No. 14-1413

In the Supreme Court of the United States

MINISTERIO ROCA SOLIDA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Federal Claims lacks jurisdiction under 28 U.S.C. 1500 to hear a takings claim against the United States when the plaintiff has the same takings claim pending in a suit against the United States in another court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 778 F.3d 1351. The opinion of the Court of Federal Claims (Pet. App. 34-46) is reported at 114 Fed. Cl. 571.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2015. The petition for a writ of certiorari was filed on May 27, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In *Cappaert* v. *United States*, 426 U.S. 128 (1976), this Court addressed a claim to "water rights within the Ash Meadows area" of Nevada by private parties who required water for commercial agriculture. See *United States* v. *Cappaert*, 375 F. Supp. 456,

458 (D. Nev.), aff'd, 508 F.2d 313 (9th Cir. 1974), aff'd, 426 U.S. 128 (1976). "The Ash Meadows region is a unique and diverse desert wetland" that sustains "[h]undreds of plant and animal species," many of which are endemic to Ash Meadows itself. 50 Fed. Reg. 20,777, 20,777 (May 20, 1985). Such endemic species that exist only at Ash Meadows depend on the wetland for species survival. *Ibid.*

The Court in *Cappaert* rejected the private claim to Ash Meadows water because it concluded that the government's establishment of the nearby Devil's Hole National Monument had impliedly reserved federal water rights to the amount of unappropriated water needed to protect a unique fish species of scientific interest. 426 U.S. at 139-142. "[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose," the Court held, "the Government, by implication, reserves appurtenant water then unappropriated," such that the government's reserved "water rights [will be] sufficient to accomplish the purposes of the reservation." *Id.* at 138-139.

In 1977, one year after *Cappaert*, "[t]he agricultural interests in Ash Meadows sold approximately 23 square miles [14,720 acres] of land to a real estate developer," which subsequently proposed a development that "would have resulted in elimination of most habitats occupied by Ash Meadows endemic species." 50 Fed. Reg. at 20,778-20,779. One of Ash Meadows' endemic species had already succumbed to extinction by 1984, when the federal government acquired "approximately 11,173 acres of land and all of the certified water rights previously owned by [the developer]" and used the newly acquired land "to establish the

Ash Meadows National Wildlife Refuge." *Id.* at 20,778. The government established the refuge "to protect the large number of [Endangered Species Act] candidate, proposed, and listed plants and animals found in Ash Meadows." *Ibid.* The refuge, which now covers over 23,000 acres and is listed as a "Wetland of International Importance" under the Ramsar Convention on Wetlands,[1] "is a haven for rare native wildlife" containing "the greatest concentration of endemic life in the United States." U.S. Fish & Wildlife Serv., *Ash Meadows National Wildlife Refuge* 3-4 (2013), http://www.fws.gov/uploadedFiles/Region_8/NWRS/Zone_1/Desert_Complex/Ash_Meadows/Sections/Brochures/AshMeadows_GB2013_lores.pdf.

In 1990, the Fish and Wildlife Service (FWS) issued a species recovery plan for Ash Meadows. FWS, *Recovery Plan for the Endangered and Threatened Species of Ash Meadows, Nevada* (1990), http://www.fws.gov/nevada/protected_species/fish/documents/ws_pupfish/RP_ashmeadows.pdf. The plan explained that past agricultural and mining activities had "resulted in alteration of [natural] spring flows" and produced "substantial changes in biotic communities." *Id.* at 41. The 1990 plan also explained that, after the "natural character" of the areas had been determined and "waterflow restoration plan[s]" had been devised, the spring-water flows would be restored to their "historic channels" as specified by the plans. *Id.* at 41-42. The 2010 implementation of one aspect of a waterflow restoration plan gave rise to the events in this case.

