No. ________

In The
Supreme Court of the United States

MINISTERIO ROCA SOLIDA, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JOSEPH F. BECKER
Counsel of Record
NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGATION
1225 Westfield Ave., Suite 7
Reno, Nevada 89509
cjcl@npri.org
(775) 636-7703
Attorney for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The serious constitutional concerns expressed by both the concurring and dissenting justices in *Tohono*[1] now unsurprisingly resurface as Ministerio Roca Solida, Inc. (Solid Rock Ministry, hereinafter "Roca Solida") is quite predictably put "between itself and a hard place" by 28 U.S.C. § 1500 as recently transformed by the *Tohono* majority. It must now forgo one constitutional right to vindicate another.

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

As such, the questions presented are:

1. Whether Congress may, through jurisdictional statutes, limit an aggrieved party seeking non-overlapping relief for multiple explicit constitutional rights violations to

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

QUESTIONS PRESENTED FOR REVIEW – Continued

seek vindication in but one federal court even though no such court may make the aggrieved party whole and no single court has jurisdiction over all claims brought and/or all relief sought.

2. Whether, even if *arguendo Tohono* were somehow correctly decided in holding that § 1500's language "*in respect to a claim*" means "*associated with in any way*," the *Tohono* holding is nevertheless unconstitutional as applied to Petitioner below.

PARTIES TO THE PROCEEDING

Ministerio Roca Solida, Inc. (Solid Rock Ministry, "Roca Solida") is a religious institution, incorporated in the State of Nevada, and the Petitioner in this action. It owns vested rights to the water taken by the United States without due process or just compensation. It was the Plaintiff in the action before the United States Court of Federal Claims and the Plaintiff-Appellant in the United States Court of Appeals for the Federal Circuit.

The United States is the Respondent in this action. It was the Defendant in the action before the United States Court of Federal Claims and the Defendant-Appellee in the United States Court of Appeals for the Federal Circuit.

RULE 29.6 DISCLOSURE

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ministerio Roca Solida, respectfully petitions this Court for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Federal Circuit. The Federal Circuit's judgment was entered on February 26, 2015 and, as repeated in the Circuit's concurrence, presents a "substantial constitutional question." App. at 15.

OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the Federal Circuit, filed on February 26, 2015, and reprinted in the Appendix at 1-33. The opinion of the Court of Federal Claims filed on January 15, 2014 is reprinted in the Appendix at 34-46.

JURISDICTION

The court of appeals for the Federal Circuit filed its opinion and entered judgment on February 26, 2015. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This heavily-divided Court's reversal of the longstanding interpretation of 28 U.S.C. § 1500 in *United States v. Tohono O'Odham Nation*, 131 S.Ct. 1723 (2011) has the practical effect of Congress' writing, albeit arguably through "judicially-misinterpreted" jurisdictional statutes, constitutional protections[2] out of the U.S. Constitution – a power not held by Congress acting alone, either through jurisdictional statutes or otherwise.

Such reversal of longstanding precedent, combined with the Tucker Act's six-year statute of limitations (28 U.S.C. § 2501) and the Little Tucker Act's remedy cap (28 U.S.C. § 1346(a)(2)), now, as a practical matter, dictates that a party seeking non-overlapping relief for multiple constitutional rights violations may seek vindication in but one federal court, even though no such court can make the aggrieved party whole and no single court has jurisdiction over all claims brought and/or all relief sought. For this injustice and the substantial constitutional question raised, *certiorari* should be granted.

[2] U.S. Const. amends. I and V.

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

Victor Fuentes, pastor of Ministerio Roca Solida, Inc. (Solid Rock Ministry, hereinafter, "Roca Solida") is a Cuban political refugee who heroically swam seven miles of open ocean in the dark of night to escape President Fidel Castro's tyrannical regime. Upon being granted political asylum at Guantanamo Bay and his subsequent relocation to the United States, Mr. Fuentes became an ordained Christian minister, started a church, and through the generosity of his congregants was able, in 2006, to purchase for the church he pastors a forty-acre parcel for $500,000 – a true desert oasis in Nevada's Amargosa Valley. This forty-acre parcel, now dubbed "Little Patch of Heaven," contained both camp-suitable buildings and a desert-spring-fed stream, which has traversed the forty-acre parcel since at least the year 1881, in and with which the ministry was able to perform baptisms, water animals, fill its recreational pond, and use for meditational purposes; religiously serving inner-city Las Vegas and North Las Vegas youth, among others. Roca Solida's fee simple parcel is surrounded by wildlife refuge land that is managed by the U.S. Fish and Wildlife Service ("USFWS").

In August 2010, the United States and its employee, refuge manager Sharon McKelvey, acting both

ultra vires[3] and contrary to the First and Fifth Amendments to the U.S. Constitution, altered the historic flow pattern of the spring-fed stream traversing Roca Solida's parcel and diverted the flow of water to a higher elevation flow path – a channel engineered by the United States just to the outside of Petitioner's property line. In so doing, the United States "took" vested water rights belonging to Roca Solida.

On Christmas Eve 2010, coincident to the area's first significant post-stream-diversion rainfall, water from the newly-diverted stream overflowed its newly-constructed channel, moved toward its historic (and lower-elevation) path, flooding and damaging Roca Solida's buildings and property with the very spring flow that was both illegally and unconstitutionally diverted away from Roca Solida's property by the United States just four months earlier.

After initially retaining private counsel while searching for and then securing *pro bono* counsel and subsequent to satisfying the Federal Tort Claims Act's mandated administration claim and six-month waiting period, on August 22, 2012, Petitioner Roca Solida filed a Complaint in United States District Court for the District of Nevada. This District Court Complaint

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[3] Among other legal infirmities, USFWS failed to satisfy the permitting requirements of the Clean Water Act and failed to satisfy Federal Emergency Management Agency requirements as administered by Nye County Nevada officials.

seeks declaratory and injunctive relief for still-ongoing constitutional due process and free exercise violations, monetary relief under the Federal Torts Claim Act, 28 U.S.C. § 1346(b)(1) (hereinafter, "FTCA") for the negligent waterway rerouting and resultant flooding, and monetary relief under the Little Tucker Act, 28 U.S.C. § 1346(a)(2) for the temporary taking Petitioner seeks to make non-permanent with the declaratory and injunctive relief sought in the District Court.

And, on August 24, 2012, in the event declaratory relief and water restoration were not achieved in the District Court (thus making the temporary taking of Petitioner's water permanent) or the takings valuation rose above $10,000, Petitioner Roca Solida also filed a claim for relief in the U.S. Court of Federal Claims but immediately sought a stay of the proceedings therein pending resolution of the non-overlapping relief sought in the District Court. For additional factual clarity with respect to the non-overlapping nature of relief sought, Petitioner further tenders the following.

The FTCA negligence claim in the District Court lies against the United States for the way in which its water diversion project was undertaken and this FTCA claim and relief sought lie independently of each of its other claims. The District Court is the proper forum for resolution of Petitioner's FTCA claim and the District Court need not find either a taking or other unconstitutional actions to find for

Petitioner Roca Solida on this FTCA claim for flood damage.

Second, the United States' *ultra vires* confiscation of their (baptismal) water commensurate with its diversion project also violated Petitioner's right to procedural and substantive due process as well as its rights to free exercise of religion. For this reason, in addition to the monetary relief for flood damage sought in the aforementioned FTCA claim, Petitioner sought a declaratory judgment in U.S. District Court against all Defendants that their actions were unconstitutional and, on these grounds, injunctive relief to restore the water to its historical flow path such that Petitioner may once again physically access their vested water rights and fully resume their religious practices and other church camp activities.

However, irrespective of any injunctive relief awarded, restitution for the water of which Petitioner has been deprived between August of 2010 and through such time when the District Court may restore the flow of the water to its forty-acre parcel is in no way remedied, even partially, by securing all of the aforementioned declaratory, injunctive, and tort damage relief sought in that District Court.

Thus, initially, in the interest of judicial efficiency, Petitioner sought relief for this "temporary" taking in the District Court hoping the relief would not exceed that court's $10,000 jurisdictional limit. However, because Petitioner has now been deprived of those vested water rights for nearly five years, the

Court of Federal Claims is the only court that can entertain its takings claim over $10,000 to remedy this now-five-year-but-hopefully-non-permanent loss of vested water rights.[4]

"Proceed[ing] in what appears to be a sensible way, perhaps the only way possible under federal statutes," according to the Federal Circuit, App. at 17, and for protection against a running of the statute of limitations on a 2010 government deprivation,[5] Petitioner thus filed its August 2012 Complaint in the U.S. Court of Federal Claims and therein requested that court to stay those proceedings pending resolution of Petitioner's due process, free exercise, FTCA claims, and declaratory and injunctive relief sought before the U.S. District Court.

Because the six-year statute of limitations will expire in August 2016 prior to the resolution of Petitioner's district court claims and is critical to the understanding of the injustice visited upon Petitioners and the substantial constitutional question raised by the lower courts' *Tohono*-construed application of 28 U.S.C. § 1500, the following timeline demonstrating no unreasonable delay on Petitioner's part is offered:

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[4] Through no lack of due diligence on Petitioner's part, the amount of the temporary taking has now exceeded the District Court's jurisdictional limits and continues to rise. 28 U.S.C. § 2501.

[5] "28 U.S.C. § 2501 . . . is jurisdictional and not subject to equitable tolling." App. at 15.

- August 2010 – United States' confiscation of water by way of a diversion of navigable waterway from its historic path (which all records indicate traversed at least some portion of Petitioner's private parcel since at least 1881).

- August 2010 Petitioner Roca Solida temporarily retained (unaffordable) private counsel while continuing its search for *pro bono* counsel.

- December 2010 – Flooding of Petitioner's church camp property resulting from the United States' unpermitted and otherwise *ultra vires* and negligently constructed stream-diversion project.

- October 2011 – NPRI Center for Justice Board of Directors agree to provide *pro bono* legal counsel to Petitioners.

- January 2012 – Petitioner files statutorily-mandated SF 95 Claim Form with U.S. Department of the Interior (for FTCA flood damages) and awaits the running of the statutorily-mandated six-month period. (Despite USPS certified mail records indicating timely delivery, this SF 95 Claim went completely unacknowledged by the United States until January 2013 at which time and by such response Petitioner's claim is denied and invited to sue the United States if it hopes for tort relief (but by which time Petitioner had already filed Complaints

in both District Court and the Court of Claims)).

- August 2012 – Petitioner files Complaint for claims subject to District Court's jurisdiction in District Court and its Big Tucker Act "takings claim" in the Court of Federal Claims.[6] 28 U.S.C. § 2501.

- November 2012 – United States files its "standard" motion to dismiss on non-specificity as well as other grounds.

- December 2012 – Petitioner files a more-factually-detailed Amended Complaint despite believing initial Complaint satisfied all FRCP notice pleading requirements.

- December 2012 – United States files new motions to dismiss Petitioner's Amended Complaints (attempting to dismiss all claims and all parties on similar grounds as its first motion to dismiss).

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[6] While Petitioner arguably could have filed its Big Tucker Act takings claim absent waiting the FTCA-mandated six-month SF 95 Claim period, filing such a claim would have: (1) negatively impacted Petitioner's likelihood of securing tort relief for the flooding, absent litigation; and (2) not done anything to alter the time taken by the U.S. District Court on the declaratory, injunctive, and tort relief sought therein thus having no impact on the harm visited upon Petitioner by the post-*Tohono* loss of protection against a running of the six-year statute of limitations.

- July 2013 – District Court denies in their entirety the United States' motions to dismiss all claims and all parties.
- July 2013 – The United States files its Answer to Petitioner's Amended Complaint.
- September 2013 – Discovery begins in District Court case, extended through May 2014 by the United States' numerous motions for extensions of time.
- September 2013 – The United States appeals non-dismissal of Refuge Manager Sharon McKelvey in her individual capacity to the Circuit Court of Appeals for the Ninth Circuit with the United States' Opening Brief due May 2014 (after, again, United States moved for an extension of the filing date for its Opening Brief). Hearing date on this appeal is, thus far, unscheduled by that court. Ultimate resolution date currently unknown but could very realistically extend beyond August 2016.
- June 2014 – Cross Motions for Summary Judgment filed with briefing completed in October 2014; awaiting disposition by District Court.

