seeking money damages must be dismissed merely because it stems from the same trust relationship between the Nation and the Government as the Nation's district court suit seeking an equitable accounting. The statute, however, is most naturally read to bar CFC jurisdiction only when the "operative facts" are the same in both actions and both actions seek the same relief. That construction is *in pari materia* with the larger statutory scheme of expansive waivers of sovereign immunity of which section 1500 is a part, including the Tucker Act, 28 U.S.C. § 1491 (2006), and the Indian Tucker Act, 28 U.S.C. § 1505 (2006). Congress did not provide a means for wronged parties to seek redress in the form of damages only to condition it on the surrender of other causes of action. The Government's reading of section 1500 is grossly overbroad, and this Court should reject it.

The panel below and the en banc Federal Circuit in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1549-51 (Fed. Cir. 1994) (en banc) relied upon more than half a century of Court of Claims reasoning when they concluded that section 1500 deprives the CFC of subject matter jurisdiction only when an earlier-filed district court action seeks duplicative relief. *See Casman v. United States*, 135 Ct. Cl. 647, 647 (1956). As respondent explains, "claim" in section 1500 means "claim for relief," and the statute was designed to have plaintiffs elect a single forum in which to press claims for damages. It was not meant to deprive them of the only forum in which they may seek such damages simply because they may also wish to assert other claims. Indeed, Congress has required plaintiffs to split between the CFC and the district courts claims for relief which – but for the allocation of jurisdiction between the district courts and the CFC – otherwise could be considered in a single action. Nothing in the statutory scheme suggests that Congress thereby intended to deprive plaintiffs of one form of relief if they elect to seek another.

The Government's reading of section 1500 traps plaintiffs in many contexts in a jurisdictional "gotcha." This brief focuses on one of those contexts, regulatory takings, to illustrate that the Government's interpretation of section 1500 *cannot* be correct. The Government's reading of the statute would force private property owners into a quandary: either they must forfeit their ability to challenge the validity

of the regulation, or they must risk losing their rights to seek just compensation. Such a construction of the statute, in addition to being inequitable, raises serious constitutional concerns.

Like the Nation's claims for relief in the case at bar, a claim that an action of 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" or is otherwise invalid under the Due Process Clause, and the CFC, which has exclusive jurisdiction to award just compensation (but only after the district court has ruled the regulation valid or the plaintiff has conceded its validity). Under the Government's theory, separate claims for relief brought in the district court and CFC are, to use the Government's phrase "associated," and the CFC action for just compensation is subject to dismissal. Thus, under the Government's view of section 1500, a property owner would be forced either to forfeit the right to challenge the regulation, or risk losing her right to seek just compensation.

This brief is focused on two points. *First*, a property owner's assertion that the Government has violated the Due Process and Takings Clauses of the Fifth Amendment *must* be split between the district courts and the CFC, respectively, and the CFC action can *only* be filed after the district court action. The Government's interpretation of section 1500 cannot be correct, since the statute should not be read to

deprive property owners of the right to seek just compensation. *Second*, this brief will highlight two examples from regulatory takings cases to show how the Government's reading of section 1500 would lead to absurd and unfair results.

ARGUMENT

Originally enacted in 1868 to thwart forum shopping and duplicative lawsuits by claimants seeking compensation 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 (2006) (emphasis added). This statutory withdrawal of CFC subject matter jurisdiction should be viewed in the same way that the CFC and its predecessor courts have viewed it for more than fifty years: to bar CFC consideration only when the relief sought in the two actions is the same.