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[1] Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11,084, 996 U.N.T.S. 245.

b. Petitioner is a non-profit religious corporation. C.A. App. 13. In 2006, petitioner purchased a 40-acre parcel of land located entirely "within the boundaries of the Ash Meadows National Wildlife Refuge," which petitioner has used "for [the] operation of a church camp ministry." *Ibid.*

In August 2010, a FWS water project changed the course of a water flow in the Ash Meadows refuge that had previously flowed across petitioner's parcel. C.A. App. 13-14. Petitioner alleges that it had used the water as part of its ministry (including for baptisms), and that the change in flow deprived it of water and resulted in the loss of its camp recreation pond. *Ibid.*

2. a. On August 24, 2012, petitioner filed this action in the Court of Federal Claims (CFC). C.A. App. 12. Petitioner's complaint (*id.* at 12-16) alleged that the August 2010 "water diversion project" resulted in a Fifth Amendment taking of petitioner's property for which petitioner was entitled to money damages as just compensation. *Id.* at 15-16.

The Tucker Act grants the CFC jurisdiction over monetary claims "against the United States" that are founded, *inter alia*, "upon the Constitution," 28 U.S.C. 1491(a)(1), including Fifth Amendment takings claims, *Preseault* v. *ICC*, 494 U.S. 1, 11-12 (1990); see also *United States* v. *King*, 395 U.S. 1, 2-3 (1969). The Little Tucker Act grants federal district courts concurrent jurisdiction over such monetary claims "not exceeding $10,000." 28 U.S.C. 1346(a)(2). A plaintiff asserting a takings claim, however, cannot simultaneously pursue the claim in both the CFC and district court. Section 1500 of Title 28 provides that the CFC lacks jurisdiction over "any claim for or in respect to which" the plaintiff has "any suit or process" against

the United States or an agent thereof "pending in any other court." 28 U.S.C. 1500. A plaintiff thus cannot maintain a claim in the CFC when "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).

Petitioner simultaneously asserted its takings claim in both the CFC and in the federal district court for the District of Nevada. Like its CFC complaint, petitioner's district court complaint (C.A. App. 35-42) asserted a claim for "money damages" for the "taking of [petitioner's] property" allegedly resulting from the FWS's 2010 "water diversion project," regardless of whether the alleged taking be "a temporary taking or otherwise." *Id.* at 41-42; see *id.* at 37. The district court complaint also asserted three additional claims: (1) a claim that the 2010 project deprived petitioner of procedural due process in violation of the Fifth Amendment by allegedly denying petitioner "access to its water," *id.* at 39-40; (2) a claim that the project prevented petitioner from "conduct[ing] baptisms and religious meditational sessions using the water" in violation of the First Amendment's Free Exercise Clause, *id.* at 40; and (3) a claim under the Federal Tort Claims Act (FTCA) for damages allegedly caused by negligence in connection with the project that allegedly resulted in the December 2010 flooding of petitioner's property, *id.* at 40-41; see *id.* at 38-39.[2]

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[2] Petitioner's district court action against the United States is now pending a decision at summary judgment. See *Ministerio Roca Solida* v. *FWS*, No. 2:12-cv-1488 (D. Nev.). Petitioner's district court complaint alleged that, after the 2010 project at issue, petitioner in 2011 submitted documentation to Nevada's State

b. The CFC dismissed petitioner's CFC takings action without prejudice. Pet. App. 34-46. The CFC held that it lacked jurisdiction over the takings claim because petitioner's pending district court action triggered Section 1500's jurisdictional bar over a CFC claim for or in respect to which the plaintiff has an action pending in another court. *Id.* at 38-45. The court explained that petitioner's district court complaint had, "at best, repackaged the same conduct [alleged in its CFC complaint] into . . . different theories, and at worst, alleged the same takings claim" as its CFC action. *Id.* at 40 (citation omitted). Even if Section 1500 were given a narrow reading, the CFC explained, it would lack jurisdiction over the takings claim because "both here and in the district court [petitioner] seeks money damages as compensation for

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Water Engineer to substantiate petitioner's claim to water rights, C.A. App. 37, but petitioner has identified no ruling by the State engineer confirming such rights. See 2:12-cv-1488 D. Ct. Doc. 41, at 16 (June 25, 2014). The government's summary-judgment submissions, by contrast, have explained that rulings by the state engineer have recognized that the government "holds certificated water rights for the entire annual discharge (surface flow) of the springs in the Ash Meadows National Wildlife Refuge." *Id.* at 6, 16 & Ex. P ¶¶ 3-5. On July 7, 2015, the parties' fully briefed summary judgment motions were argued in the district court, which has indicated that it will prepare a written summary-judgment order. See 2:12-cv-1488 Docket Entry No. 59.