In summary, the United States, contrary even to its own Clean Water Act and FEMA regulations, negligently moved a navigable waterway resulting in: (1)

tort damages (flooding); (2) due process violations; (3) free exercise violations; and (4) at least a temporary (if not permanent) taking of Petitioner's vested water rights.

However, because of jurisdictional statutes, the takings claim may not be brought in the U.S. District Court and the declaratory and injunctive relief sought may not be brought in the U.S. Court of Federal Claims, the Big Tucker Act's now-imminent statute-of-limitations-expiration forces the Petitioner (post-*Tohono*), to choose vindication of only certain rights; none of which will make the Petitioner whole.

Thus, despite all due diligence and timeliness by Petitioner, it is now abundantly clear that Petitioner cannot achieve adjudication of its non-overlapping claims[7] for relief in the U.S. District Court and any appeals to the Ninth Circuit before a six-year running of the statute of limitations in the "takings" initially filed at the Court of Claims and at issue in this petition.

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[7] Although arguably not germane to its decision, the Court of Claims below, in footnote 1, suggested that contrary to Plaintiff-Appellant's argument, there *is* overlapping relief sought. Petitioner here again takes issue with this conclusion. The tort, First Amendment, and Fifth Amendment *due process* claims seek none of the relief sought in the Court of Claims. Where Petitioner hoped that temporary takings would be less than $10,000 and justiciable by the District Court, the Complaint in the Court of Claims sought only takings relief in the amount greater than $10,000, be those temporary or permanent.

Notwithstanding the foregoing, on December 21, 2012, Respondent United States filed and the U.S. Court of Federal Claims below subsequently granted, pursuant to 28 U.S.C. § 1500 as now construed in *Tohono*, a Motion to Dismiss for Lack of Subject Matter Jurisdiction holding that despite illegal and unconstitutional action by the United States, Petitioner Roca Solida, in effect, must now choose between: (1) tort damages and injunctive relief to stop ongoing and future constitutional violations by Defendants; or (2) compensation for a "taking" which has already occurred and which Petitioner hopes to "make temporary" by the injunctive relief sought in the District Court.

On February 26, 2015, Circuit Judge Wallach, writing for the Federal Circuit Court of Appeals dutifully affirmed the Court of Claims' dismissal holding, *inter alia*, that insofar as Roca Solida argues the majority opinion in *Tohono* was "erroneous and unsound policy," the Federal Circuit "is not the appropriate forum in which to advance such an argument, however well or ill-founded it may be." App. at 11-12.

However, in his concurrence, Circuit Judge Taranto astutely wrote "that this application of § 1500 may soon present a substantial constitutional question about whether federal statutes have deprived Roca Solida of a judicial forum to secure just compensation for a taking; that avoidance of such constitutional questions can sometimes support

adoption of statutory constructions that would otherwise be rejected; [and] that neither *Tohono* nor other authorities squarely address § 1500's application when it raises the constitutional question lurking here." App. at 15.

The time to address this "substantial constitutional question" is now.

STATEMENT OF RELATED CASES

No appeal from this case is or has previously been taken before this Court. This action was heard below in the United States Court of Appeals for the Federal Circuit and United States Federal Court of Claims. To the best of counsel's knowledge, no other pending cases will directly affect this Court's decision in this case.

This Court should, however, be aware that claims for non-overlapping relief outside the jurisdiction of the U.S. Federal Court of Claims below are currently before the U.S. District Court for the District of Nevada – one aspect of which (a *Bivens* claim) is on interlocutory appeal to the Ninth Circuit as a result of the District Court's denial of a U.S. Fish and Wildlife Service employee's motion to be dismissed in her individual capacity.

REASONS FOR GRANTING THE WRIT

As denoted in the circuit court's concurrence quote above, this case presents "a substantial constitutional question"[8] regarding the application of the Fifth Amendment to the United States Constitution. It warrants: (1) a fresh look at the consequences of *Tohono*'s 2011 reversal of longstanding and superior precedent; (2) serious consideration of the resulting injustice; and (3) a review of the questions presented.

> [T]he 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

[8] "A substantial constitutional question would be raised if federal statutes forced a claimant to choose between securing judicial just compensation for a taking of property and pursuing constitutional and other legal claims challenge, and if successful, the underlying action alleged to constitute a taking." App. at 21 (*citing Blanchette*, 419 U.S. at 148-49 (withdrawing the Tucker Act remedy, without a corresponding guarantee of just compensation, may "raise serious constitutional questions.").

> inquiry. No amount of compensation can authorize such action.[9]

The courts below, in applying § 1500 as construed by the majority in *Tohono* and granting/affirming Respondent's Motion to Dismiss, obliterated the vital and explicit constitutional protections proclaimed by this Court in *Lingle* and, not surprisingly, the serious constitutional concerns expressed by both the concurring and dissenting justices in *Tohono* now resurface. Unfortunately for Roca Solida, the courts below have, albeit with some stated reservations, applied *Tohono* such that even when government tramples myriad constitutional rights in one "factual swoop," a Plaintiff must now choose between various constitutional remedies, none of which will make it whole; the ultimate result, of course, being the negation of vital and explicit constitutional rights.

Summarizing, as did the Federal Circuit, "[t]he combination of three statutes – (1) § 1500 as construed in *Tohono*; (2) the Tucker Act's six-year statute of limitations, 28 U.S.C. § 2501, which is jurisdictional and not subject to general equitable tolling; and (3) the Little Tucker Act's $10,000 cap on just-compensation claims in district courts, 28 U.S.C. § 1346(a)(2) – threatens to deprive Roca Solida for what (we must assume on the motion to dismiss)

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[9] *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005) (internal citations omitted).

might be a taking of its property" and presents "a substantial constitutional question." Appendix 15-16.

This Court's reversal of its longstanding (fifty-year) interpretation of 28 U.S.C. § 1500 in *Tohono* has, in practical effect, eliminated constitutional rights in a way both uncontemplated by Congress and in a way contrary to time-honored holdings of this Court. For each of the aforementioned reasons, and as further detailed below, this Court should grant review of the questions presented.

ARGUMENT

I. *TOHONO* WAS WRONGLY DECIDED BY THIS COURT AND WARRANTS A FRESH LOOK.

Summary

The jurisdictional statute, 28 U.S.C. § 1500 was enacted for two purposes: (1) to prevent the United States from compensating a party twice for the same injury; and (2) to prevent the judicial inefficiencies of litigating the same claims twice.

Even if, *arguendo*, it were somehow the intent of Congress in enacting § 1500 to preclude access to legal remedies for those rights textually and explicitly guaranteed by the Constitution, how could it be that Congress, by a simple majority, could eviscerate entire constitutional provisions simply by denying

any means of judicial redress or access to the courts for such governmental transgressions.

Courts have not only held such to be a denial of due process itself but also a co-equal duty to act constitutionally and should, in fact, do so, irrespective of whether Congress votes to violate constitutional rights, or not. Courts, after all, are to be that check on the tyranny of the majority – especially that "simple" majority where no "super-majority" exists to textually amend the Constitution.

Additionally, applying § 1500 to deny Petitioner all access to be made judicially whole runs contrary to a long history of precedent which, for more than fifty years, justly and efficiently allowed for relief of those aggrieved by government agents exceeding their constitutional constraints in multiple ways – albeit in one fact pattern – the jurisdiction over which relief was congressionally fragmented into multiple courts.

Moreover, as a policy matter, the effect of denying access to judicial remedies that allow persons to be made whole according to the Constitution will only further encourage aggrieved parties to vindicate their own rights, at least as they understand them. Where a jurisdictional statute is in any way vague such that it has been interpreted contrarily for 50 years, a new interpretation denying a party their "day in court" is almost universally perceived as patently unjust and contrary to all notions of the due process notice and hearing requirements.

A. This Court's Construal Of § 1500 Is Contrary To The Purpose Of The Statute, Leads To Absurd Results, And Is, Therefore, In Error.

The text, purpose, and history of § 1500 provide strong reason to believe that Congress did not intend for § 1500 to put plaintiffs to a choice between two non-duplicative remedies that Congress has made available exclusively in two forums.

Rather, Congress enacted the statute to prevent "duplicative lawsuits" brought by the so-called "cotton claimants" in the aftermath of the Civil War. *Keene Corp. v. U.S.,* 508 U.S. 200, 206 (1993). The cotton claimants sought monetary compensation for seized cotton in the Court of Claims pursuant to the Abandoned Property Collection Act, 12 Stat. 820. Because they had difficulty satisfying the statutory requirement that, to obtain compensation, they must not have given aid or comfort to participants in the rebellion, *see* § 3 of the Act, they also sought relief – either in the form of money damages or actual cotton – in separate lawsuits against federal officials on tort theories such as conversion. "It was these duplicative lawsuits that induced Congress to enact § 1500's predecessor." *Keene,* 508 U.S. at 206.

This historical backdrop sheds light on what Congress would have understood to be a suit or process "for or in respect to" a "claim" in the Court of Claims. Congress undoubtedly intended to preclude a claim for money in the Court of Claims when the

plaintiff was pursuing a suit "for" the same money in District Court. Because, however, some cotton claimants sought return of the cotton itself in District Court, it was also necessary to preclude jurisdiction in the Court of Claims when the plaintiff's other action was "in respect to" that demand for money – *i.e.* when the plaintiff was seeking duplicative relief. Had the courts awarded such plaintiffs both the cotton itself and money damages, the plaintiffs would have obtained twice what they deserved. In this way, Congress eschewed "a narrow concept of identity" that would have permitted plaintiffs to pursue and obtain duplicative relief to remedy the very same harm. *Id.* at 213.

"[Courts] must not, in the absence of an unmistakable directive, construe § 1500 'in a manner which runs counter to the broad goals which Congress intended it to effectuate.'" *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968) (internal citations omitted).

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute. . . .

United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940).

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases the Supreme Court has followed their plain meaning. *When that meaning has led to absurd or futile results, however, this Court has looked and should look beyond the words to the purpose of the act.*

Id. at 543 (emphasis added; internal footnotes omitted). "Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words.'" *Id.*

"The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function." *Id.* at 544.

> This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for

> reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts.

Id. "A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'" *Id.*

Here, however, this Court's construal of 28 U.S.C. § 1500 is clearly out of touch with the intent of the statute (not to mention the courts' longstanding interpretation of at least 50 years). Roca Solida, of course, is not trying to get paid twice for the same loss of "cotton" or anything else. In fact, Roca Solida only hopes to be paid for the permanent loss of water as a last resort if the District Court refuses to grant the injunctive relief to which Petitioner believes it is legally entitled or the temporary loss in the alternative case that its water is restored. Without a grant of *certiorari* leading to restoration of jurisdiction in the U.S. Court of Federal Claims and a stay pending resolution of injunctive relief at the District Court, the six-year statute of limitations on this "last resort" permanent takings claim and any temporary takings claim will run on at least some of the vested rights before Petitioner is able to adjudicate its claims for injunctive relief in the District Court, the court in which federal statutes require these claims to be brought. This, of course, is the entire basis for filing in the Court of Claims and the requested stay of

proceedings. It is *not* and was never Petitioner's motive or desire to be "made whole twice," the very purpose for which § 1500 was indeed enacted.

B. *Tohono*'s Construal Requiring Dismissal Runs Contrary To Respondent's Stated Purpose Of Judicial Efficiency.

"Parallel actions seeking the same or duplicative relief, or different forms of relief that are available entirely in one court, are redundant; actions seeking different forms of relief that Congress has made available exclusively in different courts are not." *Tohono*, 131 S.Ct. at 1737 (Justices Sotomayor and Breyer, concurring). "To the extent [Respondent] is concerned about the burdens of parallel discovery, federal courts have ample tools at their disposal, such as stays, to prevent such burdens." *Id.* (*referencing* David Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 599 (1967)).