I. PROPERTY OWNERS SEEKING COMPLETE RELIEF FROM A FEDERAL ACT INTERFERING 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) (due process test), 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, 124-26 (1978) (takings test). "Regulatory takings" doctrine recognizes that government's power to adopt and impose regulations affecting 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 Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government 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 advances" formulation as a takings test, and clarified that the heightened scrutiny required is not a "takings" standard, but rather sounds in due process. *Lingle*, 544 U.S. at 540 ("We conclude that this

formula [the *Agins v. City of Tiburon* substantially advances' test] prescribes an inquiry in the nature of a due process, not a takings test[.])").[3] *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 County Reg'l 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

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[3] Heightened scrutiny in this context has its source in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 127 (1978). In that case, the Court held a regulation is not a taking when it serves "a substantial public purpose." *Id*. (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)). The Court held it is:

> implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property.

Penn Central, 438 U.S. at 127 (emphasis added) (citing *Nectow v. City of Cambridge*, 277 U.S. 183 (1928)) and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (Stevens, J., concurring)). Thus, courts may examine the means used to accomplish important government ends. This Court has continued to examine regulation under this standard for over three-quarters of a century. *First English*, 482 U.S. at 316 ("It has also been established doctrine at least since Justice Holmes' opinion for the Court in [*Mahon*] that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' ") (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

the regulation[.]").[4] Despite the change in nomenclature in *Lingle*, however, the existing procedure has not changed; a property owner who does not concede the validity of a regulation, but challenges it (whether under the Due Process Clause or some other theory, such as invalidity under the Administrative Procedure Act (APA)) must assert that claim separately from any claim 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

[4] District Courts retain the power to declare certain regulatory actions violative of the Takings Clause: for example, if the legislature declares what was private property to be public property, but makes no allocation for compensation. *See*, *e.g.*, *Hodel v. Irving*, 481 U.S. 704, 718 (1987) (invalidating federal statute as violating the Takings Clause); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Prot.*, 130 S. Ct. 2592, 2602 (2010) (plurality opinion) (state supreme court decision that transforms private property to public property violates Takings Clause).

> 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. *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, 236-42 (1997) (affirming district court's invalidation of statute for violation of the Takings Clause because statute made no provision for the payment of compensation); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987) (court invalidating government action for violating the Takings Clause); *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (invalidation for violation of Takings Clause).

Under *Lingle* then, due process and takings claims are separate and distinct "claims" and the Constitution requires a forum for each.

B. Federal Jurisdictional Split: District Court First, CFC Second

When federal action is alleged to be invalid and to have violated the Takings Clause, the jurisdictional split between the district courts on one hand, and the CFC on the other, requires a property owner to litigate those claims in two fora. A regulatory takings plaintiff who wants to challenge the validity of government action, yet preserve her right to seek just compensation if the action is upheld, cannot do so in a single suit. To obtain declaratory, injunctive, or equitable relief under the APA or directly under the Due Process Clause, the property owner must file suit in district court.[5] To obtain just compensation, the

[5] *See, e.g., Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986) (permit challenge properly

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owner must 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 Enter.*, 524 U.S. at 521-22 (recognizing dual fora of CFC and district court for different relief).

The property owner must also seek this relief in a set sequence: Only after the validity of the regulation is either adjudicated in favor of the Government, or conceded by the property owner, is a claim in the CFC under the Just Compensation Clause ripe. *Lingle*, 544 U.S. at 543; *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

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brought under APA); *Bell Atl. Tel. Cos. v. F.C.C.*, 24 F.3d 1441, 1445-46 (C.A. D.C. 1994) (APA preserves ability to challenge government action in district court); *Security Sav. Bank, SLA v. Dir., Office of Thrift Supervision*, 798 F. Supp. 1067, 1077 (D. N.J. 1992) (Tucker Act does not forbid injunctive relief in APA); *Fallini v. Hodel*, 725 F. Supp. 1113, 1122 (D. Nev. 1989) (APA authorizes district courts to review constitutional claims including Fifth Amendment takings); *1902 Atlantic Ltd. v. Hudson*, 574 F. Supp. 1381, 1406 (D.C. Va. 1983) (In APA, Congress intended district courts to exercise authority to set aside governmental action contrary to constitutional right).

squarely into the jurisdictional ambush set by the Government's broad reading of section 1500. The district court action for administrative, injunctive or declaratory relief clearly could be deemed "associated" with the later-filed CFC action for just compensation, meaning that under the Government's theory, the CFC case should be dismissed.