Petitioner asserted district court claims not only against the government but also against the Ash Meadows Refuge Manager (Sharon McKelvey) in her individual capacity, which petitioner has labeled as *Bivens* claims. See Pet. 13; C.A. App. 36, 39-41. McKelvey's fully briefed interlocutory appeal from the district court's pleading-stage denial of qualified immunity is pending in the Ninth Circuit. *Ministerio Roca Solida* v. *McKelvey*, No. 13-16808 (9th Cir.) (oral argument scheduled for Nov. 18, 2015).

a Fifth Amendment taking arising out of the same operative facts." *Id.* at 42 n.1.

3. a. The court of appeals affirmed. Pet. App. 1-14. As relevant here, the court explained that a CFC action and an action in another court will constitute suits "for or in respect to the same claim" under Section 1500 "if they are based on substantially the same operative facts." *Id.* at 5 (quoting *Tohono*, 131 S. Ct. 1731) (emphasis omitted). The court noted that petitioner "does not argue that its co-pending suits are not based on substantially the same operative facts." *Id.* at 6. The court concluded that petitioner's CFC and district court suits triggered Section 1500's jurisdictional bar because the "co-pending suits are based on substantially the same operative facts." *Ibid.*

The court of appeals then addressed petitioner's contention that "its takings claims based on the diversion of water beginning in August 2010" would, "in August 2016," be barred by 28 U.S.C. 2501's "six-year statute of limitations." Pet. App. 12. The court stated that "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." *Id.* at 13. The court also stated that "the considerations and analysis presented in [Judge Taranto's] concurring opinion," which identified potential ways that a plaintiff pursuing a constitutional takings claim might advance its claim in light of Section 1500 and the statute of limitations, "may have merit." *Ibid.* But the court noted that petitioner "concedes the statute of limitations [for bringing a takings claim in the CFC] will not run until August

2016" and, for that reason, "the constitutional question is not sufficiently ripe for review." *Ibid.*

b. Judge Taranto authored a concurring opinion. Pet. App. 15-33. Judge Taranto stated that he "join[ed] the court's opinion," while expressing the view that the "application of § 1500 may soon present a substantial constitutional question about whether federal statutes have deprived [petitioner] of a judicial forum to secure just compensation for a taking." *Id.* at 15. Judge Taranto explained that Section 1500 and the CFC's six-year statute of limitations (28 U.S.C. 2501) could potentially operate in the future to prevent petitioner from pressing his just-compensation claim in the CFC. Pet. App. 15-16. He also noted petitioner's own delay in filing suit "two years after the August 2010 completion of the water-diversion project" but did not decide whether that delay might affect the analysis. *Id.* at 23. Judge Taranto instead concluded "that we need not pursue" the proper resolution for situations in which the six-year limitations period might bar a CFC takings claim, "because the problem is not present at the moment" and "because there may be avenues open to addressing the constitutional question if it arises in the dispute between [petitioner] and the government" in the future. *Id.* at 15; see *id.* at 26.

Petitioner's contention that it might be deprived of a forum for its takings claim, Judge Taranto explained, is merely a "contingent" possibility that "may not ripen." Pet. App. 17. "[T]he Nevada [district court] case may be over by August 2016," before the six-year statute of limitations for petitioner to file a (renewed) takings claim in the CFC would expire. *Id.* at 16-17. In addition, petitioner's district court action

"may definitively establish the non-existence of a taking that [would] require[] just compensation." *Id.* at 17.