From the perspective of judicial efficiency described above, Petitioner believes, and the Federal Circuit concurs that Petitioner has acted in "a sensible way." App. at 17. All claims, arising from the related facts that may be raised in the U.S. District Court have been raised therein and a stay had been motioned for in the Court of Claims below such that, in the event declaratory relief is not granted by the District Court resulting in a (permanent) taking in excess of the amount of the jurisdiction of the District

Court, that claim was preserved in the Claims Court without burdening the federal government.

In fact, "requiring that suits be filed contemporaneously . . . better insures the claimants' good faith and rewards the diligent prosecution of grievances. It also encourages claimants to muster their evidence early, and to preserve it." *Creppel v. U.S.*, 41 F.3d 627, 634 (Fed. Cir. 1994). "In addition, it prevents claimants from surprising the Government with potentially stale claims based on events that transpired many years before. Not coincidentally, these are the very reasons that statutes of limitation themselves exist." *Id.* (*citing Chase Sec. Corp. v. Donaldson,* 325 U.S. 304, 314 (1945); *Order of R.R. Telegraphers v. Railway Express Agency,* 321 U.S. 342, 348-49 (1944)). Certainly, this sound rationale has not now suddenly become nonsensical post-*Tohono*!

Even if, *arguendo,* the government were somehow burdened to some extent by a stay pending resolution of the claims in the District Court, Petitioner argues that "efficiency is not the touchstone for liberty"[10] and the purpose of a constitutional government of limited powers is not efficiency but preservation of individual rights as against an oppressive state.

[10] *State v. Weber,* 221 Conn. 84, 602 A.2d 963 (1992) (Connecticut Supreme Court Justice Berdon dissenting).

"[T]he Bill of Rights was not drafted with bureaucratic efficiency in mind." *United States v. McAlister*, 630 F.2d 772, 775 (10th Cir. 1980). It would, of course, be much more efficient to sentence immediately everyone *accused* of a crime rather than carrying out the burdensome process of a jury trial with high burdens of proof imposed upon government. *Id*.

But, is this *Tohono*-imposed choice of rights, the vindication of which cannot make Petitioner whole the preferred state of affairs for protection of Constitutional rights?! Petitioner is one Cuban political refugee well-experienced with oppressive government who answers this question in the very strong negative.

C. Neither Congress Nor This Court Has The Authority To De Facto Invalidate Explicit Constitutional Protections By Foreclosing All Access To Judicial Remedies.

Even if, *arguendo*, Congress intended the "*Tohono*" interpretation of § 1500, "[a] statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right." In addition to the Federal Circuit

holding as much in this case below,[11] the D.C. Circuit also had little doubt that such a "limitation on the jurisdiction of *both* state and federal courts to review the constitutionality of federal legislation . . . would be [an] unconstitutional infringement of due process." *Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987) *opinion reinstated on reconsideration sub nom. Bartlett on Behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987). "Congress may not use its power to control jurisdiction as an indirect means to impair rights." *Morgan Guar. Trust Co. of New York v. Republic of Palau*, 680 F. Supp. 99, 105 (S.D.N.Y. 1988).

As the Supreme Court has noted in a similar situation, "[i]f the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong." *Graham & Foster v. Goodcell*, 282 U.S. 409, 431 (1931).

[11] In addressing Circuit Judge Taranto's concern that the jurisdictional statutes as interpreted post-*Tohono* serve to entirely foreclose remedies to explicit constitutional rights, Circuit Judge Wallach wrote, "[w]hile the considerations and analysis presented in the concurring opinion may have merit, the constitutional question is not sufficiently ripe for review." App. at 13.

The *Bartlett* court contemplated exactly the injustice that is occurring here, where "a litigant would have no judicial forum whatsoever . . . in which to pursue its constitutional claim." *Bartlett,* 816 F.2d at 703. Because Congress had no authority to foreclose all judicial access to a textually explicit constitutional claim, neither the *Tohono* court nor this Court should interpret § 1500 as having done so.

Rather, as the canon of constitutional construction that "*where a statute may in some be construed as constitutional it must be construed*" dictates, the pre-*Tohono* interpretation (*i.e. Loveladies*[12]) interpretation of § 1500 must be followed. And, due process requires it. "As the D.C. Circuit stated, due process places limits on Congress' power 'when Congress denies *any* forum – federal, state or agency – for the resolution of a federal constitutional claim.'" *Adair v. Winter*, 451 F. Supp. 2d 210, 216 (D.D.C. 2006) (cite to *Bartlett* omitted).

D. This Court's *Tohono* Construal Of § 1500 Errantly Results In Takings Claims Subsuming Other Claims Contrary To Both Established Precedent And All Notions Of Equity And Justice.

This Court's recent construal of 28 U.S.C. § 1500 forces Petitioner to choose immediately between two

[12] *Loveladies Harbor, Inc. v. U.S.,* 27 F.3d 1545 (Fed. Cir. 1994) (impliedly overruled by *Solida v. U.S.*, *see* App. at 10-11).

federal courts, neither of which can make Petitioner whole for wrongs committed by the United States and its agents. Takings claims, however, do not (necessarily) subsume other claims arising from the same operative facts. In fact, this Court has squarely rejected the notion that a "takings" claim subsumes due process challenges even in cases where, as here, such a due process violation ultimately results also in an uncompensated taking by government.

In *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 537 (2005), this Court held that: "[The Takings Clause] is designed not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of <u>otherwise proper interference</u> amounting to a taking." *Id*. (underlining added). In fact, due process violations cannot be remedied under the Takings Clause, because "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." *Id.* at 543. *See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987); *Crown Point Development, Inc. v. City of Sun Valley,* 506 F.3d 851, 856 (9th Cir. 2007) (*citing Lingle*).

Absent being able to maintain claims in both courts of limited jurisdiction, choosing between two remedies, neither of which can make one whole is patently unjust and therefore no statute, especially if

it is in anyway vague,[13] should be construed to assume such is the case. Such an interpretation is against all reason and justice, and, where such an interpretation "is against all reason and justice for a people to entrust a Legislature with SUCH powers; . . . it cannot be presumed that they have done it." *Calder v. Bull*, 3 U.S. 386, 388 (1798) (emphasis added).

Lastly, each of the reasons the *Tohono*-construed application of 28 U.S.C. § 1500 is unconstitutional as applied to Petitioner, as detailed in Section II below, serves to further elucidate why *Tohono* was wrongly decided by this Court in the first place.

This Court should grant review.

II. EVEN IF, *ARGUENDO*, *TOHONO* WERE NOT WRONGLY DECIDED, ITS APPLICATION IN THIS CASE RAISES A "SUBSTANTIAL CONSTITUTIONAL QUESTION" AND VIOLATES PETITIONER'S CONSTITUTIONAL RIGHTS.

Summary

In August 2010, the United States, contrary even to its own Clean Water Act and FEMA regulations, negligently moved a navigable waterway resulting in:

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[13] Here, § 1500 was arguably "vague" enough to be interpreted contrarily for the more than 50 years prior to *Tohono*. *See, e.g.*, *Loveladies Harbor, Inc. v. U.S.,* 27 F.3d 1545 (Fed. Cir. 1994) (arguably overturned by *Tohono* and/or *Solida v. U.S.*, *see* App. at 10-11); but that, of course, is Petitioner's precise point.

(1) tort damages (flooding); (2) due process violations; (3) free exercise violations; and (4) at least a temporary (if not permanent) taking of Petitioner's vested water rights. However, because of jurisdictional statutes, the takings claim may not be brought in the U.S. District Court and the declaratory and injunctive relief sought may not be brought in the U.S. Court of Federal Claims, the Big Tucker Act's now-imminent statute-of-limitations expiration forces the Petitioner (post-*Tohono*) to forgo one constitutional right to vindicate another.

In summary, the combination of three statutes – (1) § 1500 as construed in *Tohono*; (2) the Tucker Act's six-year statute of limitations, 28 U.S.C. § 2501, which is jurisdictional and not subject to general equitable tolling; and (3) the Little Tucker Act's $10,000 cap on just-compensation claims in district courts, 28 U.S.C. § 1346(a)(2) – threatens to deprive Roca Solida of the opportunity to secure complete relief for what (we must assume on the motion to dismiss) will result in a taking of its property. That is because the six-year period allowed for bringing a Tucker Act suit in the Court of Federal Claims (which is not limited by dollar amount) will end before the § 1500 bar on doing so is lifted by completion of the Nevada district-court action. *See* App. at 15-16.

The Federal Circuit's concurring opinion explored each of the scenarios in which Petitioner's might escape the wrath of this Court's construal of § 1500

and concluded that, absent resolution of all claims by the other federal courts, each scenario presented significant legal impediments. *See* App. at 26-33. Insofar as there has been no movement in either the District Court or the Ninth Circuit on Petitioner's "factually-related but non-overlapping claims," the circuit court's substantial constitutional concerns have now become more poignant than ever.

Even Circuit Judge Wallach wrote, "[w]hile the considerations and analysis presented in the concurring opinion may have merit, the constitutional question is not sufficiently ripe for review." App. at 13. It is now nearly four months post-argument and three months post-decision with no movement at either the District Court or the Ninth Circuit and one must now wonder how bad must be the "smell" before such a claim is considered "ripe."[14]

A. As Applied To Petitioner, This Court's Construal Of § 1500 Violates Petitioner's Constitutional Rights.

As this Court's construal of *Tohono* is applied in this case, Petitioner can only be made whole if it can prevent the government's "temporary" taking from

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[14] Given the Ninth Circuit's minimal eighteen-month-plus appeal period, there is no reason to believe that the non-overlapping claims for relief will be resolved prior to the evisceration of Petitioner's takings claim. *See* http://www.ca9.uscourts.gov/content/faq.php (question 17).

becoming "permanent" in the District Court and then be compensated for the temporary deprivation between confiscation and restoration – but this "restoration" can only occur through the District Court's declaring those Defendants' actions unconstitutional, illegal, and ultimately restore water – illegally diverted by Defendants – back through Petitioner's property. As detailed in Petitioner's timeline above, it has exercised all due diligence in prosecuting its claims. However, given governmental delays, both by baseless motions and judicial backload, it is now clearly impossible for those issues to be resolved within six years.

Because the Court of Claims may not entertain claims for declaratory and injunctive relief to restore Petitioner's constitutional rights, just as the District Court may not compensate a temporary or permanent taking where the value of the taking exceeds $10,000, the courts below must NOT be allowed to place Petitioner in a position of having to choose between the two at this stage of litigation and, therefore, this Court should grant certiorari to resolve this substantial constitutional question.

Here, as in *Loveladies Harbor, Inc. v. U.S.,* 27 F.3d 1545 (Fed. Cir. 1994) (impliedly overruled by *Solida v. U.S.*, *see* App. at 10-11), Petitioner seeks to challenge the validity of a Government action in District Court and simultaneously to challenge its economic consequences as a taking in the Court of Federal Claims.

In *Loveladies,* this Court found it foreseeable that the District Court would not adjudicate the challenge before expiration of the statute of limitations on the takings claim. *Id.* at 1555. This Court therein determined that a claimant may commence a challenge in the District Court and in the Court of Federal Claims without facing the ticking jeopardy of the six-year bar. *Id.* at 1556. This Court stated: "[I]t would not be sound policy to force plaintiffs to forego monetary claims in order to challenge the validity of Government action, or to preclude challenges to the validity of Government action in order to protect a constitutional claim for compensation." *Id.*

Thus, in *Loveladies*, the Federal Circuit clarified that a litigant may file a suit challenging the validity of governmental regulatory activity concurrently with a takings claim arising from the same set of facts. Furthermore, if a District Court finds the regulatory activity valid, the Court of Federal Claims must hear the takings claim even if the regulatory challenge consumes more than six years. Accordingly, the Court of Federal Claims may stay a takings action pending completion of a related action in a District Court. *See Creppel v. U.S.,* 41 F.3d 627, 633 (Fed. Cir. 1994).