The CFC has denied the Government's repeated attempts to invoke section 1500 to seek dismissal of a CFC suit seeking damages in takings and similar cases when the plaintiff had previously filed a district court action seeking different relief. 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 the CFC claiming the Government's actions in depositing hazardous waste on and around its property was an uncompensated taking and seeking compensation. *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." *Id.* at 46. The CFC, as it has repeatedly, denied the Government's motion to dismiss. *Id.*; *accord Loveladies*, 27 F.3d at

1548; *Cooke v. United States*, 77 Fed. Cl. 173, 178-79 (Fed. Cl. 2007) (denying the Government's motion to dismiss pursuant to § 1500 in the employment context because the requested monetary relief can be granted for each claim in a different form and measure, and thus there is no risk of subjecting the Government to double liability."); *Williams v. United States*, 71 Fed. Cl. 194, 200 (Fed. Cl. 2006) (denying the Government's motion to dismiss pursuant to § 1500 because "there is no explicit overlap in the requested relief. Williams seeks monetary relief and correction of his military records in this court. . . . [but] [i]n the district court, Williams sought only declaratory relief[.]"); *Marks v. United States*, 34 Fed. Cl. 387, 400 (Fed. Cl. 1995) (denying the Government's motion to dismiss in takings case because "the nature of the two claims, one, a request for compensation due to an alleged improper taking under Amendment V to the Constitution, in this court and the other, a request for declaratory and injunctive relief, in the district court. . . . are different, thus diminishing the effect of a section 1500 claim.").

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. *See* 28 U.S.C. § 2501 (1994).[6] 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, unless she conceded the validity of the government action. *See Cristina Inv. Corp., v. United States*, 40 Fed. Cl. 571, 578 n.3 (1998) (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") (emphasis omitted) (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.").

The Government's interpretation of section 1500 cannot be correct, since it forces property owners to choose between two available remedies, invalidation or compensation. The right to just compensation, however, is self-executing, and flows directly from the Constitution. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("We have recognized that a landowner is entitled to bring an action in inverse

[6] Nor could the litigants agree to toll the statute of limitations. *John R. Sand and Gravel Co. v. United States*, 552 U.S. 130, 134-39 (2008).

condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation[.]' 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)); *see also First English*, 482 U.S. at 316 n.9 ("[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking").[7]

The Government's overly broad interpretation of section 1500 thus takes on a constitutional dimension since it would potentially 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

[7] 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 because those claims would not be ripe. *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).

> public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

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 the Nation are not seeking discretionary government benefits, but to secure complete relief for alleged violations of their constitutional rights, a much more important interest.[8]

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[8] 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 [U.S. Const., 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."); In enacting section 1500, Congress did not seek to limit justice but rather to require plaintiffs to elect a specific forum wherein money damages could be sought. *See Casman*, 135 Ct. Cl. at 647 (interpreting section 1500 as being inapplicable where the relief sought in district court is entirely different than the relief sought in the Court of Claims). 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.

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, in order to save a statute from unconstitutionality."

United States v. Int'l Business Machines Corp., 517 U.S. 843, 868 (1996) (quoting *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.").

While regulatory takings cases may raise special constitutional concerns because of the constitutional nature of the just compensation remedy, those concerns should inform the interpretation of section 1500 regardless of the context in which the question arises

– since statutes must have a single consistent meaning. Moreover, any reading of the statute that deprives plaintiffs of the complete remedy to which Congress has otherwise entitled them raises significant questions. Accordingly, because the canon of constitutional avoidance counsels especially strongly against the Government's reading of section 1500 in takings context, it requires rejection of the Government's reading in any context. *See Clark v. Martinez,* 543 U.S. 371, 381-82 (2005).