Judge Taranto further reasoned that "there are at least some possibilities for [petitioner] to secure partial or complete relief even if the Nevada case is still blocking a suit in the [CFC] in August 2016." Pet. App. 17. First, he noted, the transfer statute (28 U.S.C. 1631) might arguably allow the district court to transfer petitioner's district-court takings claim to the CFC at a later date. Pet. App. 27-28. Second, petitioner's district-court takings claim could potentially provide petitioner full relief, even if the monetary relief exceeds $10,000. *Id.* at 28-29. Third, equitable tolling might arguably be available if the statute of limitations would otherwise bar a constitutional takings claim. *Id.* at 30. Fourth, forward-looking curative injunctive relief might be available in the district court to restore the diverted water if monetary relief was unavailable. *Id.* at 31. Furthermore, the judge concluded, it is an open question "whether § 1500 should be given a distinctively narrow application when necessary to avoid [substantial constitutional] questions." *Id.* at 24-26.

Ultimately, however, Judge Taranto concluded that such issues "do not have to be faced at present" because it is yet unclear whether petitioner will be prevented from pursuing CFC relief. Pet. App. 17, 26. Invoking a "longstanding principle of judicial restraint," Judge Taranto determined that it would not be "advisable to pursue the question now," before the question has arisen in this case. *Ibid.* (citation omitted).

ARGUMENT

Section 1500 prohibits a plaintiff from pursuing a claim against the United States in the CFC when the plaintiff has another suit against the United States pending in another court "for or in respect to" the same claim. 28 U.S.C. 1500; *United States* v. *Tohono O'odham Nation*, 131 S. Ct. 1723, 1727 (2011). The CFC therefore lacks jurisdiction over petitioner's takings claim because petitioner has the same takings claim pending in district court. The court of appeals correctly affirmed the CFC's dismissal of petitioner's CFC claim without prejudice.

Petitioner purports to present the question whether Congress may prevent a litigant from "seeking non-overlapping relief" for alleged constitutional violations in different courts by forcing the litigant to pursue relief in "one federal court" that is unable to order complete relief. Pet. i-ii. That question, however, is not presented here. First, petitioner brought the *same* claim—a takings claim based on the effects of an August 2010 waterflow restoration project—in both the CFC and district court. Petitioner cannot properly split that single claim between two courts, and its attempt to pursue such a claim in the CFC and district court falls squarely within Section 1500's jurisdictional bar. Second, Section 1500 does not, as petitioner suggests, limit a litigant to relief in but one court. Section 1500 prevents the litigant from pursuing a claim in the CFC only if the litigant has a claim "for or in respect to" the CFC claim *simultaneously* pending in another court. In this case, the CFC dismissed petitioner's takings claim "without prejudice" due to the pendency of petitioner's district court action. Pet. App. 35, 45-46. As the court of appeals recognized,

petitioner may ultimately be able to pursue his takings claim in the CFC by refiling it before the statute of limitations runs in August 2016. *Id.* at 13. No further review is warranted.

1. Section 1500 provides that the CFC lacks "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" or its agents. 28 U.S.C. 1500. "The rule is more straightforward than its complex wording suggests. The CFC 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." *Tohono*, 131 S. Ct. at 1727.

Two suits are "for or in respect to" the same claim if they are "'based on substantially the same operative facts.'" *Tohono*, 131 S. Ct. at 1727, 1731 (quoting *Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993)). In addition, Section 1500 focuses on plaintiffs that simultaneously pursue multiple suits against the government by eliminating CFC jurisdiction only when a plaintiff has a parallel suit "pending" in another court. As such, Section 1500's "purpose is clear": By barring the CFC from entertaining a claim when the plaintiff has another suit pending for or in respect to that claim, Section 1500 "save[s] the Government from burdens of redundant litigation." *Id.* at 1730. "[T]hat purpose is no less significant today" than when Congress enacted Section 1500's predecessor in 1868. *Ibid.*; see *id.* at 1727.