B. This Court's Dicta In A Distinctly Different Case Where The Statute Of Limitations Was Not At Issue Should Not Be Utilized To Dispose Of Petitioner's Constitutional Rights.

The courts below relied on *Tohono* and its progeny despite the fact that the statute of limitations at issue here and the serious implications thereof were not even before the *Tohono* court. Absent corrective action by this Court, mere dicta would become the basis for significant denial of justice and any opportunity for Petitioner's vindication of textually explicit constitutional rights.

Although the courts applied *United States v. Tohono,* 131 S.Ct. 1723 (2011) and its progeny to preclude any and all possibility that Roca Solida be made whole even once, Roca Solida's situation can be easily distinguished from that in *Tohono*. According to the majority in *Tohono*, no statute of limitations was imposed upon that claimant "for Congress has provided in every appropriations Act for the Department of Interior since 1990 that the statute of limitations on Indian trust mismanagement claims shall not run until the affected tribe has been given an appropriate accounting." *Tohono,* 131 S.Ct. at 1731.

In dicta (as this question was (according to even the majority) not properly before this Court), the majority also went on to say that even if such a tolling of the statute of limitations did not exist, such monetary relief as Plaintiff seeks when, as a last

resort, injunctive relief is denied, is only "available by grace and not by right." *Id.* To this, Petitioner takes great exception. As one who swam seven miles in open waters to escape Fidel Castro's totalitarian regime, Petitioner believes that, in a constitutional republic, it is government itself that exists only by "grace" (consent of the governed) and not by "right."[15]

Again in dicta, the majority in *Tohono* claim that they "enjoy no liberty to add an extension to remove apparent hardship" from a statute (a statute on which this Court reversed course to create just such a hardship) but this, too, belies historical precedent. Where a statute is misinterpreted in such a way as to defy all reason and logic, a Court may interpret § 1500 as it has for the past fifty years to allow citizens to be made whole when confronted with wrongful actions of a federal government run amok.[16] This

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[15] " . . . That to secure these rights [Life, Liberty, and the Pursuit of Happiness], Governments are instituted among Men, deriving their just Powers from the Consent of the Governed. . . ." THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

[16] *See, e.g.,* "The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and give it to B.: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, *it cannot be presumed that they*

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is especially important given the historical context of § 1500 and the inability of Petitioner, through no fault of its own, to be made whole by a statutory scheme which arbitrarily divides valid claims into different courts for adjudication. Any other interpretation allows government to deny rights and face only partial claims for its malfeasance and trampling of rights in "one factual swoop."

Dicta must not be allowed to *dictate* the abrogation of Petitioner's explicit constitutional rights and this Court should grant review of the questions presented.

have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them." *Calder v. Bull,* 3 U.S. 386, 388 (1798) (emphasis added).

CONCLUSION

For all the aforementioned reasons, this petition for a writ of certiorari should be granted.

Submitted May 27, 2015

Respectfully submitted,

Joseph F. Becker
Counsel of Record
NPRI Center for Justice and Constitutional Litigation
1225 Westfield Ave., Suite 7
Reno, Nevada 89509
cjcl@npri.org
(775) 636-7703
Attorney for Petitioner

United States Court of Appeals for the Federal Circuit

MINISTERIO ROCA SOLIDA,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2014-5058

Appeal from the United States Court of Federal Claims in No. 1:12-cv-00541-EDK, Judge Elaine Kaplan.

Decided: February 26, 2015

JOSEPH F. BECKER, Center for Justice and Constitutional Litigation, Reno, Nevada, argued for plaintiff-appellant.

ANNA KATSELAS, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by ELIZABETH ANN PETERSON, SAM HIRSCH, GREGORY D. PAGE, ANDREW C. MERGEN, KATHERINE J. BARTON.

Before WALLACH, TARANTO, and CHEN, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WALLACH.

Concurring opinion filed by *Circuit Judge* TARANTO.

WALLACH, *Circuit Judge*.

This case presents the question of whether a suit brought against the United States in the United States Court of Federal Claims ("Claims Court") must be dismissed for lack of subject matter jurisdiction because an earlier-filed related claim against the United States remains pending in a United States district court. Because the Claims Court correctly held jurisdiction is improper under these circumstances, this court affirms.

BACKGROUND

In 2006, plaintiff-appellant Ministerio Roca Solida ("Roca Solida"), a non-profit religious organization, purchased a forty-acre parcel of land in Nevada. At the time of purchase, a desert stream flowed across the property, the water rights to which Roca Solida also purchased. The water supplied a recreational pond and was used for baptisms, among other uses. Roca Solida's property is situated within a national wildlife refuge that is managed by the U.S. Fish and Wildlife Service ("FWS"). According to defendant-appellee United States, an FWS water

restoration project completed in 2010 "restored [the] stream to its natural channel," the effect of which was to divert the stream away from Roca Solida's property, depriving it of water it would have otherwise enjoyed. Appellee's Br. 2-3.

In response, Roca Solida instituted two lawsuits against the United States. First, it brought suit in federal district court in Nevada, seeking declaratory, injunctive, and compensatory relief on the basis of alleged violations under the First and Fifth Amendments to the United States Constitution, and also "at least $86,639.00 in damage[s]" under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80. Appellant's App. 41. Second, it brought suit two days later in the Claims Court, seeking declaratory relief and compensatory damages on the basis that the diversion project constituted an unlawful taking in violation of the Fifth Amendment and asserting FWS negligently executed the water diversion project, causing $86,639 in damages to "land, structures, and animals." *Id.* at 14-15.

The United States moved to dismiss the Claims Court action for lack of subject matter jurisdiction in light of the pending district court action under 28 U.S.C. § 1500 (2006). The Claims Court dismissed the case without prejudice. Roca Solida timely appealed. This court has jurisdiction to review the decision of the Claims Court under 28 U.S.C. § 1295(a)(3) (2012).

Discussion

I. Standard of Review

An order dismissing a case for lack of subject matter jurisdiction under 28 U.S.C. § 1500 is reviewed de novo. *Trusted Integration, Inc. v. United States,* 659 F.3d 1159, 1163 (Fed. Cir. 2011). The plaintiff bears the burden of establishing jurisdiction. *Taylor v. United States,* 303 F.3d 1357, 1359 (Fed. Cir. 2002).

II. Jurisdiction Is Barred by Statute

The Claims Court "has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." *United States v. Tohono O'Odham Nation,* 131 S. Ct. 1723, 1727 (2011). This rule derives from 28 U.S.C. § 1500, which states:

> The United States Court of Federal Claims shall not have jurisdiction of any claim *for or in respect to* which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500 (emphasis added). Two inquiries are required when determining whether § 1500 applies: "(1) whether there is an earlier-filed suit or process

pending in another court, and, if so, (2) whether the claims asserted in the earlier-filed case are for or in respect to the same claim(s) asserted in the later-filed Court of Federal Claims action." *Brandt v. United States,* 710 F.3d 1369, 1374 (Fed. Cir. 2013) (internal quotation marks and citation omitted). Roca Solida does not dispute the suit filed in Nevada district court constitutes an earlier-filed suit for purposes of the first inquiry.

With respect to the second inquiry, the Supreme Court has explained that "[t]wo suits are *for or in respect to* the same claim, precluding jurisdiction in the [Claims Court], if they are *based on substantially the same operative facts,* regardless of the relief sought in each suit." *Tohono,* 131 S. Ct. at 1731 (emphases added). That is, the two co-pending suits need not be identical. *See id.* at 1728 (quoting *Keene Corp. v. United States,* 508 U.S. 200, 212 (1993)) ("The phrase 'in respect to' . . . 'make[s] it clear that Congress did not intend the statute to be rendered useless by a narrow concept of identity.'"). In addition, it is irrelevant whether the relief sought in the two copending suits is the same or different (e.g., injunction versus money damages). *Id.* at 1731. All that matters is that the two suits be based on "substantially the same operative facts." *Id.*

In this case, the Claims Court found the two pending actions "[met] the standard set forth in *Tohono,*" i.e., they were "'based on substantially the same operative facts.'" *Ministerio Roca Solida v. United States,* No. 12-541L, at 3 (Fed. Cl. Jan. 15,

2014) (quoting *Tohono,* 131 S. Ct. at 1731). The Claims Court noted "the claims in both actions arise from [Roca Solida's] ownership of the same parcel of land and water and its alleged injuries as a result of the same FWS water diversion project," and also noted the two complaints used "virtually identical language." *Id.*

In Plaintiff's Opposition to United States' Motion to Dismiss, Roca Solida argued takings claims "do not (necessarily) subsume other claims *arising from the same nucleus of operative fact.*" Appellant's App. 53 (emphasis added); *see id.* at 59. On appeal, Roca Solida repeats this language, *see* Appellant's Br. 14, also noting its "[c]omplaints are similar because they describe the *same* errant project," Reply Br. 10. Although Roca Solida criticizes the "same operative facts" standard articulated in *Tohono,* it does not argue that its co-pending suits are not based on substantially the same operative facts. *See* Reply Br. 8 ("The *Tohono* [C]ourt's notion that claims are identical if they arise from the same transaction or have a substantial overlap in the operative facts is deeply flawed. . . .").

This court concludes Roca Solida's two co-pending suits are based on substantially the same operative facts. Jurisdiction in the Claims Court is therefore barred under § 1500.

III. Appellant's Arguments Are Precluded by Binding Precedent

Roca Solida presents three principal arguments challenging, in effect, the Supreme Court's interpretation of § 1500. These arguments relate to Congressional intent, pre-*Tohono* judicial interpretation of § 1500, and the extent to which the rule of *Tohono* fulfills the goals of judicial economy. Roca Solida additionally attempts to distinguish *Tohono* on the basis that *Tohono* did not involve a statute of limitations and the present matter does. Each of these arguments is addressed in turn.

A. *Tohono* Represents Binding Precedent, Notwithstanding Appellant's Assertions of Congressional Intent

First, Roca Solida argues "Congress did not intend for § 1500 to put plaintiffs to a choice between two nonduplicative remedies." Appellant's Br. 17. It notes § 1500 was enacted during the aftermath of the Civil War to prevent duplicative lawsuits that could have allowed plaintiffs to "obtain[ ] twice what they deserved." *Id.* at 18. Unlike such duplicative remedies, Roca Solida asserts, its desired remedies are nonduplicative because it seeks only to be made whole.[1] *Id.* at 21. Roca Solida maintains it cannot "be

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[1] In its brief, Roca Solida asserts that "denying access to judicial remedies that allow persons to be made whole according to the Constitution will only further encourage aggrieved parties to vindicate their own rights. . . . Southern Nevadans have seen

(Continued on following page)

made whole even once," *id.* at 21, "[b]ecause the Court of Claims may not entertain claims for declaratory and injunctive relief[2] . . . just as the [d]istrict [c]ourt may not compensate a temporary or permanent taking where damages exceed $10,000," *id.* at 17.

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recently exactly what such self-vindication of rights may look like and judicial actions fostering such scenes should not be encouraged." Appellant's Br. 12. During oral argument, counsel conceded this statement was written in the light and context of a possibility that disappointed litigants "may take up arms." Oral Arg. at 1:55-2:12, *Roca Solida v. United States, available at* http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2014-5058.mp3. Appellant's brief, dated May 12, 2014, was filed in the wake of an armed protest in southern Nevada by supporters of a rancher named Cliven Bundy against the Bureau of Land Management. *See, e.g.,* Jeff German, *Sheriff: FBI Is Investigating Threats Made to Law Enforcement During Bundy Showdown,* Las Vegas Review-Journal (May 8, 2014), http://www.reviewjournal.com/news/bundy-blm/sheriff-fbi-investigating-threats-made-law-enforcement-during-bundy-showdown. Such inflammatory language is inappropriate.