In the case at bar, the Court is presented with two competing views of section 1500. The construction urged by the Nation has been utilized by the Federal Circuit and by the CFC and its predecessors for more than fifty years. *See Casman v. United States*, 135 Ct. Cl. 647, 647 (1956); *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994) (en banc). During this time Congress has not overruled this construction but, indeed, as demonstrated in respondent's brief, has implicitly endorsed it. The expansive view pressed by the Government, on the other hand, not only flies in the face of the balance of the statutory scheme waiving the United States' sovereign immunity in a wide variety of contexts, but also cannot be squared with the doctrine of constitutional avoidance. Consequently, the longstanding construction of section 1500 by the Federal Circuit and the Court of Claims should be affirmed.

II. TWO EXAMPLES HIGHLIGHT THE ABSURD AND INEQUITABLE NATURE OF THE GOVERNMENT'S INTERPRETATION OF SECTION 1500

Two previous regulatory takings decisions illuminate the extreme overbreadth of the Government's proposed standard ("associated in any way") and the anomalous results that flow from it.

In *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994) (en banc), the Federal Circuit Court confronted a very similar issue as the one now before this Court – but in the regulatory takings context. The property owner unsuccessfully sought a wetlands development permit from the Army Corps of Engineers. *Id.* at 1547. The property owner first filed suit in district court challenging the validity of the permit denial under the Administrative Procedures Act. *Id.* While the district court case was pending, the property owner instituted a CFC action seeking just compensation because the denial of its permit was a taking. The CFC agreed. *Id.* On appeal, the Government argued that the CFC lacked jurisdiction under section 1500 because the claims brought in the district court and CFC were "the same." *Id.* at 1549.

The Federal Circuit rejected this characterization. *Id.* "If the claims are distinctly different, Loveladies are excused from the jurisdictional dance required by § 1500." *Id.* "Deciding if the claims are the same or distinctly different requires a comparison

of the claims raised in the Court of Federal Claims and in the other lawsuit." *Id.* (citing *Keene*, 508 U.S. at 210 (internal quotation marks omitted)). While both the district court action and the CFC action were based on the Government's violation of the Fifth Amendment, the district court complaint sought declaratory relief but the CFC complaint sought money damages. *Loveladies*, 27 F.3d at 1553. The court concluded that for the CFC to be precluded under section 1500 from hearing a claim, "the claim pending in another court must arise from the same operative facts, and must seek the same relief." *Id.* at 1551. The court noted that "[w]e know of no case arising from the same operative facts in which § 1500 has been held to bar jurisdiction over a claim praying for relief distinctly different from that sought in a pending proceeding." *Id.*

In a situation involving navigable waters arising six years later, the CFC again rejected the Government's overbroad 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. *Id*. at 1163-64. When the property owner refused to comply, the Corps demolished the piers and filed suit for reimbursement. *Id*. The property owner

brought its mandatory counterclaim, asserting, under *Agins*, that the Corps' actions did not substantially advance a legitimate governmental interest and seeking invalidation. After an adverse ruling in the district court, the property owner instituted an action in the CFC seeking just compensation. *See Alameda Gateway, Lid. v. United States*, 45 Fed. Cl. 757 (1999). The government invoked section 1500 asserting that the counterclaim precluded CFC jurisdiction. 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 for the cost of demolishing its own piers.[9]

In both of the above situations, the interpretation of section 1500 the Government urges this Court to adopt would have barred the property owners from obtaining just compensation, even though the property owners could obtain the alternative relief they sought only in the district court. Section 1500 was designed to prohibit forum shopping and to make claimants choose a single forum in which to seek money damages from the Government. It cannot be read to bar all other claims merely because they may be "associated in any way" with a claim for damages,

[9] These cases settled after *Alameda Gateway* sought this Court's review of the Ninth Circuit's opinion.

and certainly cannot be read to force a claimant to choose a damage remedy at the expense of all others.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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SEPTEMBER 2010