The court of appeals and CFC correctly held that the CFC lacked jurisdiction over petitioner's takings claim and that petitioner's claim should thus be dismissed without prejudice. Petitioner has simultane-

ously asserted the same takings claim in the CFC and district court based on the government's August 2010 "water diversion project" in the Ash Meadows Wildlife Refuge. Compare C.A. App. 14-16 (CFC) with *id.* at 37, 41-42 (district court). Those duplicative takings claims both sought compensation whether the alleged taking is deemed "temporary in nature or otherwise." *Id.* at 16; see *id.* at 42. Such duplicative claims fall within the heartland of Section 1500's jurisdictional bar.

Petitioner states (Pet. 7 n.4, 11 n.7) that his CFC complaint "sought only takings relief in the amount greater than $10,000" because it "hoped" that its district court takings claim "would be less than $10,000 and justiciable by the District Court" under the Little Tucker Act. Petitioner also states (Pet. 7 & n.4) that the amount of his district court takings claim now "exceed[s] the District Court's jurisdictional limits," such that the CFC now is "the only court that can entertain its takings claim." But petitioner's own decision simultaneously to assert the same takings claim in both courts instead of asserting it only in the CFC (which has jurisdiction over all takings claims against the United States regardless of the amount in controversy) reflects improper claim splitting. More significantly, petitioner's decision to pursue its takings claim seeking monetary relief in two fora triggers Section 1500's jurisdictional bar. Despite petitioner's assertion (Pet. 7 n.4, 11) that the district court lacks jurisdiction over its takings claim, petitioner's own takings claim remains pending in district court.[3]

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[3] Petitioner similarly represented to the court of appeals that the district court lacked jurisdiction over its takings claim, Pet. C.A. Br. 7 (May 12, 2014), yet petitioner has subsequently contin-

If petitioner had asserted its takings claim only in the CFC and pursued only non-takings claims in district court, petitioner might have argued that Section 1500 does not bar CFC jurisdiction over the takings claim by arguing that the suits involved distinct claims not "based on substantially the same operative facts," *Tohono*, 131 S. Ct. at 1727. Section 1500's test for CFC jurisdiction focuses on the "operative" facts at issue, and those "operative facts" must be "substantially the same" in each suit for the CFC to lack jurisdiction. *Ibid.* But because petitioner asserted the same takings claims in both the CFC and district court, it was unable to assert such an argument: Suits that include the same claim necessarily involve substantially the same operative facts. Accordingly, as the court of appeals noted, petitioner has "not argue[d] that its co-pending suits are not based on substantially the same operative facts." Pet. App. 6.

This case therefore does not involve a plaintiff who has carefully separated a takings claim (pursued in the CFC) and other claims (pursued in another court). Such a case could implicate different analytical considerations. Petitioner's decision to simultaneously pursue the same takings claim in the CFC and district court, however, lies within the core of Section 1500's prohibition. At the very least, Congress through Section 1500 has properly prohibited a plaintiff from

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ued to assert that same takings claim in district court, arguing that although the monetary value of its takings claims "exceeds the jurisdiction of [the district court]," that fact does not itself "defeat jurisdiction" in that court. See 2:12-cv-1488 D. Ct. Doc. 49, at 17 (D. Nev.) (Aug. 4, 2014); see also, *e.g.*, 2:12-cv-1488 D. Ct. Doc. 38 at 2, 23 (D. Nev.) (June 25, 2014).

pursuing a claim in the CFC when the plaintiff has the same claim pending in another court.

2. a. In *Tohono*, this Court held that the CFC lacks jurisdiction under Section 1500 when a plaintiff has pending suits in the CFC and another court that present claims "based on substantially the same operative facts" even if the suits do not seek the same relief. 131 S. Ct. at 1731. Petitioner argues (Pet. 16-28) that "*Tohono* was wrongly decided." Pet. 16 (capitalization omitted). But even petitioner admits (Pet. 18) that Congress enacted Section 1500 to prevent "duplicative lawsuits." Petitioner thus appears (*ibid.*) to limit its argument to the contention that "Congress did not intend for § 1500 to put plaintiffs to a choice between non-duplicative remedies," apparently focusing on its district court non-takings "claims for non-overlapping relief" which seek "declaratory and injunctive relief." See Pet. 11, 13. Cf. p. 5, *supra* (discussing petitioner's non-takings claims).