[2] *See Tohono,* 131 S. Ct. at 1729 ("[T]he [Claims Court] has no general power to provide equitable relief against the Government or its officers."); *id.* at 1734 (Sotomayor, J., concurring) ("[A]n action seeking injunctive relief to set aside agency action must proceed in district court, but a claim that the same agency action constitutes a taking of property requiring just compensation must proceed in the [Claims Court]."); *Brady v. United States,* 541 Fed. App'x 991, 992 (Fed. Cir. 2013) (Plaintiff's "requests for declaratory and injunctive relief are also outside the jurisdiction of the Claims Court."); *Hoopa Valley Tribe v. United States,* 596 F.2d 435, 443 (Ct. Cl. 1979) ("[T]he Court of Claims has no jurisdiction of suits for injunctions or declaratory judgments.").

Roca Solida explains it is seeking injunctive relief (which the Claims Court cannot provide) in the district court, and only if injunctive relief is denied will it seek monetary compensation for the permanent loss of water (which, if the amount exceeds $10,000, the district court cannot provide) in the Claims Court. Appellant's Br. 21. It notes it has requested a stay in the Claims Court pending the outcome in the district court. *Id.* at 5; *see also* Appellant's App. 16.

In requesting relief that parallels the present case in important ways, the plaintiff in *Tohono* brought suit in United States district court, alleging federal officials breached their fiduciary duty in managing tribal assets and requesting an accounting, i.e., equitable relief. *Tohono,* 131 S. Ct. at 1727. In a simultaneous action before the Claims Court, the plaintiff sought money damages on the basis of allegations of "almost identical violations of fiduciary duty." *Id.*

Holding the Claims Court lacked jurisdiction pursuant to § 1500, the *Tohono* Court found irrelevant the fact that there was no "remedial overlap." *Id.* at 1728. Plaintiffs may not avoid the jurisdictional bar of § 1500, the Court stated, "by carving up a single transaction into overlapping pieces seeking different relief," such as equitable relief in the district court and damages in the Claims Court. *Id.* at 1730.

The Supreme Court in *Tohono* gave due consideration to Congressional intent, explaining the context

and original purpose of the predecessor to § 1500. *Tohono,* 131 S. Ct. at 1728. It is true, as Roca Solida points out, that concurring and dissenting opinions in *Tohono* expressed views regarding Congressional intent that may have been contrary to those expressed by the majority. Justice Sotomayor, in a concurrence joined by Justice Breyer, read "[t]he legislative history [of § 1500 to] confirm[ ] Congress' intent to preclude requests for *duplicative relief.*" *Tohono,* 131 S. Ct. at 1736 (Sotomayor, J., concurring) (emphasis added). Justice Ginsburg stated in her dissent that "[w]hen Congress bars a plaintiff from obtaining complete relief in one suit . . . and does not call for an election of remedies, Congress is most sensibly read to have comprehended that the operative facts give rise to two discrete claims." *Id.* at 1739 (Ginsburg, J., dissenting). These concurring and dissenting opinions, of course, do not negate the binding nature of the majority opinion.

B. The Pre-*Tohono* Judicial Interpretation of § 1500 on Which Roca Solida Relies Is No Longer Good Law

Roca Solida relies on this court's decision in *Loveladies Harbor, Inc. v. United States,* 27 F.3d 1545 (Fed. Cir. 1994), for the proposition that "it would not be sound policy to force plaintiffs to forego monetary claims in order to challenge the validity of Government action, or[, conversely,] to preclude challenges to the validity of Government action in order to protect

a constitutional claim for compensation." Appellant's Br. 24 (quoting *Loveladies,* 27 F.3d at 1556).

As the Claims Court correctly noted, however, *Loveladies*' holding that § 1500 does not preclude Claims Court jurisdiction so long as the "pending action in another court seeks distinctly different relief," *id.* at 1549, was effectively overruled by *Tohono.* It provides no solace to Roca Solida.

C. Policy Considerations Do Not Allow This Court to Ignore Binding Precedent

In a related argument, Roca Solida asserts "'actions seeking different forms of relief that Congress has made available exclusively in different courts are not [redundant]'" and therefore not inefficient. Appellant's Br. 25 (quoting *Tohono,* 131 S. Ct. at 1737 (Sotomayor, J., concurring)). Similarly, it notes "'federal courts have ample tools at their disposal, such as stays, to prevent . . . burdens [such as parallel discovery]" that might arise from co-pending suits. *Id.* (quoting *Tohono,* 131 S. Ct. at 1737 (Sotomayor, J., concurring)). However, just as the concurring and dissenting opinions in *Tohono* do not diminish the binding nature of the *Tohono* majority opinion, neither do their policy considerations.

In effect, Roca Solida argues the Supreme Court's majority opinion was erroneous and unsound policy. However, "this is not the appropriate forum" in which to advance such an argument, "[h]owever well or ill-founded [it] may be." *Korczak v. United States,* 124

F.3d 227, 1997 WL 488751, at *2 (Fed. Cir. 1997) (unpublished table decision). "We are duty bound to follow the law given us by the Supreme Court unless and until it is changed." *Id.*

D. *Tohono* Has Not Been Effectively Distinguished

Roca Solida also attempts to distinguish *Tohono* on the basis that *Tohono* did not involve a statute of limitations because Congress through special legislation has provided "the statute of limitations on Indian trust mismanagement claims shall not run until the affected tribe has been given an appropriate accounting." *Tohono,* 131 S. Ct. at 1731. By contrast, Roca Solida asserts, its takings claims based on the diversion of water beginning in August 2010 would begin to be barred in August 2016 by the six-year statute of limitations generally applicable to all claims before the Claims Court. *See* 28 U.S.C. § 2501.

However, the Supreme Court in *Tohono* explicitly considered and rejected the argument that § 1500 should be interpreted more flexibly where the limited and nonoverlapping jurisdictions of the district court and Claims Court work a "hardship" on the plaintiff. It stated: "Even were some hardship to be shown [such as incomplete relief resulting from the running of a statute of limitations], considerations of policy divorced from the statute's text and purpose could not override its meaning." *Tohono,* 131 S. Ct. at 1731; *id.* at 1730 ("There is no merit to the Nation's assertion

that the interpretation adopted here cannot prevail because it is unjust, forcing plaintiffs to choose between *partial remedies* available in different courts.") (emphasis added). Although Roca Solida argues this statement is dictum (because no statute of limitations was at issue in *Tohono*), this court has previously recognized "the Supreme Court has made clear that the statutory language of § 1500 leaves no room to account for such hardship." *Cent. Pines Land Co. v. United States,* 697 F.3d 1360, 1367 n.6 (Fed. Cir. 2012).

As Judge Taranto's concurring opinion indicates, the Supreme Court in *Tohono* did not explicitly address the situation where a plaintiff is prevented from asserting a right under the United States Constitution by the interplay between § 1500 and a statute of limitations. Although Roca Solida asserts it is being forced to "choose between: (1) tort damages and injunctive relief to stop ongoing and future constitutional violations [including First Amendment violations] . . . or (2) compensation for a 'taking' [under the Fifth Amendment]," Appellant's Br. 10, it concedes the statute of limitations will not run until August 2016, *id.* at 7 n.9. While the considerations and analysis presented in the concurring opinion may have merit, the constitutional question is not sufficiently ripe for review.

Conclusion

The Claims Court does not have jurisdiction over Roca Solida's claim because a similar claim remains pending in a United States district court, because the district court claim is based on "substantially the same operative facts" as those in the Claims Court proceeding, and because, under *Tohono,* it is irrelevant that the relief sought in each forum is nonoverlapping or would work a hardship in the form of incomplete relief. For these reasons, the decision of the Claims Court is

AFFIRMED

United States Court of Appeals
for the Federal Circuit

MINISTERIO ROCA SOLIDA,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2014-5058

Appeal from the United States Court of Federal Claims in No. 1:12-cv-00541-EDK, Judge Elaine Kaplan.

TARANTO, *Circuit Judge*, concurring.

I agree that we should affirm the Court of Federal Claims' dismissal of Roca Solida's Tucker Act case under 28 U.S.C. § 1500, based on the construction of that section's language in *United States v. Tohono O'Odham Nation,* 131 S. Ct. 1723 (2011). I join the court's opinion. I do so, however, with the recognition that this application of § 1500 may soon present a substantial constitutional question about whether federal statutes have deprived Roca Solida of a judicial forum to secure just compensation for a taking; that avoidance of such constitutional questions can sometimes support adoption of statutory constructions that would otherwise be rejected; that neither *Tohono* nor other authorities squarely address § 1500's application when it raises the constitutional question lurking here; but that we need not pursue special-construction possibilities now – not just because the problem is not present at the moment, but because there may be avenues open to addressing the constitutional question if it arises in the dispute between Roca Solida and the government.

To summarize: The combination of three statutes – (1) § 1500 as construed in *Tohono*; (2) the Tucker Act's six-year statute of limitations, 28 U.S.C. § 2501, which is jurisdictional and not subject to general equitable tolling; and (3) the Little Tucker Act's $10,000 cap on just-compensation claims in district courts, 28 U.S.C. § 1346(a)(2) – threatens to deprive Roca Solida of the opportunity to secure complete relief for what (we must assume on the motion to

dismiss) might be a taking of its property. That is because the six-year period allowed for bringing a Tucker Act suit in the Court of Federal Claims (which is not limited by dollar amount) may well end before the § 1500 bar on doing so is lifted by completion of the Nevada district-court action. But if that occurs, Roca Solida may have remedies. One possibility, highly problematic but not foreclosed by today's decision, is invocation of the transfer statute, 28 U.S.C. § 1631, to transfer to the Court of Federal Claims (when the § 1500 bar ends) the takings claim Roca Solida timely filed in the district court, a claim broad enough to encompass Roca Solida's full claim for just compensation for a permanent or temporary taking. If a full just-compensation remedy is statutorily unavailable, the district court may be entitled to adjudicate the permanent-taking claim and order return of the property if it finds a taking. And if restorative relief is incomplete, as by leaving a temporary taking uncompensated, questions would arise about whether tolling of the statute of limitations might be recognized to avoid unconstitutionality or whether the combination of remedy-depriving statutes is unconstitutional as applied.

It is hardly implausible that the two-forum water-diversion dispute here will arrive at a point at which those issues will have to be addressed if raised: according to the government, the six-year limitations period ends in August 2016, and neither party has said that the Nevada case is positively likely to end

by then. Nevertheless, the troubling potential-loss-of-Fifth-Amendment-rights issues are at present contingent – they may not ripen: the Nevada case may be over by August 2016, and that case may definitively establish the non-existence of a taking that requires just compensation. Perhaps the likelihood that such issues will arise, here and more generally, would permit us to consider, in the present appeal, a constitutional-avoidance exception to § 1500's otherwise-required application. But I do not think it advisable to pursue that question now, partly because, uncertain and complex as they may be, there are at least some possibilities for Roca Solida to secure partial or complete relief even if the Nevada case is still blocking a suit in the Court of Federal Claims in August 2016. I therefore elaborate on the problems hovering on the horizon and possible remedial solutions to those problems.

A

Roca Solida has proceeded in what appears to be a sensible way, perhaps the only way possible under federal statutes, to try to secure complete judicial relief for the water diversion that it claims was unlawful on several grounds, including several constitutional grounds.

Roca Solida has made clear that its main aim has been to secure restoration of the diverted stream to the path it once took through Roca Solida's land. In

district court, it has sought injunctive and declaratory relief from the government's diversion of the stream, and among its grounds it has invoked the First Amendment's Free Exercise Clause and the Fifth Amendment's Due Process Clause. But as long as the Tucker Act remedy for just compensation is available in the Court of Federal Claims, Roca Solida may not invoke the Fifth Amendment's Takings Clause to obtain restoration of the water in district court, because the Fifth Amendment, insofar as it applies here, does not bar takings, only takings without just compensation. *See Blanchette v. Conn. Gen. Ins. Corps.,* 419 U.S. 102, 127 (1974).[1] And Roca Solida could not bring a claim for water restoration in the Court of Federal Claims, whose Tucker Act jurisdiction, including particularly its takings-claim jurisdiction, is limited to monetary relief as relevant here. *See United States v. King,* 395 U.S. 1, 3 (1969); *see also Acadia Technology, Inc. v. United States,* 458 F.3d 1327, 1331 (Fed. Cir. 2006) (just-compensation claim assumes alleged taking itself was not wrongful; challenges alleging wrongfulness of alleged taking must be brought elsewhere).

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[1] Roca Solida has not argued in the Nevada case that the water diversion could be reversed by injunction on the Takings Clause ground that it was not for a "public use." *Cf. Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 543 (2005) ("[I]f 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.").

Roca Solida has also sought just-compensation damages, both in district court and in the Court of Federal Claims. The damages claim in the district court would, at a minimum, address the alleged temporary taking that would come to an end if Roca Solida were to succeed in achieving its primary, restoration objective; and when filed, it was plausibly valued at no more than $10,000, the limit for district court jurisdiction under the Little Tucker Act. But the claim is written broadly enough to cover a claim of both permanent and temporary taking. At the same time, Roca Solida brought the present Court of Federal Claims takings case under the Tucker Act. That claim would address the request for just compensation for a permanent taking, plausibly valued at more than $10,000, if the non-takings claims for restoration in the district court fail. It also could provide just compensation for a temporary taking if, though the water got restored, the passage of time were to raise the value of the temporary-taking claim to more than $10,000.

The Court of Federal Claims case would never need to be adjudicated if, for example, Roca Solida obtained restoration of the water in the district court and sought no more than $10,000 in just compensation for any uncured taking. *Smith v. Orr,* 855 F.2d 1544, 1553 (Fed. Cir. 1988). Accordingly, Roca Solida immediately asked the Court of Federal Claims to stay its Tucker Act case. But Roca Solida might not obtain restoration of the water in the district-court case, and even a temporary-taking claim might grow

in value to more than $10,000 given that the stream diversion occurred in 2010. Should Roca Solida seek just compensation in excess of $10,000 for either a temporary or permanent taking, the Court of Federal Claims appears to be the exclusive judicial forum for obtaining it, at least if this court's conclusion in *Smith v. Orr,* 855 F.2d at 1552, about the loss of initially proper Little Tucker Act jurisdiction when the claim rises in value above $10,000 were applied broadly. *See Christopher Vill., L.P. v. United States,* 360 F.3d 1319, 1332 (Fed. Cir. 2004); *but cf.* pp. 12-13, *infra* (noting question about *Smith*'s scope and soundness).

Under 28 U.S.C. § 2501, "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The government contends that the takings claim accrued in August 2010. Oral Argument at 24:30-24:40, *Ministerio Roca Solida v. United States,* 2014-5058; *see John R. Sand & Gravel Co. v. United States,* 457 F.3d 1345, 1357 (Fed. Cir. 2006), *aff'd,* 552 U.S. 130 (2008). Under that assumption, the six-year period ends in August 2016. The Nevada case may well extend beyond that date. In that event, applying § 1500 as construed in *Tohono* would block Roca Solida's ability to initiate an action in the Court of Federal Claims until the statute of limitations has run.

There would be no such bar if equitable tolling were available to suspend the running of the clock.

But the Supreme Court has recently held that it is not. *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 136-39 (2008);[2] *see FloorPro, Inc. v. United States,* 680 F.3d 1377, 1382 (Fed. Cir. 2012). As a result, because Roca Solida is pursuing its constitutional and other claims for relief in district court – claims that it cannot bring and consolidate in the Court of Federal Claims – the combination of § 1500, § 2501, and § 1346(a)(2), under the governing general standards and considered by themselves, may soon eliminate Roca Solida's access to a judicial forum for obtaining just compensation for what may be a taking.

B

A substantial constitutional question would be raised if federal statutes forced a claimant to choose between securing judicial just compensation for a taking of property and pursuing constitutional and other legal claims that challenge, and if successful could reverse, the underlying action alleged to constitute a taking. *See Blanchette,* 419 U.S. at 148-49 (withdrawing the Tucker Act remedy, without a corresponding guarantee of just compensation, may "raise serious constitutional questions"). Although, as a general matter, it is the sovereign's prerogative to

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[2] *John R. Sand* involved a takings claim, but there was no discussion in the Court's opinion of any contention that the plaintiff faced a statutory impediment to presenting its takings claim within the six-year period.

"prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted," *Beers v. Arkansas,* 20 How. 527, 529 (1858), the Fifth Amendment's Takings Clause has long been treated as guaranteeing a just-compensation remedy, not just an underlying right. Notably, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* the Supreme Court rejected the government's argument that "the prohibitory nature of the Fifth Amendment . . . combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision." 482 U.S. 304, 316 n.9 (1987). The Court explained that, to the contrary, precedent "make[s] clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *Id.*; *see also* Richard H. Fallon, Jr. et al., *Hart & Wechsler's the Federal Courts and the Federal System* 718-19 (6th ed. 2009) (characterizing the Takings Clause as establishing a constitutional remedy).[3]

Other, more general authorities may have a bearing on the constitutional questions that may

[3] In a related vein is the longstanding exception for unconstitutional takings to the general rule that a statutory waiver of sovereign immunity is required to permit an official-capacity suit against a federal officer to restore property to its rightful owner. *Malone v. Bowdoin,* 369 U.S. 643, 647-48 (1962); *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 690, 696-97 (1949); *United States v. Lee,* 106 U.S. 196, 221-23 (1882).

arise in August 2016. One line of authority concerns congressional deprivation of judicial relief for constitutional violations. The Court has repeatedly noted "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Elgin v. Dep't of Treasury,* 132 S. Ct. 2126, 2132 (2012); *Webster v. Doe,* 486 U.S. 592, 602-03 (1988). Another line of authority concerns the impermissibility of imposing "unconstitutional conditions" in various circumstances, including those involving alleged takings. The Court has explained that it has held "in a variety of contexts that 'the government may not deny a benefit to a person because he exercises a constitutional right.'" *Koontz v. St. Johns River Water Mgmt. Dist.,* 133 S. Ct. 2586, 2594 (2013). *Cf. Simmons v. United States,* 390 U.S. 377, 394 (1968) (in particular criminal-case context, deeming it "intolerable that one constitutional right should have to be surrendered in order to assert another").

I do not address how those and perhaps other authorities would apply if federal statutes were to preclude Roca Solida from obtaining a judicial award of just compensation for a taking because it pursued its constitutional and other legal claims in district court. Rulings in this area have often been tightly bound to case-specific facts, as established by a fully developed factual record. In particular, I do not address whether it is relevant that Roca Solida first sued in August 2012, two years after the August 2010 completion of the water-diversion project. I also put

aside, for purposes of this opinion, the possibility that § 1500 would not have applied if Roca Solida had filed in the Court of Federal Claims before, rather than two days after, filing in district court.[4] I conclude only that serious questions are raised by the apparent combined effect of § 1500, § 2501, and § 1346(a)(2), under their general governing interpretations, on what may well be Roca Solida's situation a year and a half from now.

The substantiality of the constitutional questions raises a natural follow-on question: whether § 1500 should be given a distinctively narrow application when necessary to avoid those questions. Statutes have sometimes been given constructions as applied to particular situations to avoid substantial constitutional problems, even when other considerations,

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[4] I put that aside because the government can hardly contend that Roca Solida could easily have avoided § 1500 difficulties by reversing the order of filing, although *Tecon Eng'rs, Inc. v. United States,* 343 F.2d 943 (Ct. Cl. 1965), supports such a contention. *See Brandt v. United States,* 710 F.3d 1369, 1379 n.7 (Fed. Cir. 2012) (*Tecon* "remains the law of this circuit"; holding that a case was not "pending" during the time between the district court's judgment and the filing of a notice of appeal). The government has argued that *Tecon*'s order-of-filing rule is no longer good law, invoking *Tohono,* 131 S. Ct. at 1729-30, and *UNR Indus., Inc. v. United States,* 962 F.2d 1013, 1023 (Fed. Cir. 1992) (en banc). Brief for the United States at 33-36, *Brandt v. United States,* 2012 WL 1943736 (Fed. Cir. 2012); United States' Combined Petition for Panel and En Banc Rehearing, at 9-14, *Brandt,* 710 F.3d 1369 (Jun. 10, 2013) (No. 12-5050), *denied,* Aug. 19, 2013; *see Brandt,* 710 F.3d at 1380-82 (Prost, J., concurring) (*Tecon* should be overruled).

including textual considerations, pointed the other way. *See, e.g., Bond v. United States,* 134 S. Ct. 2077, 2088-90 (2014); *Jinks v. Richland County,* 538 U.S. 456 (2003); *Raygor v. Regents of Univ. of Minn.,* 534 U.S. 533 (2002); *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 200 (1979).

C

Neither the Supreme Court nor this court has addressed whether § 1500 should be applied in such circumstances. *Tohono* did not involve a takings claim (it involved a breach-of-trust claim) under the Tucker Act. *Keene Corp. v. United States,* 508 U.S. 200 (1993), did involve a takings claim among the Tucker Act claims at issue, but the court did not have before it or address a contention that applying § 1500 to bar the Tucker Act suit, in combination with the statute of limitations, § 2501, might force the claimant to choose between giving up a just-compensation claim and giving up other legal claims, including other constitutional claims. Indeed, the government in *Keene,* addressing the possibility that a Tucker Act claim might be untimely when the § 1500 bar ended, represented that "equitable tolling of the statute of limitations may be available" for a plaintiff with such a claim. Brief for the United States at 40-41, *Keene,* 508 U.S. 200 (No. 92-166), 1993 WL 290106, at *40-41. Only fifteen years later did the Court hold, at the government's urging, that § 2501 is jurisdictional and thus not susceptible to equitable tolling. *John R. Sand,* 552 U.S. at 139.

Other Supreme Court decisions likewise do not address whether § 1500 might properly be read not to bar a Tucker Act suit when a contrary holding, in combination with the statute of limitations, would force the claimant to choose between giving up a just-compensation claim and giving up other legal claims, including other constitutional claims. *See Matson Nav. Co. v. United States,* 284 U.S. 352, 354 (1932) (Court of Claims action founded upon breach of contract); *Corona Coal Co. v. United States,* 263 U.S. 537, 539 (1924) (Court of Claims action founded upon act of Congress); *In re Skinner & Eddy Corp.,* 265 U.S. 86, 91 (1924) (Court of Claims action founded upon breach of contract). Nor, evidently, is the issue decided in rulings by this court and its predecessors.

D

The foregoing constitutional questions, and their potential consequences for construing § 1500, do not have to be faced at present. The scenario making the constitutional questions seemingly serious ones may not arise. And as a general matter, a "'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" *Camreta v. Greene,* 131 S. Ct. 2020, 2031 (2011) (quoting *Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S. 439, 445 (1988)). Although application of that principle sometimes requires a judgment call about the degree of contingency involved, the appropriateness of applying it here is reinforced by the conclusion that, even

with the dismissal under § 1500, Roca Solida has several possible (not to say certain or clear) paths to seeking partial or complete judicial relief.

One possible path to explore can be seen by broadening the statutory focus, beyond § 1500, § 2501, and § 1346(a)(2), to include the transfer statute, § 1631 – but § 1500 might well block that path. Putting § 1500 to one side for a moment, it may be that § 1631 would allow the transfer to the Court of Federal Claims of the takings claim filed in district court in 2012, once that claim rose in value to more than the $10,000 allowed under the Little Tucker Act; and if so, the resulting Court of Federal Claims action would be treated, for statute-of-limitations purposes, as if it had been filed in 2012. 28 U.S.C. § 1631 ("[w]henever" a court "finds that there is a want of jurisdiction," it "shall, if it is in the interest of justice, transfer such action" to a court "in which [it] could have been brought at the time it was filed," where it "shall proceed as if it had been filed in . . . [the transferee court] on the date upon which it was actually filed in . . . [the transferor court]"). Although transfers are not obligatory, avoidance of statute-of-limitations problems (which a re-filing after a dismissal might present) is "[a] compelling reason for transfer," *Texas Peanut Farmers v. United States,* 409 F.3d 1370, 1374 (Fed. Cir. 2005), as is the interest in providing the constitutionally guaranteed judicial forum for a claim for just compensation for a taking.