But in doing so, petitioner ignores its own district court takings claim that seeks the same monetary relief for the same alleged taking at issue in its CFC suit. Petitioner even concedes (Pet. 18-19) that "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." That concession confirms the correctness of the court of appeals' judgment. Petitioner states that its takings claim exceeds $10,000 in value. Pet. 6-7 & n.4. If petitioner were to prevail on its takings claim in the CFC and establish $15,000 as just compensation, petitioner would recover all $15,000, not just the $5000 that exceeds the $10,000 that a plaintiff could recover in district court. Cf. Fed. Cl. R. 54(c) (CFC

shall grant the "relief to which each party is entitled, even if the party has not demanded that relief in its pleadings"). Petitioner's district court and CFC takings claims thus involve the same monetary relief. Moreover, even if petitioner were to attempt to disclaim the first $10,000 in just compensation at issue in its CFC claim, petitioner would still have engaged in improper claim splitting, requiring the United States to litigate the alleged taking and amount of compensation in two courts. Section 1500 appropriately prohibits such tactics.

b. Petitioner alternatively argues (Pet. 28-35) that, even if *Tohono* was correctly decided, the application of Section 1500 to bar CFC jurisdiction violates petitioner's constitutional rights. In petitioner's view, Section 1500 forces it to choose between bringing (in the CFC) its takings claim based on the government's August 2010 waterflow restoration project and bringing (in district court) three other claims: a tort claim for the December 2010 flooding of its property, a procedural due process claim, and a free-exercise claim. See Pet. 29. Petitioner, however, did not merely seek to bring such non-takings claims in district court. As noted, petitioner also asserted the same takings claim in district court that it asserted in the CFC. The question whether the CFC would have had jurisdiction over petitioner's takings claim if petitioner had pursued only its non-takings claims in district court is not presented here. In that situation, for example, the CFC would have to decide whether petitioner's FTCA claim for injuries allegedly sustained as a result of a discrete flooding incident involves the same "operative facts" as its claim that the Ash Meadows project restoring waterflow to its historic chan-

nels resulted in a taking of petitioner's property. But here, the pendency of petitioner's takings claim in district court alone was fatal to CFC jurisdiction over that claim.

3. In any event, this case would be a poor vehicle for review. The CFC dismissed petitioner's takings claim without prejudice, Pet. App. 35, 45-46, and petitioner admits that the statute of limitations for brining that claim again in the CFC does not expire until August 2016, Pet. 7. The court of appeals accordingly recognized that it would be premature to decide how to address circumstances in which Section 1500 and the statute of limitations for CFC claims might prevent a plaintiff from asserting a constitutional claim because such circumstances have not developed here. Pet. App. 13; accord *id.* at 15, 17, 26 (concurring opinion). Among other things, petitioner's district court action may conclude before the limitations period runs in August 2016, such that petitioner could properly refile his takings claim in the CFC. Cf. p. 5 n.2, *supra*. Moreover, Judge Taranto discussed in his concurring opinion the question whether petitioner's two-year delay in filing suit following the implementation of the 2010 waterflow restoration project could affect the analysis if the statute of limitations would arise as an obstacle,[4] as well as potential arguments that might lead to full relief on petitioner's claims. See pp. 8-9, *supra*. The court of appeals concluded that the considerations and analysis in the concurring opinion "may have merit," Pet. App. 13. But the court of appeals—like Judge Taranto—declined to resolve the

[4] A related question would be whether the analysis could be affected by any failure by petitioner to seek expedited disposition of the proceedings in district court after it filed suit.

merits of such arguments because they were not yet "ripe for review." *Ibid.*; see *id.* at 15, 17, 26 (concurring opinion). Review by this Court is similarly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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