But § 1500 creates a problem for the transfer possibility. We have held that, in the transfer situation,

(a) § 1631 requires asking whether § 1500 would have blocked the transferred claim if it had been filed in the Court of Federal Claims at the same time the untransferred claims were filed in the district court and (b) § 1500 applies to simultaneously filed claims. *See United States v. County of Cook,* 170 F.3d 1084, 1090-91 (Fed. Cir. 1999); *see also Griffin v. United States,* 590 F.3d 1291, 1293 (Fed. Cir. 2009); *Harbuck v. United States,* 378 F.3d 1324, 1328 (Fed. Cir. 2004). Under that approach, a transfer of the takings claim here, even after termination of the rest of the Nevada action, would seem to raise this question: would § 1500 have barred the filing of the takings claim in the Court of Federal Claims in 2012 simultaneously with the filing in the Nevada district court of all the claims currently in the Nevada case except the takings claim? That is not the question presented to us today, but the *Tohono* standard appears to be a significant obstacle to Roca Solida's obtaining a favorable answer.[5]

Another possible path is through the district court's adjudication of the full takings claim, regardless of amount – but this path itself contains an apparent obstacle, albeit one of uncertain breadth and solidity. As to the possibility: Longstanding

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[5] Pursuit of a transfer might also raise other issues, such as how to preserve the takings claim's transferability – perhaps severance and a stay of the takings claim in district court, *see* Fed. R. Civ. P. 21 – until the rest of the Nevada action is no longer pending.

precedent holds that, in general, satisfaction of statutory jurisdictional prerequisites is to be "tested by the facts as they existed when the action is brought." *Smith v. Sperling,* 354 U.S. 91, 93 n.1 (1957); *see Grupo Dataflux v. Atlas Global Grp., L.P.,* 541 U.S. 567, 570 (2004) (the "time-of-filing rule is hornbook law"); *Keene,* 508 U.S. at 209. Under that principle, it may be that Roca Solida's takings claim in the district court, proper when filed because plausibly then valued at no more than $10,000, can still be adjudicated in district court and support an award of more than $10,000 if warranted by post-filing events.

An obstacle to that conclusion, however, is this court's decision in *Smith v. Orr,* which concluded, in the context of an employee's claim for backpay, that a district court would lose Little Tucker Act jurisdiction once the amount claimed "accrued to greater than $10,000." 855 F.2d at 1553. Perhaps *Smith v. Orr* should be limited to barring claims, such as backpay claims based on fixed salary payments, where the non-contingent facts alleged make it effectively certain from the outset that the amount at issue will exceed $10,000. *Cf. St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 288-89 (1938) (Regarding one jurisdictional minimum, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."). *Smith v. Orr* itself cited only backpay cases in reaching its conclusion,

855 F.2d at 1553 nn. 42-45, 47, and we have not applied *Orr* outside those circumstances. *See Simanonok v. Simanonok,* 918 F.2d 947, 950-51 (Fed. Cir. 1990). Moreover, a leading scholar, discussing *Smith v. Orr,* has stated that "the proposition that a court may take and then lose trial jurisdiction due to the mere passage of time may be questioned in light of" *Keene* and *Grupo Dataflux.* Gregory C. Sisk, Litigation With The Federal Government 238 (4th ed. 2006).

Alternatively, or in addition, perhaps a special constitutional-avoidance tolling of the § 2501 statute of limitations is justified, despite the general absence of equitable tolling. There may be an argument for such tolling on a ground that borrows from the essential principles stated in decisions allowing injunctive relief if the Tucker Act remedy has been withdrawn: "it cannot be doubted that the [Tucker Act] remedy to obtain compensation from the Government *is as comprehensive as the requirement of the Constitution*" and "the true issue is whether there is sufficient proof that Congress intended to *prevent* such recourse." *Blanchette,* 419 U.S. at 127, 126 (internal quotation marks omitted; emphases as in *Blanchette*). It is open to serious question whether Congress intended to prevent just-compensation relief for a taking through the combination of § 1500, § 2501, and § 1346(a)(2). If that combination precludes such relief, even when also considering the transfer statute, it might be that the combination should be held unconstitutional as applied, allowing suit for more than $10,000 either in

district court or in the Court of Federal Claims when the § 1500 bar ends.

Aside from the possibility of an as-applied constitutional invalidation, if Roca Solida eventually lacks statutory means of obtaining just compensation in court, it may have a forward-looking judicial remedy should it prove that its property was taken. Notably, it may be that the district court can entertain a takings claim to restore the diverted water if the just-compensation remedy is not available. The unavailability of a just compensation remedy generally allows otherwise-authorized litigation to obtain forward-looking curative relief against an alleged taking. *See Horne v. Dep't of Agric.,* 133 S. Ct. 2053, 2063 (2013); *Eastern Enterprises v. Apfel,* 524 U.S. 498, 521-22 (1998) (plurality opinion) (where monetary relief against the government is not "an available remedy," equitable relief for a taking is "within the district courts' power"); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.,* 438 U.S. 59, 71 n.15 (1978) (affirming the district court's subject-matter jurisdiction under 28 U.S.C. § 1331(a) to entertain a request for a declaratory judgment that, because the Price-Anderson Act "does not provide advance assurance of adequate compensation in the event of a taking, it is unconstitutional"). *See also supra* p. 7 n.3.[6] The

[6] Apart from the *Malone/Larson/Lee* authorization of injunctive relief, the Administrative Procedure Act waives sovereign immunity for challenges to federal agency action by certain persons "seeking relief other than money damages," 5 U.S.C.

(Continued on following page)

district court may consider whether such restoration relief is available under those authorities if Roca Solida can no longer maintain a Tucker Act case in August 2016.

The important and deeply rooted interest in the effectiveness of a constitutional guarantee – here, of a just compensation remedy for a taking – would be well served if the answers to the how-to-secure-relief questions turned out to be clear should they have to be faced. Unfortunately, it is easy to imagine that the costs, uncertainties, and delays of litigating over forum, procedure, and remedies will be substantial – burdens addressed, though probably not fully lifted, by the availability of interest as a part of a just-compensation award (*see Kirby Forest Indus., Inc. v. United States,* 467 U.S. 1, 10-11 (1984)) and the availability of attorney's fees (*see* 42 U.S.C. § 4654(c); *Bywaters v. United States,* 670 F.3d 1221 (Fed. Cir. 2012)). Complexity, lack of clarity, splitting of jurisdiction, and § 1500's rigid rule are features of the current legal landscape at issue here, and the

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§ 702, and generally authorizes district courts to "set aside agency action . . . found to be . . . contrary to a constitutional right," § 706, when the challenged action is "final agency action for which there is no other adequate remedy in a court," § 704. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S. Ct. 2199, 2204 (2012); *Bennett v. Spear,* 520 U.S. 154, 175 (1997). The preclusion of an adequate Tucker Act damages remedy might satisfy the § 704 precondition. The government has not suggested that its position in this two-forum dispute is that the employee who executed the diversion project acted beyond her statutory authority.

practical effect of those features may easily be to cause loss or abandonment of meritorious constitutional claims. But because there is some possibility that Roca Solida will have remedies available if needed, I conclude that we should apply § 1500 as construed in *Tohono* rather than grapple more definitively with the constitutional questions that are not yet certain to arise in this dispute.

In the United States Court of Federal Claims

* * * * * * * * *	*	
MINISTERIO ROCA SOLIDA,	*	
Plaintiff,	*	
	*	
v.	*	No. 12-541L
THE UNITED STATES OF AMERICA,	*	(Filed: January 15, 2014)
	*	
	*	
Defendant.	*	
* * * * * * * * *	*	

OPINION AND ORDER

Joseph Francis Becker, NPRI Center for Justice and Constitutional Litigation, Reno, NV, for plaintiff.

Gregory Daniel Page, Natural Resources Section, United States Department of Justice, Washington, DC, for defendant.

KAPLAN, Judge.

This suit alleges a taking of property without just compensation in violation of the Fifth Amendment. Pending before the Court is the government's motion to dismiss under Rule 12(b)(1) of the Rules of the Court of Federal Claims for lack of subject matter jurisdiction. The government argues that – pursuant to 28 U.S.C. § 1500 – this Court lacks jurisdiction under the Tucker Act because at the time the complaint was filed here, plaintiff had already filed a complaint against the United States in another court based on substantially the same operative facts. For

the reasons that follow, the Court grants the government's motion and dismisses the case without prejudice.

I. BACKGROUND

Plaintiff Ministerio Roca Solida ("Solid Rock Ministry") is a Christian church in Nevada founded in 2006 by Pastor Victor Fuentes, a Cuban refugee. Compl. ¶ 3; Pl.'s Opp'n to Def.'s Mot. To Dismiss 3. In November, 2006, with donations from parishioners, Solid Rock Ministry purchased a forty-acre parcel of land in Nye County, Nevada for $500,000. Compl. ¶ 5. Solid Rock Ministry built a church camp on the property where attendees can retreat, meditate, and enjoy nature. *Id.* ¶¶ 5-6. Flowing through the camp was a desert stream, which Solid Rock Ministry used for baptisms. *Id.* ¶ 6. The stream also fed a pond that attendees of the camp used for recreation. *Id.* When Solid Rock Ministry purchased the property, it also purchased water rights to this stream. *Id.*

Although the camp is Solid Rock Ministry's property, it is situated within the boundaries of the Ash Meadows National Wildlife Refuge. *Id.* ¶ 5. A unit of the National Wildlife Refuge System, Ash Meadows is managed by the United States Fish and Wildlife Service ("FWS"). *Ash Meadows National Wildlife Refuge,* U.S. Fish and Wildlife Service (Dec. 11, 2013), http://www.fws.gov/refuge/ash_meadows/. As part of its wildlife management mandate, FWS had undertaken a water diversion project on Ash

Meadows land. *Compl.* ¶ 7. FWS finished work on this project in August 2010. *Id*.

Solid Rock Ministry alleges that FWS's water diversion project routed Solid Rock Ministry's water "completely around the borders of the church's forty acre parcel" and thus "prevented Solid Rock Ministry's water from entering the church property." *Id*. Solid Rock Ministry further alleges that FWS executed the project negligently, causing $86,639 in damage to the camp from flooding that occurred on December 23, 2010, the first day of significant rainfall after the diversion. *Id*. ¶ 9.

To redress its injuries, Solid Rock Ministry filed suit against FWS and the Ash Meadows Wildlife Refuge Manager in the United States District Court for the District of Nevada on August 22, 2012. *Ministerio Roca Solida v. United States,* No. 2:12-cv-1488-RCJ-VCF (D. Nev. filed Aug. 22, 2012). In that suit, which is still pending, Solid Rock Ministry seeks declaratory and injunctive relief for alleged violations of the due process clause and the First Amendment's free exercise clause arising out of the water diversion project. It is also seeking damages under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b)(1), and compensation under the Fifth Amendment Takings Clause. *See* Compl. ¶¶ 19-33.

On August 24, 2012, two days after Solid Rock Ministry filed its suit in the district court, it filed the present case here. The present complaint relates to the same water diversion project that forms the basis

for Solid Rock Ministry's complaint in the District of Nevada. In its complaint, Solid Rock Ministry requests that this Court "stay action in this proceeding pending resolution of the relief sought in the United States District Court for the District of Nevada" and that, depending on the outcome of its other suit, this Court "declare that Defendants' water diversion project resulted in a taking of Plaintiff's property rights in water and land and award money damages plus interest for said takings, be they temporary in nature or otherwise." Compl. ¶ 17. Solid Rock Ministry filed its suit here to preserve its right to recover damages in excess of $10,000 in this Court against the potential future bar of the Tucker Act's six-year statute of limitations. *See* Pl.'s Opp'n to Def.'s Mot. to Dismiss 3.

II. DISCUSSION

Whether this Court has jurisdiction to decide a case is a threshold matter, and, if no jurisdiction exists, the Court must order dismissal without proceeding further. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-95 (1998). In deciding a motion to dismiss for lack of subject matter jurisdiction, the court accepts as true all undisputed facts in the plaintiff's complaint and draws all reasonable inferences in favor of the plaintiff. *Trusted Integration, Inc. v. United States,* 659 F.3d 1159, 1163 (Fed. Cir. 2011). The plaintiff, however, bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Id*.

In filing its takings claims in this court, Solid Rock Ministry invokes this court's jurisdiction under the Tucker Act, which authorizes the Court of Federal Claims to render judgment upon "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a). Claims for damages under the Takings Clause of the Fifth Amendment are within this Court's Tucker Act jurisdiction. *Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.,* 525 F.3d 1299, 1309 (Fed. Cir. 2008). Indeed, as noted above, the Court of Federal Claims possesses exclusive jurisdiction over such claims when damages exceed $10,000. § 1346(a)(2).

The Court of Federal Claims' Tucker Act jurisdiction is, however, limited by 28 U.S.C. § 1500. That statute provides that the Court of Federal Claims lacks subject matter jurisdiction "of any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States. . . ." *Id*. As the court of appeals has observed, two inquiries are required to determine the applicability of the jurisdictional bar contained in § 1500: "(1) whether there is an earlier-filed 'suit or process' pending in another court, and, if so, (2) whether the claims asserted in the earlier-filed case are 'for or in respect to' the same claim(s) asserted in the later-filed Court of Federal Claims action." *Brandt v.*

United States, 710 F.3d 1369, 1374 (Fed Cir. 2013); *see also Trusted Integration,* 659 F.3d at 1163-64 (citing *United States v. Tohono O'Odham Nation,* 131 S. Ct. 1723, 1727 (2011)).

In this case, the answer to the first inquiry is undisputed: there is currently pending in the District of Nevada an earlier-filed suit by the plaintiff against the United States. The sole issue before the Court, therefore, is whether the present suit contains claims that are "for or in respect to" the claims in the complaint the plaintiff filed in the district court.

The Supreme Court has held that the claims asserted in an earlier action are "for or in respect to" a claim later filed in the Court of Federal Claims if the pending suit in district court is "based on substantially the same operative facts." *Tohono,* 131 S. Ct. at 1731. The jurisdictional bar applies, the Supreme Court held, even if no overlap exists between the relief sought in this Court and the relief sought in the district court. *Id*. *See also Cent. Pines Land Co., L.L.C. v. United States,* 697 F.3d 1360, 1364 (Fed. Cir. 2012) (applying *Tohono*).

Solid Rock Ministry's action in the district court and the present case meet the standard set forth in *Tohono.* The claims in both actions arise from Solid Rock Ministry's ownership of the same parcel of land and water and its alleged injuries as a result of the same FWS water diversion project. In fact, the complaints in the two cases describe the underlying government actions in virtually identical language.

The complaints "at best, repackaged the same conduct into . . . different theories, and at worst, alleged the same takings claim." *Cent. Pines,* 697 F.3d at 1365.

Solid Rock Ministry appears to concede that its claims in the District of Nevada for injunctive relief and its claims in this court for monetary relief involve substantially the same operative facts. *See, e.g.*, Pl.'s Opp'n to Def.'s Mot. to Dismiss 6 (referring to its claims as "arising from the same nucleus of operative fact"). But despite this concession, Solid Rock Ministry argues that, based upon the history and the original purpose of § 1500, Congress did not intend for the statute to bar suits that seek relief different from and additional to that sought in the district court. *See* Pl.'s Opp'n to Def.'s Mot. to Dismiss 9. It notes that § 1500 has origins in an 1868 statute designed to prevent "cotton claimants" from filing duplicative lawsuits against government officials that would have effectively resulted in double payments on a single claim. Pl.'s Opp'n to Def.'s Mot. to Dismiss 8; *Keene Corp. v. United States,* 508 U.S. 200, 206 (1993). It argues that its lawsuits are not similarly "duplicative" because it is not seeking to be made whole twice; rather, it seeks to secure injunctive relief and money damages in the district court while preserving its right to seek a monetary remedy here for the taking of its property, should the damages for such taking ultimately exceed $10,000. *See* Pl.'s Opp'n to Def.'s Mot. to Dismiss 9 ("Solid Rock is not trying to get paid twice for the same loss. . . ."). Solid

Rock Ministry argues moreover that the result of reading § 1500 to preclude this Court's jurisdiction – the possible loss of a cause of action due to the expiration of the statute of limitations – is unfair and may ultimately preclude it from vindicating its Fifth Amendment rights to just compensation.

Solid Rock Ministry's arguments cannot be reconciled with binding precedent from the Supreme Court and the Federal Circuit. First, the *Tohono* Court was fully aware of the history of § 1500 that Solid Rock describes. *See Tohono,* 131 S. Ct. at 1728. The Court placed its reliance, however, on what it considered the plain statutory language when it ruled that § 1500 bars claims "based on facts alone," regardless of the relief sought or the underlying legal theories. *Tohono,* 131 S. Ct. at 1728; *Trusted Integration,* 659 F.3d at 1164 (citing *Keene Corp.,* 508 U.S. at 212, and noting that whether the legal theories underlying the asserted claims in each action are the same or different is irrelevant to whether the claims asserted in an earlier action are "for or in respect to" the claims later filed in this Court). In short, the only pertinent question in deciding § 1500's application is whether there is substantial factual overlap between the claims; the forms of relief sought in the parallel actions are not relevant. *See, e.g., Pelligrini v. United States,* 103 Fed. Cl. 47, 51-52 (2012) (ordering dismissal in a case very similar to Solid Rock Ministry's in which the plaintiff asserted claims under the FTCA in district court and under the Fifth Amendment Takings Clause in the Court of Federal Claims, where

both suits involved the same underlying facts). *See also Kingman Reef Atoll Invs., L.L.C. v. United States,* 103 Fed. Cl. 660, 689 (2012) (dismissing a takings claim when a quiet title action with substantially the same underlying facts was pending in district court); *U.S. Home Corp. v. United States,* 108 Fed. Cl. 191, 197-98 (2012) (dismissing a claim seeking damages for a breach of deed covenants when a claim seeking a declaratory judgment under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 with the same operative facts was pending in district court).[1]

Nor is there any merit to Solid Rock Ministry's argument that *Tohono* is inapposite because the claims here, unlike the claims in *Tohono*, are subject to a statute of limitations, whose expiration could

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[1] Although *Tohono* holds that § 1500's jurisdictional bar may apply even absent any overlap between the relief sought in the district court and the relief sought in the CFC, it bears noting that in this case – contrary to Solid Rock Ministry's arguments – there is, in fact, overlap between the relief sought in the two forums. Thus, both here and in the district court Solid Rock Ministry seeks money damages as compensation for a Fifth Amendment taking arising out of the same operative facts. Therefore, even under the narrower interpretation of § 1500 that governed prior to *Tohono,* this Court would lack jurisdiction to decide Solid Rock Ministry's takings claim. *See Keene Corp.,* 508 U.S. at 214 (holding that § 1500 requires dismissal if "the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested" and that the plaintiff's takings claim in district court and its takings claim in the Court of Federal Claims met this standard).

deprive Solid Rock Ministry of a damages remedy for the alleged "taking" of its property. *See* Pl.'s Opp'n to Def.'s Mot. to Dismiss 10. Indeed, the Supreme Court in *Tohono* expressly noted that even if the plaintiff's claims were subject to bar by a statute of limitations, the result would be the same, observing that "[e]ven were some hardship to be shown, considerations of policy divorced from the statute's text and purpose could not override its meaning. . . . This Court enjoys no liberty to add an exception . . . to remove apparent hardship." *Tohono,* 131 S. Ct. at 1731 (internal quotation marks omitted).

Solid Rock Ministry acknowledges the Supreme Court's refusal to carve out a hardship exception, but it argues that the statements to that effect in *Tohono* constitute "dicta" that need not be followed. Pl.'s Opp'n to Def.'s Mot. to Dismiss 10. But while the discussion of "hardship" arising out of the hypothetical expiration of a statute of limitations may be characterized as "dicta" in the context of the facts in *Tohono,* the *Tohono* Court's direction that § 1500 "leaves no room to account for . . . hardship" has been held "clear" by the Federal Circuit. *Cent. Pines,* 697 F.3d at 1367 n. 6; *see also Goodeagle v. United States,* 105 Fed. Cl. 164, 174 (2012) (relying on the Supreme Court's statement on hardship in rejecting plaintiffs' request for an exception to § 1500); *U.S. Home Corp.,* 108 Fed. Cl. at 200 n. 6 (quoting *Cent. Pines,* 697 F.3d at 1367 n. 6, for the proposition that "§ 1500 leaves no room to account for hardship"). Therefore, the fact

that the plaintiff here is subject to a statute of limitations, while the plaintiff in *Tohono* was not, is not material to the disposition of the jurisdictional issue. Binding precedent dictates that there may be no consideration of hardship in determining the applicability of the jurisdictional bar.

The rest of Solid Rock Ministry's arguments amount to similar requests that this Court depart from binding Supreme Court or Circuit precedent. For example, Solid Rock Ministry cites Justice Sotomayor's concurrence in *Tohono* to support an argument that dismissing this suit "runs contrary to" judicial efficiency and that a stay of proceedings would better serve that end. *See* Pl.'s Opp'n to Def.'s Mot. to Dismiss 11 (citing 131 S. Ct. at 1737 (Sotomayor, J., concurring)). But Justice Sotomayor made this observation in the context of her criticism of the majority's opinion in *Tohono*; the gist of the majority's opinion is that such policy considerations, like considerations of hardship, are not to be considered in determining this Court's jurisdiction (or lack thereof) under § 1500.

Similarly, Solid Rock Ministry cites *Loveladies Harbor, Inc. v. United States,* 27 F.3d 1545 (Fed. Cir. 1994) (en banc), for the proposition that "a litigant may file a suit challenging the validity of governmental regulatory activity [in district court] concurrently with a takings claim [in the Court of Federal Claims] arising from the same set of facts." Pl.'s Opp'n to Def.'s Mot. to Dismiss 13. *Loveladies Harbor,* however, does not assist the plaintiff's case because it too

conflicts with the more recent Supreme Court and Federal Circuit precedent as described above.

To be sure, the Supreme Court in *Tohono* did not expressly overrule *Loveladies Harbor. But cf. Tohono,* 131 S. Ct. at 1734 (Sotomayor, J., concurring), 1739 (Ginsburg, J., dissenting) (citing *Loveladies Harbor* as an earlier framework that the majority in *Tohono* rejects). The Federal Circuit in *Trusted Integration,* however, clearly indicated that *Loveladies Harbor* no longer controls to the extent that it places its focus on whether the relief sought in the two actions is different. *Trusted Integration,* 659 F.3d at 1164, 1166 n. 2 (juxtaposing *Loveladies Harbor,* in which the Court said that the claim pending in another court "must arise from the same operative facts, *and* must seek the same relief," and *Tohono,* which "clarified" that the claim must arise from the same operative facts "regardless of the relief sought in each suit"). For these reasons, several judges on this court have concluded (correctly) that *Loveladies Harbor* has effectively been overruled. *See, e.g., Pellegrini,* 103 Fed. Cl. at 51 (citing *Loveladies Harbor* as "overruled . . . by *Tohono*"); *U.S. Home Corp.,* 108 Fed. Cl. at 194 (stating that *Loveladies Harbor* was "rejected by the Supreme Court in *Tohono*").

CONCLUSION

On the basis of the foregoing discussion, this Court's exercise of jurisdiction is precluded by 28 U.S.C. § 1500. Plaintiff's complaint, accordingly, is

dismissed without prejudice, and plaintiff's request for a stay is denied as moot. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/Elaine D. Kaplan
ELAINE D. KAPLAN
Judge, U.S. Court of Federal Claims